Is the Decision Appealable?

A Trial Lawyer's Guide to Illinois Appellate Jurisdiction

by Timothy J. Storm

Introduction

Whether an order entered by the circuit court can be appealed is a key question that every litigator is likely to face from time to time. Promptly determining whether a particular order is (or may be made) appealable is vital because the appellate court's jurisdiction depends on an appealable order.[1] Even if the opposing party does not challenge appellate jurisdiction, the reviewing court will examine its own jurisdiction *sua sponte*.[2]

The appellate court must dismiss an appeal of an unappealable order.[3] In the best-case scenario, such a premature appeal will be terminated early in the process, before much time and effort have been expended. However, it is more likely that the parties will have filed their briefs before the appeal is dismissed.[4] On the other hand, when an appealable order has been entered, a notice of appeal must be timely filed or the right to appeal will be lost.

Some of the rules governing appealability are not entirely user-friendly, leading to some confusion as to whether a particular order qualifies. This article sets out general guidelines to determine whether an order is appealable. An order need only fall within the parameters of a single provision of the rules to be appealable; a "near miss" under one rule does not necessarily preclude appellate jurisdiction under another.[5]

For purposes of appealability, decisions of the circuit court come in five varieties: (1) appealable to the appellate court by right; (2) appealable to the appellate court after a finding or certification by the circuit court; (3) appealable to the appellate court by leave of the appellate court; (4) appealable directly to the Supreme Court; and (5) not appealable until the entire case is concluded. Each category is outlined below.

Appealable to the appellate court by right

Four categories of circuit court orders are appealable as of right so that the appellate court has jurisdiction over an appeal immediately upon the entry of the order and timely filing of a notice of appeal without the need for any further jurisdictional step.[6]

Rule 301 – Final judgments disposing of an entire case. The Illinois Constitution provides that every final circuit court judgment that terminates a civil case is appealable to the appellate court.[7] A final judgment fixes, determines, and disposes of the parties' rights regarding

1. *Estate of Young v. Dept. of Rev.*, 316 Ill. App. 3d 366, 372, 734 N.E.2d 945, 949-50 (1st Dist. 2000).
2. *People v. Trimarco*, 364 Ill. App. 3d 549, 550, 846 N.E.2d 1008, 1010 (2d Dist. 2006).
3. *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1024, 822 N.E.2d 941, 942 (2d Dist. 2005).
4. *Village of River Forest v. Ash Realty Co.*, 23 Ill. App. 3d 645, 647-48, 321 N.E.2d 68, 70 (1st Dist. 1974) (a challenge to appellate jurisdiction may be raised after briefs are filed).
5. *In re Sean A.*, 349 Ill. App. 3d 964, 968, 812 N.E.2d 669, 672 (3d Dist. 2004).
6. *See Hartford Fire Ins. Co. v. Whitehall Convalescent & Nursing Home, Inc.*, 321 Ill. App. 3d 879, 885, 748 N.E.2d 674, 679-80 (1st Dist. 2001).
7. Ill. Const., Art. VI, §6. *See also* Ill. Sup. Ct. R. 301.

the litigation.[8] An order that leaves matters regarding the ultimate rights of the parties for future determination is not final.[9]

A judgment may be final as to certain parties and/or certain issues without terminating the entire case, but Rule 301 applies only to final orders that end the entire controversy.[10] Appeals from final orders that do not dispose of the entire case are covered by Rules 304(a) and (b), and are addressed below.

Many considerations affect whether an order is an appealable final judgment under particular circumstances,[11] but several issues tend to arise repeatedly:

- A finding for the plaintiff on liability alone on a claim seeking damages or other relief is not final until the court has finally granted or denied relief.[12]
- If, at the time of announcing a final judgment, the trial judge requires submission of a written order, the judgment is not final until the judge actually signs the written judgment and it is filed.[13]
- Neither a jury verdict[14] nor a judge's findings of fact[15] alone is final or appealable.
- An order dismissing a case or striking a pleading without prejudice is not final and appealable.[16]
- While a proper and timely post-trial motion remains pending and undisposed, the underlying judgment cannot be appealed.[17]

Where a "claim" for attorneys' fees remains outstanding, the judgment is not final.[18] However, a pending request for fees that is incidental to the judgment does not delay the time to appeal the judgment as to the rest of the case.[19]

