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Missing the Party: The California Notice of Appeal

Benjamin G. Shatz

In both California and federal practice, a notice of appeal is one of the simplest documents to prepare. Yet human nature ensures that careless mistakes will occur. Under California's rules, a notice of appeal is "sufficient" if it "identifies the particular judgment or order being appealed" and is signed. Cal Rules of Ct 8.100. The federal rules impose another requirement not expressly included in California practice: A federal notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." Fed R App P 3(c)(1)(A). Recognizing that lawyers often represent multiple parties, the federal rules also allow describing the appealing parties using terms such as "all plaintiffs" or "all defendants, except X."

What happens, however, when a California notice of appeal neglects to name a party that intended to appeal? One can easily imagine the harried lawyer who represents eight parties filing a notice of appeal that inadvertently names only seven of them, when the intent was for all eight to appeal. To be sure, California's rules require that a "notice of appeal must be liberally construed." Cal Rules of Ct 8.100(a)(2). But does that liberality extend to allowing an appeal by a party not named in the notice of appeal?

Liberally construing the language of a notice of appeal to correct an inaccurate date or other typographical error is one thing, but introducing an entirely new appellant arguably is something else altogether. After all, "[t]he right to appeal is not a free-floating privilege that anyone may grab." *People v Punzalan* (2003) 112 CA4th 1307, 1310, 6 CR3d 30. And it hardly seems too much to ask to require that a notice of appeal specifically name the appellants.

An early example of this type of mishap occurred in *People v Lewis* (1933) 219 C 410, 27 P2d 73, in which two defendants—Lewis and Crisp—were jointly tried and convicted of burglary. A timely notice of appeal was filed for Crisp, but a separate notice of appeal filed for Lewis several days later was beyond the jurisdictional deadline. Lewis's attorney sought to correct this problem with an affidavit swearing that Lewis's name was "improperly omitted" from the timely notice of appeal. The trial court accepted this explanation and allowed an amendment to the notice of appeal to include Lewis. The supreme court, however, soundly rejected this fix and dismissed Lewis's appeal, emphasizing that the deadline for a notice of appeal is "mandatory and jurisdictional."

Fast-forward 40 years to *People v North Beach Bonding Co.* (1974) 36 CA3d 663, 111 CR 757, a bail forfeiture case involving a bonding company and a surety insurer. The notice of appeal named the bonding company but did not name the surety company or the underlying individual criminal defendant, even though the "Appellants' Opening Brief" referred to all three as "Defendants and Appellants." The court of appeal pointed out that "[c]ounsel's failure to name the surety insurer in its notice of appeal . . . could have led to graver consequences if the county, as well it might have, had sought and secured an order dismissing the appeal." 36 CA3d at 667 n4. Yet the court ignored this flaw, apparently because the respondent "acquiesced," and proceeded to resolve the merits of the appeal.

A similar situation arose a few years later in *Beltram v Appellate Dep't* (1977) 66 CA3d 711, 126 CR 211. Beltram involved a jury verdict against the City of Los Angeles and an individual city police officer premised on the officer's misconduct. The city filed a notice of appeal, but that notice failed to indicate that the police officer was appealing as well. Seven months after entry of judgment, the superior court appellate department allowed the city to amend its notice of appeal to add the name of the officer.

The court of appeal condoned this amendment, citing the rule that a notice of appeal "will be liberally construed unless the respondent is prejudiced or misled by its defects." 66 CA3d at 715. Because the city's liability derived wholly from the liability of its employee, and the issues regarding the city and the officer were identical, "the inadvertent omission of the employee's name from the notice of appeal cannot have prejudiced or misled plaintiffs or in any way affected their preparation for the appeal." 66 CA3d at 715. The court reasoned that this result would "further the policy of hearing legal disputes on their merits and avoid a windfall for one party as the result of another's technical procedural mistake." 66 CA3d at 715.

North Beach Bonding and *Beltram* are examples of the appellate courts' generosity in construing a notice of appeal to include missing parties. That generosity even extends to lawyers who neglect to name themselves as appellants when appealing sanctions awards imposed jointly and severally against counsel and client. In a number of cases, the court of appeal has invoked the doctrine of liberal construction to deem a notice of appeal brought only in the name of a party to also be considered an appeal from the lawyer. See, *e.g., Eichenbaum v Alon* (2003) 106 CA4th 967, 974, 131 CR2d 296; *Cromwell v Cummings* (1998) 65 CA4th Supp 10, 15, 76 CR2d 171; *Kane v Hurley* (1994) 30 CA4th 859, 861 n4, 35 CR2d 809; see also *Marriage of Golan* (Aug. 23, 2007, B190703; not certified for publication) 2007 Cal App Unpub Lexis 6862; *Twin Rivers Ranch v Renwood Props., Ltd.* (Sept. 29, 2006, C049904, C051401; not certified for publication) 2006 Cal App Unpub Lexis 8708; *Rodriguez v Prommer* (Feb. 6, 2003, B154808; not certified for publication) 2003 Cal App Unpub Lexis 1271.

