# Not Too Late to Appeal: Extensions of Time to Appeal in Illinois and Federal Practice

*By Timothy J. Storm*

**Introduction**

One basic rule retained since law school by most lawyers – including those with little or no involvement in litigation – is that an appeal must be taken within 30 days after the entry of a final judgment in the trial court. Another basic principle cherished by many lawyers is that to every rule there is an exception. So it is with the 30-day appeal deadline.

This article outlines the circumstances in federal and Illinois state practice under which a notice of appeal that is filed more than 30 days after the trial court's entry of final judgment in a civil case will preserve access to the appellate court.

**General Rules for Timely Filing**

As a general rule in both federal and state practice, a notice of appeal must be filed in the trial court no later than 30 days after a final judgment is entered by the trial court.[1] One categorical exception in federal practice is that the notice must be filed within 60 days after the entry of final judgment in cases in which the United States or an officer or agency of the United States is a party.[2]

In federal and state practice, timely filing of certain post-judgment motions will extend the trial court's jurisdiction over the case. The period for filing a notice of appeal does not begin until (or, more accurately, begins anew) after the court disposes of all such post-judgment motions.[3] However, neither repetitive post-judgment motions nor motions to reconsider rulings on post-judgment motions will extend the appeal period.[4]

A post-judgment motion that does not satisfy the requirements of rule and case law will have no effect on the running of the appeal period and a notice of appeal filed after the applicable appeal period will be useless.[5] Therefore, if a post-judgment motion is filed, it is vital to determine whether the motion is of the type that will toll the appeal period. A specific list of such motions is set forth in Fed. R. App. P. 4(a)(4)(A). In state practice, post-judgment motions include a motion for rehearing or retrial, to modify or vacate the judgment[6] or for other relief of a similar nature.[7]

In Illinois state practice, where a party wishes to join an appeal, appeal separately, or cross-appeal, a separate notice of appeal must be filed within 10 days after service of the original notice or within 30 days after the entry of judgment, whichever is later.[8] In federal practice, any such additional notices must be filed within 14 days after the first notice was filed or within 30 days of the entry of judgment, whichever is later.[9]

In state cases, timely filing of the notice of appeal is mandatory and jurisdictional so that a failure to file on time cannot be overlooked by the appellate court.[10] In federal cases, timely filing is also said to be mandatory and jurisdictional,[11] but the "jurisdictional" nature of a timely notice in federal court has an exception, discussed below, with no parallel in state court practice.

**Extensions in Illinois State Practice**

**No extensions by the trial court.** The circuit court has no power to extend the time for filing a notice of appeal provided in the rules.[12] As a practical matter, the circuit court essentially controls when the period begins because it determines the date on which it enters a final judgment and the timing of its disposition of post-judgment motions. However, once a judgment is entered and the post-judgment motions are disposed of, the circuit court's ability to control the running of the period ends. Accordingly, a circuit court's purported stay of all matters after the entry of a final judgment does not toll the appeal period.[13]

**Extensions by the appellate court.** Under Ill. Sup. Ct. R. 303(d), within 30 days after the expiration of the original 30-day appeal period, a party may file a motion in the reviewing court for leave to appeal out of time.[14] The motion must be accompanied by the proposed notice of appeal.[15] If a proper motion for extension is not filed within the prescribed time, the appellate court is without power to extend the time for appeal.[16]

To be entitled to file an appeal within the 30-day period following the initial 30-day period, the party must show a "reasonable excuse for failure to file a notice of appeal on time[.]" [17] Reasonable excuse is "intended as a lenient standard vesting the court with a broad discretion."[18] While there are relatively few reported decisions from which to draw examples, reasonable excuses may include such things as "illness of counsel, an honest mistake of counsel, delay in the mail, a snowstorm, and many others."[19] Under the heading of mistakes of counsel, a docketing error may be a reasonable excuse.[20] A delay arising from mere negligence is not.[21]

**Extensions in Federal Practice**

**Extensions by the trial court.** In a procedure directly opposite that employed in state court, only the district court may extend the time for appeal beyond the initial period.[22] The court of appeals has no power to do so pursuant to rule and statute.[23]

The Federal Rules of Appellate Procedure include two distinct provisions for extending the appeal period, each with its own requirements. Falling under Fed. R. App. P. 4(a)(5) are motions for an extension of time that are filed during the original appeal period or within 30 days thereafter.[24] The second category, covered by Fed. R. App. P. 4(a)(6), involves motions too late to be included in the first category, but no later than 180 days after the judgment was entered or 7 days after the moving party receives notice of the entry of the judgment, whichever occurs sooner.[25]

Under Fed. R. App. P. 4(a)(5), a motion for extension of time must be filed with the district court within 30 days after the expiration of the original appeal period.[26] A motion filed within the original appeal period may be brought *ex parte* unless the court

requires otherwise.[27] However, a motion brought after the original appeal period must be noticed and served in the ordinary manner.[28] The maximum extension available under Rule 4(a)(5) is 30 days after the original appeal period or 10 days after the date of the order granting the extension, whichever is later.[29]