Rule 304(b) – Specified final judgments not disposing of the entire case. Rule 304(b) specifically sets forth five categories of final judgments that are appealable even though they do not dispose of the entire litigation.[20] The rule encompasses final orders: (1) which finally determine a party's rights in an estate administration or similar proceeding; (2) which finally determine a party's rights in a receivership or similar proceeding; (3) in a proceeding under 735 ILCS

8. *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135, 650 N.E.2d 245, 247 (3d Dist. 1995).
9. *In re Pet. to Inc. the Vill. of Greenwood*, 275 Ill. App. 3d 465, 470, 655 N.E.2d 1196, 1199 (2d Dist. 1995).
10. *In re Marriage of Sproat*, 357 Ill. App. 3d 880, 881, 830 N.E.2d 843, 843 (2d Dist. 2005).
11. It has been noted that the "line of cleavage between final and interlocutory orders is not yet scientifically prescribed and the definitions and pronounced tests must be considered primarily with reference to the facts of a particular case and the relief sought in the pleading." *In re Org. of Fox Valley Comm. Airport Auth.*, 23 Ill. App. 3d 168, 170, 318 N.E.2d 496, 498 (2d Dist. 1974). This remains true over 30 years later.
12. *Pinkerton Sec. & Inv. Serv. v. Ill. Dept. of Human Rights*, 309 Ill. App. 3d 48, 56, 722 N.E.2d 1148, 1154 (1st Dist. 1999).
13. Ill. Sup. Ct. R. 272. *In re App. of the Cty Treasurer*, 356 Ill. App. 3d 1102, 1107-08, 827 N.E.2d 526, 531-32 (4th Dist. 2005).
14. *Ill. State Toll Highway Auth. v. Marathon Oil Co.*, 200 Ill. App. 3d 836, 841, 559 N.E.2d 497, 500 (2d Dist. 1990).
15. *Smith v. Smith*, 240 Ill. App. 3d 776, 778, 608 N.E.2d 248, 250 (1st Dist. 1992).
16. *Paul H. Schwendener, Inc. v. Jupiter Elec. Co., Inc.*, 358 Ill. App. 3d 65, 73, 829 N.E.2d 818, 827 (1st Dist. 2005).
17. Ill. Sup. Ct. R. 303(a)(1). *See also City of DeKalb v. Thomas*, 331 Ill. App. 3d 9, 11, 770 N.E.2d 730, 731-32 (2d Dist. 2002).
18. *Mars v. Priester*, 205 Ill. App. 3d 1060, 1064, 563 N.E.2d 977, 980 (1st Dist. 1990). A Rule 137 sanctions motion is a "claim" (*John G. Phillips & Assoc. v. Brown*, 197 Ill. 2d 337, 340, 757 N.E.2d 875, 877 (2001)) and a "judgment or order is not final and appealable while a Rule 137 claim remains pending unless the court enters a finding pursuant to Rule 304(a)." Ill. Sup. Ct R. 303(a)(1).
19. *See, e.g., Buntrock v. Terra*, 348 Ill. App. 3d 875, 884, 810 N.E.2d 991, 998 (1st Dist. 2004).
20. *See In re Estate of Ohlman*, 259 Ill. App. 3d 120, 124, 630 N.E.2d 1133, 1137 (1st Dist. 1994).

5/2-1401; (4) in a proceeding under 735 ILCS 5/2-1402; and (5) holding a party or counsel in contempt and imposing a penalty.[21]

Two key aspects of any appeal under Rule 304(b) must be borne in mind. First, no order may be appealed under that rule unless it is final.[22] Second, once an order appealable under Rule 304(b) is entered, that order *must* be appealed within 30 days or the right to appeal will be lost.[23] However, if a party files a post-judgment motion, an appeal must be filed within 30 days after a ruling on the motion.[24]

Rule 306A – Child custody determinations. Effective in 2004, Rule 306A provides for the immediate appeal of four types of orders dealing with child custody matters: (1) initial final child custody orders; (2) orders modifying child custody where a change of custody has been granted; (3) final orders of adoption; and (4) final orders terminating parental rights.[25]

Only final orders are appealable pursuant to Rule 306A.[26] Some confusion has arisen over whether Rule 306A permits an appeal of child custody orders entered in a marriage dissolution case before the final decree is entered. Both the First and Second Districts have held that such custody orders are not immediately appealable pursuant to Rule 306A,[27] and the aggrieved party must either await the final decree or seek an immediate appeal under Rule 306 (a)(5),[28] which is discussed below.