The authority on this point is not uniform. In numerous other cases, the courts have had no sympathy for counsel who failed to properly name themselves in a notice of appeal and thus have refused to construe a notice of appeal to include sanctioned counsel as an appellant. See, *e.g., Laborde v Aronson* (2001) 92 CA4th 459, 465, 112 CR2d 119 (because attorney himself "did not notice an appeal from the order imposing [the] sanctions," the court was "without jurisdiction to review that portion of the order"); *Taylor v Varga* (1995) 37 CA4th 750, 761 n12, 43 CR2d 904 ("court lacks jurisdiction to review the portion of the sanction order applicable to counsel for appellants" because "counsel did not themselves appeal from the imposition of sanctions"); *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 24 CR2d 337 ("Absent any attempted appeal by the sanctioned party, the sanction ruling is not presently reviewable"); see also *Olmstead v Arthur J. Gallagher & Co.* (Sept. 14, 2006, A109640; not certified for publication) 2006 Cal App Unpub Lexis 8109; *Greenhouse v Quartz Hill Water Dist.* (Jan. 11, 2005, B171693; not certified for publication) 2005 Cal App Unpub Lexis 273; *Knight v Demin* (Mar. 7, 2002, F032393; not certified for publication) 2002 Cal App Unpub Lexis 3336.

The same split of authority also occurs with appeals from attorney fee awards imposed jointly and severally on parties and counsel to punish the filing of a frivolous motion to strike a complaint under the anti-SLAPP statute (CCP §425.16). *Puleri v Hansen* (Apr. 27, 2006, G035350; not certified for publication) 2006 Cal App Unpub Lexis 3458 (attorney was "not a party to this appeal because he failed to include his name in the notice of appeal"); *Howard v Dolan* (Dec. 12, 2005, A109137; not certified for publication) 2005 Cal App Unpub Lexis 11455 (liberally construing notice of appeal to embrace appeal by attorney).

Given the inconsistency in how liberally appellate courts will construe notices of appeal, the bottom line is that appellants should be particularly careful not to omit parties. Rather than pin one's hopes on the court stretching to find that a notice of appeal also perfects an appeal from an unnamed appellant, prudent practitioners will double-check to ensure that every party that intends to appeal is specifically named in the notice of appeal. Similarly, respondents on appeal should carefully examine notices of appeal for opportunities to prevent nonappealing parties from freeloading on properly perfected appeals. A prompt motion to dismiss an appeal on the basis that the purported appellant has not actually appealed may be a shortcut to victory.

Gentry v Superior Court and *Murphy v Check 'N Go:* Preserving Employees' Class Action Rights

Joseph Jaramillo

Predispute employment agreements requiring employees to arbitrate their claims against their employer and waive their right to bring class actions have become increasingly common. Although courts have called this provision a "class action waiver," I will refer to it also as a "prohibition" or "ban" because typically it is imposed unilaterally on the employee by his or her employer without providing the opportunity to make an informed choice.

Such class action prohibitions greatly impede the enforcement of workers' rights because they foreclose the ability to seek relief for those who may not otherwise sue their employer. They also remove the incentive for employers to avoid unlawful conduct when the cost of noncompliance is merely defending the few individual actions that are filed against them. Two recent cases should help stem the tide of class action bans by making it more difficult for employers to enforce them.

In *Gentry v Superior Court* (2007) 42 C4th 443, 64 CR3d 773, reported in this issue on p 222, the California Supreme Court considered for the first time whether a class action waiver could be enforced against an employee alleging a class-wide denial of overtime pay. Although much of the argument between the parties centered on whether the class action ban was unconscionable under *Discover Bank v Superior Court* (2005) 36 C4th 148, 30 CR 3d 76, which considered a class action ban in the consumer context, the *Gentry* court ruled that the ban could be invalidated not only for its unconscionability but also as a violation of public policy. Although careful not to declare all class action bans in overtime cases unenforceable, the court held in strong terms that the right to pursue a class action may not be waived when it is a more effective means to vindicate statutory rights than individual litigation or arbitration.

The court's decision was rooted in the strong public policy expressed in Lab C §1194, which makes the rights to the legal minimum wage and overtime pay unwaivable. Three practical realities led the court to conclude that a class action ban could interfere with employees' ability to vindicate these unwaivable rights. First, individual wage and hour recoveries are often modest and their pursuit presents substantial risk to individual workers. Proceeding in a class action provides employees with modest claims a means to seek redress. Second, current employees are unlikely to pursue individual cases due to a legitimate fear of retaliation. The court found Division of Labor Standards Enforcement (DLSE) complaint statistics to support plaintiff's assertion that retaliation against employees is widespread. Third, some employees may not pursue litigation because they are unaware their legal