To qualify for an extension, the movant must show excusable neglect or good cause.[30] Traditionally, the Seventh Circuit has treated excusable neglect as a strict standard[31] to be construed narrowly.[32] However, the United States Supreme Court has rejected a narrow view of excusable neglect in favor of a "flexible understanding."[33] Considerations in finding excusable neglect include "the danger of prejudice to [the nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[34]

Examples of excusable neglect include: an unexplained delay by the post office in delivering a mailed notice of appeal[35]; counsel's failure to receive timely notice of the judgment followed by attempts to ascertain the status of the case[36]; mistakes by court personnel[37]; a deficiency in a timely filed notice of appeal for failure to list all of the multiple appellants[38]; delays caused by counsel's over-commitment to court-appointed cases[39]; and tardiness in filing the appeal arising from potentially conflicting statutory provisions regarding the time for appeal in an admiralty case.[40]

"Good cause" requires a lesser showing than excusable neglect[41] but is intended to "take account of a narrow class of cases in which a traditional 'excusable neglect' analysis would be inapposite."[42] Good cause is a factor "in situations in which there is no fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant."[43]

Fed. R. App. P. 4(a)(6) applies only when the moving party did not receive timely notice of the entry of judgment. In such cases, an extension may be granted upon motion filed within 7 days after the movant received notice of the judgment or within 180 days after the entry of judgment, whichever is sooner.[44] A request for relief under those circumstances must be sought by motion because mere lack of timely notice of the entry of judgment does not automatically affect the time to appeal.[45]

An order granting an extension under Fed. R. App. P. 4(a)(6) must include findings that the movant "was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry" and that "no party would be prejudiced" by the extension.[46] The requirement of findings by the district court is mandatory.[47]

A district court's order declining to extend the time under either Fed. R. App. P. 4(a)(5) or (6) is an appealable final judgment, which is reviewed by the court of appeals for abuse of discretion.[48] An order granting an extension may be challenged by the appellee without filing a cross-appeal because a question of appellate jurisdiction is involved and the court of appeals has the duty to inquire into its own jurisdiction.[49]

**No extensions by the court of appeals except in "unique circumstances."** As noted above, the Federal Rules of Appellate Procedure grant no authority to the court of appeals to permit late filing of a notice of appeal.[50] Actual practice is somewhat more complicated. While filing a notice of appeal within the time limit is "ordinarily" considered "mandatory and jurisdictional,"[51] courts of appeal have occasionally excused untimely filings in "unique circumstances."[52]

Under the "unique circumstances" doctrine, a late appeal may be deemed timely by the court of appeals "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."[53] Such a situation is most likely to arise when a party was late in filing a motion which will toll the appeal period under Fed. R. App. P. 4(a)(4)(A), but the trial court has assured the party that the motion was accepted as timely. Under such circumstances, the court of appeals may permit the filing of a notice of appeal at a time that would have been proper when treating the tardy trial court motion as if it had been timely filed.[54]

**Conclusion**

In both federal and Illinois state practice, it is within the court's discretion to grant or deny an extension of time to file the notice of appeal and no one should intentionally delay filing in reliance on being able to obtain an extension. The notice of appeal must always be filed on time when it is within counsel's ability to do so. To that rule there is no exception.