Rule 307 – Specified interlocutory orders. By contrast to the other categories of orders that are appealable as of right, Rule 307 provides an immediate right to appeal several types of non-final orders, including those: (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction; (2) appointing or refusing to appoint a receiver; and (3) terminating parental rights or granting, denying, or revoking temporary commitment in adoption cases.[29]

Rule 307(a) is probably most commonly invoked to obtain review of orders granting injunctions. Because the court looks to the substance of an order to determine whether it is an injunction for appeal purposes,[30] orders that compel or deny arbitration[31] or orders that grant or deny a stay of the case,[32] among others, are appealable because they are effectively injunctive in nature.

Rule 307(d) provides special procedures to obtain quick review of temporary restraining orders.[33] A petition for appeal under that provision must be filed within two days after issuance or denial of a temporary restraining order.[34]

Rule 307 does not transform an order from interlocutory into final, but merely confers appellate jurisdiction for immediate review where it would otherwise not exist.[35] The trial court is not divested of jurisdiction over the case when a notice of interlocutory appeal is filed pursuant to Rule 307, but the lower court may not take any

21. A contempt citation becomes appealable under Rule 304(b)(5) only after entry of an order that imposes a penalty. *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1025-26, 793 N.E.2d 900, 904 (1st Dist. 2003). A contempt order that imposes no sanction is not final or reviewable. *In re Estate of Hayden*, 361 Ill. App. 3d 1021, 1026, 838 N.E.2d 93, 98 (4th Dist. 2005).
22. *Stephen v. Huckaba*, 361 Ill. App. 3d 1047, 1051, 838 N.E.2d 347, 352 (4th Dist. 2005).
23. *In re Estate of Jackson*, 354 Ill. App. 3d 616, 619, 821 N.E.2d 1199, 1201 (1st Dist. 2004).
24. *Id.* at 619, 821 N.E.2d at 1201-02.
25. Ill. Sup. Ct R. 306A(a).
26. *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 108, 836 N.E.2d 147, 152 (1st Dist. 2005).
27. *Id.* at 109, 836 N.E.2d at 153; *Sproat*, 357 Ill. App. 3d at 883-84, 830 N.E.2d at 845-46.
28. *Kostusik*, 361 Ill. App. 3d at 109, 836 N.E.2d at 153.
29. Ill. Sup. Ct R. 307(a).
30. *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1039, 837 N.E.2d 953, 958 (4th Dist. 2005).
31. *Craine*, 354 Ill. App. 3d at 1025, 822 N.E.2d at 942.
32. *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 69-70, 871 N.E.2d 914, 924 (1st Dist. 2007).
33. *See Bradford v. Wynstone Prop. Owners' Ass'n*, 355 Ill. App. 3d 736, 739, 823 N.E.2d 1166, 1169-70 (2d Dist. 2005) (discussing the purpose and function of appealing a TRO pursuant to Rule 307(d)).
34. Ill. Sup. Ct R. 307(d)(1).
35. *In re Adoption of D.*, 317 Ill. App. 3d 155, 161, 739 N.E.2d 109, 114 (2d Dist. 2000).

action that would interfere with appellate review of the challenged order.[36]

Whether a party who wishes to challenge an order appealable under Rule 307 must appeal within 30 days of the order or, conversely, may await the outcome of the case without foregoing the right to appeal, has been the subject of some controversy and seemingly contradictory rulings. Courts have generally treated appeals under Rule 307 as mandatory, so that the right to appeal will be lost if not exercised within the time provided by rule.[37] However, the Illinois Supreme Court has suggested that taking an immediate appeal, where available pursuant to Rule 307 may not be mandatory, at least under some circumstances.[38] Whether an immediate appeal under Rule 307 is mandatory or optional is little more than an academic question in most cases because a party who is aggrieved by such an order will almost always desire to take an immediate appeal.

Appealable to the appellate court after a finding by the circuit court

While an order falling within one of the categories set forth above is appealable as of right because of the nature of the order, certain orders that are not otherwise immediately appealable may be made appealable by the circuit court.

Rule 304(a) – Final orders not disposing of the entire case. Final orders that do not dispose of the entire case and do not fall into one of the categories listed in Rule 304(b) or 306A may become immediately appealable "only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both."[39] Whether to enter such a finding is within the circuit court's discretion.[40]

A few important factors affect appealability under Rule 304(a). First, only a final judgment – one that finally fixes the rights of at least one party or entirely disposes of at least one claim – is eligible for a Rule 304(a) finding.[41] Nothing in Rule 304(a) can transform a non-final order into a final judgment,[42] and a Rule 304(a) finding attached to a non-final order is of no effect.[43]

Second, the language included in the order must be sufficient under the rule. While there are numerous cases resolving in various ways the question of whether several

36. *Payne v. Coates-Miller, Inc.*, 68 Ill. App. 3d 601, 608, 386 N.E.2d 398, 403 (1st Dist. 1979).
37. *See, e.g., Multiut Corp. v. Draiman*, 359 Ill. App. 3d 527, 541, 834 N.E.2d 43, 54 (1st Dist. 2005); *Bradford*, 355 Ill. App. 3d at 739-40, 823 N.E.2d at 1170.
38. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11-12, 761 N.E.2d 724, 730 (2001) (interpreting the language of Rule 307(a) as permissive rather than mandatory).
39. Ill. Sup. Ct R. 304(a).
40. *In re Marriage of Berto*, 344 Ill. App. 3d 705, 710, 800 N.E.2d 550, 554 (2d Dist. 2003).
41. Ill. Sup. Ct R. 304(a).
42. *In re Marriage of King*, 208 Ill. 2d 332, 344, 802 N.E.2d 1216, 1222 (2003).
43. *Susman v. Price*, 230 Ill. App. 3d 639, 641, 594 N.E.2d 1332, 1333-34 (1st Dist. 1992).

variant formulations of language are sufficient to create an appealable order,[44] one thing is certain: the exact language set forth in the rule will **always** satisfy the rule's requirements. Accordingly, the "Rule 304(a) language" that the prudent attorney should rely upon is: "The court finds, pursuant to Ill. Sup. Ct. R. 304(a), that there is no just reason for delaying either enforcement or appeal of this order."[45]

Third, an order that is made appealable through a Rule 304(a) finding becomes appealable only as of the date of the finding.[46] Thus, the attempted entry of a *nunc pro tunc* finding is ineffective to make an order "retroactively" appealable.[47]

Rule 308 – Certain interlocutory orders. An interlocutory order involving a question of law "as to which there is substantial ground for difference of opinion" may be made appealable by order of the circuit court if "immediate appeal from the order may materially advance the ultimate termination of the litigation."[48] The circuit court must specifically identify the certified question.[49]

After obtaining the circuit court's certification, the proponent of the appeal may, within fourteen days, file with the appellate court an application for leave to appeal.[50] The "Appellate Court may thereupon in its discretion allow an appeal from the order."[51]

Because the rule is a substantial departure from the general practice of allowing appeals only from final judgments, it carries numerous restrictions. First, it has been said that the rule "should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law [.]"[52] Second, the certified question must be a pure question of law.[53] Finally, the appellate court is generally limited to considering the question certified by the circuit court and cannot address other issues,[54] although the court may do so in the interests of judicial economy and reaching an equitable result.[55]

A request for interlocutory appeal under Rule 308 is entirely optional, and failure to seek a certification under the rule does not waive any issue for a later appeal.[56]

Appealable to the appellate court by leave of the appellate court

Rule 306(a) – Specified interlocutory orders. Illinois Supreme Court Rule 306(a) sets forth a rather disparate categorical list of orders that are appealable by petition to the appellate court. The common thread is that an immediate appeal may either prevent substantive prejudice to a party that cannot easily be remedied after a passage of time or serve significant considerations of judicial economy.

As a prerequisite to invoking appellate jurisdiction, a petition for leave to appeal must be filed in the appellate court within 30 days after the entry of the order to be reviewed.[57] The