1. Ill. Sup. Ct. R. 303(a)(1); Fed. R. App. P. 4(a)(1) and 28 U.S.C. §2107(a).
2. Fed. R. App. P. 4(a)(1)(B); 28 U.S.C. §2107(b).
3. Ill. Sup. Ct. R. 303(a)(1); Fed. R. App. P. 4(a)(4)(A).
4. Ill. Sup. Ct. R. 303(a)(2); Sears v. Sears, 85 Ill.2d 253, 258, 422 N.E.2d 610, 612 (1981).
5. Sears, 85 Ill.2d at 259, 422 N.E.2d at 612; Sec. & Exch. Comm'n v. Van Waeyenberghe, 284 F.3d 812, 814 (7th Cir. 2002).
6. 735 ILCS 5/2-1202(b) and 1203(a).
7. Marsh v. Evangelical Covenant Church of Hinsdale, 138 Ill.2d 458, 461-62, 563 N.E.2d 459, 461 (1990).
8. Ill. Sup. Ct. R. 303(a)(3).
9. Fed. R. App. P. 4(a)(3).
10. Ill. Sup. Ct. R. 301. *See also* In re Marriage of Nettleton, 348 Ill.App.3d 961, 965, 811 N.E.2d 260, 265 (2nd Dist. 2004).
11. Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 264 (1978).
12. In Interest of Smith, 88 Ill.App.3d 380, 382, 399 N.E.2d 701, 702 (4th Dist. 1980).
13. Lombard v. Elmore, 134 Ill.App.3d 898, 909, 480 N.E.2d 1329, 1337 (1st Dist. 1985), *aff'd in part and rev'd in part on other grounds*, 112 Ill.2d 467, 493 N.E.2d 1063 (1986).
14. Ill. Sup. Ct. R. 303(d).
15. *Id.*
16. Gaynor v. Walsh, 219 Ill.App.3d 996, 1004, 579 N.E.2d 1223, 1228 (2nd Dist. 1991).
17. Ill. Sup. Ct. R. 303(d).
18. People v. Anders, 20 Ill.App.3d 984, 986, 313 N.E.2d 520, 522 (1974).
19. Bank of Herrin v. Peoples Bank of Marion, 105 Ill.2d 305, 307, 473 N.E.2d 1298, 1300 (1985) (citation omitted).
20. Bank of Herrin, 105 Ill.2d at 309, 473 N.E.2d at 1300; LaGrange Mem'l Hosp. v. St. Paul Ins. Co., 17 Ill.App.3d 863, 865-66, 740 N.E.2d 21, 24 (1st Dist. 2000).
21. *See, e.g.*, Anders, 20 Ill.App.3d at 986-87, 313 N.E.2d at 522.
22. Fed. R. App. P. 4(a)(5) and (6); 28 U.S.C. §2107(c).
23. Fed. R. App. P. 26(b); 28 U.S.C. §2107.
24. Fed. R. App. P. 4(a)(5)(A).
25. Fed. R. App. P. 4(a)(6).
26. Fed. R. App. P. 4(a)(5)(A)(i). A mere untimely filed notice of appeal will not substitute for such a motion. United States *ex rel.* Leonard v. O'Leary, 788 F.2d 1238, 1240 (7th Cir. 1986).
27. Fed. R. App. P. 4(a)(5)(B).
28. *Id.*
29. Fed. R. App. P. 4(a)(5)(C).
30. Fed. R. App. P. 4(a)(5)(A)(ii).
31. Redfield v. Cont'l Cas. Corp., 818 F.2d 596, 600 (7th Cir. 1987).
32. Reinsurance Co. of Am., Inc. v. Administratia

Asigurarilor de Stat, 808 F.2d 1249, 1251 (7th Cir. 1987).

[33]. Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 388 (1993). Pioneer addressed an excusable neglect provision in the Bankruptcy Rules, but the Court cited a disagreement among the circuits as to the meaning of "excusable neglect" in Fed. R. App. P. 4(a)(5) as a reason for granting certiorari. *Id.* at 387, fn 3.

[34]. City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994) (citations omitted).

[35]. Scarpa v. Murphy, 782 F.2d 300, 301 (1st Cir. 1986).

[36]. Redfield, 818 F.2d at 603. Mere lack of notice of the entry of judgment does not automatically affect the time to appeal. Fed. R. Civ. P. 77(d).

[37]. Mennen Co. v. Gillette Co., 719 F.2d 568, 570-71 (2nd Cir. 1983).

[38]. City of Chanute, 31 F.3d at 1047.

[39]. Pearson v. Gatto, 933 F.2d 521, 525 (7th Cir. 1991).

[40]. Feeder Line Towing Serv., Inc. v. Toledo, Peoria & W. R.R. Co., 539 F.2d 1107, 1109 (7th Cir. 1976).

[41]. Redfield, 818 F.2d at 601.

[42]. Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 630 (1st Cir. 2000) (citation omitted).

[43]. Fed. R. App. P. 4(a)(5)(A)(ii), Advisory Committee Notes (2002 Amendments).

[44]. Fed. R. App. P. 4(a)(6)(A). *See also* In the Matter of Marchiando, 13 F.3d 1111, 1114 (7th Cir. 1994).

[45]. *See* Fed. R. Civ. P. 77(d).

[46]. Fed. R. App. P. 4(a)(6)(B) and (C).

[47]. Marchiando, 13 F.3d at 1114 ("This requirement is important to prevent the rule from being treated by judges and litigants as purely discretionary, transforming the 30-day period for taking an appeal into a 180-day period").

[48]. Bishop v. Corsentino, 371 F.3d 1203, 1206 (10th Cir. 2004).

[49]. City of Chanute, 31 F.3d at 1045, fn 8.

[50]. Fed. R. App. P. 4 and 26(b). *See also* Torres v. Oakland Scavenger Co., 487 U.S. 312, 315 (1988).

[51]. Hernandez-Rivera v. Immigration & Naturalization Serv., 630 F.2d 1352, 1354 (9th Cir. 1980), *citing* United States v. Robinson, 361 U.S. 220, 229 (1960).

[52]. The "unique circumstances" doctrine has been criticized in the Seventh Circuit. *See* Fogel v. Gordon & Glickson, P.C., 393 F.3d 727, 731-32 (7th Cir. 2004).

[53]. Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989).

[54]. The Seventh Circuit seems to have further narrowed the availability of relief, stating that "[i]n our view, the 'unique circumstances' exception is available only when there is a genuine ambiguity in the rules to begin with, and the court resolves that ambiguity in the direction of permitting additional time to appeal." Prop. Unltd., Inc. v. Cendant Mobility Serv., 384 F.3d 917, 922 (7th Cir. 2004).

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