44. *See In re App. of the DuPage Cty Collector*, 152 Ill. 2d 545, 547-50, 605 N.E.2d 567, 568-70 (1992) (collecting cases).
45. However, for those who like to gamble, it has been noted that "the absence of Rule 304(a)'s precise wording from the order appealed does not conclusively preclude appellate jurisdiction, [but] it must be clear that Rule 304(a) is intended to be invoked." *Matson v. Dept. of Human Rights*, 322 Ill. App. 3d 932, 939, 750 N.E.2d 1273, 1278 (2d Dist. 2001).
46. Ill. Sup. Ct R. 304(a) ("In computing the time provided in Rule 303 for filing the notice of appeal, the entry of the required finding shall be treated as the date of the entry of final judgment"). *See also Maywood-Proviso State Bank v. Village of Lisle*, 234 Ill. App. 3d 206, 214, 599 N.E.2d 481, 487 (2d Dist. 1992).
47. *Maywood-Proviso*, 234 Ill. App. 3d at 214, 599 N.E.2d at 487.
48. Ill. Sup. Ct R. 308(a).
49. *P.J.'s Concrete Pumping Serv., Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 998, 803 N.E.2d 1020, 1026 (2d Dist. 2004).
50. Ill. Sup. Ct R. 308(b).
51. Ill. Sup. Ct. R. 308(a).
52. *Kincaid v. Smith*, 252 Ill. App. 3d 618, 622, 625 N.E.2d 750, 753 (1st Dist. 1993).
53. *Hudkins v. Egan*, 364 Ill. App. 3d 587, 590, 847 N.E.2d 145, 148 (2d Dist. 2006).
54. *Sperandeo v. Zavitz*, 365 Ill. App. 3d 691, 692, 850 N.E.2d 394, 396 (2d Dist. 2006).
55. *P.J.'s Concrete*, 345 Ill. App. 3d at 998, 803 N.E.2d at 1026.
56. *Prosen v. Chowaniec*, 271 Ill. App. 3d 65, 68, 646 N.E.2d 1311, 1313 (1st Dist. 1995).
57. Ill. Sup. Ct. R. 306(c).

30-day time limit is jurisdictional.[58] Moreover, a motion to reconsider filed in the trial court does not postpone the time in which to file the petition.[59]

Appealable directly to the Supreme Court

Rule 302 – Statutory invalidations / Rule 21(c) orders / public interest cases. Two types of circuit court orders are appealed directly to the Illinois Supreme Court: (1) an order in which the circuit court holds a federal or Illinois state statute invalid; and (2) an order entered in a case under Illinois Supreme Court Rule 21(c) which seeks to compel compliance with an administrative order of a chief circuit judge.[60]

By rule, an order invalidating a statute may be appealed only if the circuit court has entered a final judgment in the case[61] and the court has complied with Illinois Supreme Court Rule 18. However, because those requirements are established by rule and are not a constitutional limitation, the Supreme Court may waive either or both of those requirements in its discretion.[62]

Rule 302(b) provides a separate basis for initial Supreme Court review. Where an order has been appealed to the appellate court in "a case in which the public interest requires prompt adjudication by the Supreme Court," the Supreme Court or a Supreme Court justice may direct that the appeal be transferred from the appellate court to the Supreme Court.[63]

Not appealable (yet)

This category contains circuit court decisions that do not fall within any categories above and are not immediately appealable. However, such orders may nevertheless become appealable eventually in connection with an appeal from a final judgment,[64] which draws into issue all prior interlocutory orders constituting a "procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken."[65]

Conclusion

The task of determining whether appellate jurisdiction exists can sometimes be difficult, but cannot be ignored for long. Without jurisdiction, the reviewing court has no power to hear or decide a case and no appeal is possible. The prospect of wasting time on an appeal that is destined to be dismissed for lack of jurisdiction should provide ample incentive to counsel for all parties to question appellate jurisdiction at the earliest stage of every appeal.[66]

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58. *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 236, 492 N.E.2d 1327, 1333 (1986).
59. *Odom v. Bowman*, 159 Ill. App. 3d 568, 571, 511 N.E.2d 1265, 1267 (5th Dist. 1987).
60. Ill. Sup. Ct R. 302(a).
61. *Big Sky Excavating, Inc. v. Ill. Bell Tel. Co.*, 217 Ill. 2d 221, 232-33, 840 N.E.2d 1174, 1181 (2005).
62. *See, e.g., id.* at 233-34, 840 N.E.2d at 1182.
63. Ill. Sup. Ct R. 302(b).
64. *Hampton v. Cashmore*, 265 Ill. App. 3d 23, 25, 637 N.E.2d 776, 778 (2d Dist. 1994) ("an order remains interlocutory relative to its appealability only so long as no final order has been entered").
65. *Valdovinos v. Luna-Manalac Med. Center, Ltd.*, 307 Ill. App. 3d 528, 538, 718 N.E.2d 612, 619 (1st Dist. 1999), *case dismissed by* 186 Ill. 2d 591, 722 N.E.2d 191 (1999).
66. One appellate court has wisely observed that the purpose of the Illinois Supreme Court rules requiring a jurisdictional statement in the appellant's brief "is not merely to tell the court that it has jurisdiction but to provoke counsel to make an independent determination of the right to appeal before writing the brief." *In re A.Z.*, 325 Ill. App. 3d 722, 724, 760 N.E.2d 133, 134 (2d Dist. 2001).