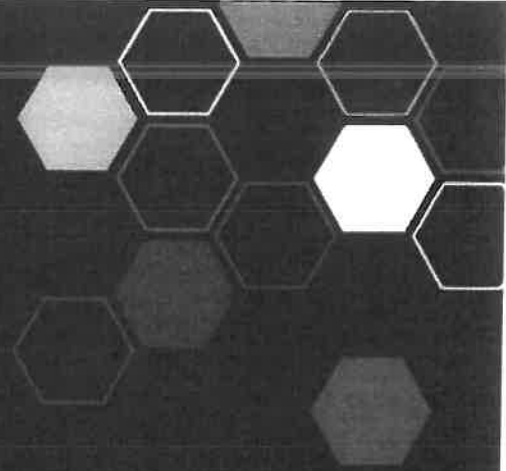


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LOS ANGELES COUNTY BAR ASSOCIATION



*The Los Angeles County Bar Association
Appellate Courts Section Presents*

Unwavering Compliance: Complying with Trial Court Decisions

Tuesday, November 6, 2018

Program - 4:30 PM - 6:00 PM

California Court of Appeals, Los Angeles

1.5 CLE Hours (INCLUDES 1.5 HRS OF APPELLATE COURTS SPECIALIZATION CREDIT)



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Division Two: ADMINISTRATIVE PRESIDING JUSTICE ELWOOD LUI

Topics



Elwood Lui is the Administrative Presiding Justice of the Court of Appeal, Second Appellate District, Division Two. He was confirmed by the Commission on Judicial Appointments on December 14, 2017. He was an Associate Justice in Division One from July 23, 2015 until his confirmation as a Presiding Justice.

He was born and raised in Los Angeles, California, and educated in public schools. He is married to Crystal Lui, a former member of the Commission on Judicial Performance, and they have two sons, Bradley Lui, a partner of Morrison and Foerster in the Washington D.C. Office, and Judge Christopher Lui of the Los Angeles Superior Court. They have five grandchildren.

He is a graduate of Los Angeles High School and the University of California at Los Angeles, where he received his Bachelor, M.B.A. and J.D. degrees. He worked his way through UCLA Law School, working full time as a C.P.A. with Deloitte and Kenneth Leventhal & Co. and concurrently serving in the United States Army Reserve.

Justice Lui has a long history of public service while engaged in the private practice of law. He currently is the Prison Compliance Officer in the federal litigation concerning the overcrowded conditions in the California state prisons. He also served as the Special Master of the State Bar Disciplinary System on two occasions, as Interim Director of the Los Angeles County Department of Children and Family Services, as a member of the Medical Board of California and as a member of the Board of Harbor Commissioners of the City of Los Angeles. He was a Deputy Attorney General. He served on a number of nonprofit boards, including Advancing Justice, Los Angeles, Public Counsel, and Children Now. He has been active in the selection process for federal and state judicial positions at the request of the White House, Senator Feinstein, and several Governors.

Justice Lui was in private practice with Jones Day from 1987 until his appointment to Division One. At Jones Day, he was a member of the senior management committees, the first partner in charge of the San Francisco Office, the practice coordinator of the Greater China Offices, and the lead appellate lawyer for the California Region. He was named as one of the "Top 100 Lawyers in California" by the Daily Journal in 2014 and on seven other occasions. He is the recipient of the Witkin Medal from the State Bar of California, the Judicial Council Bernard E. Witkin Amicus Curiae Award, the UCLA Professional Achievement Award, and the Alumnus of the Year from UCLA Law School. He was a founding member of the Southern California Chinese Lawyers Association and a recipient of the Judge Delbert E. Wong Distinguished Service Award. He was a member of the American Academy of Appellate Lawyers and the California Academy of Appellate Lawyers. Chambers has listed him as a "Senior Statesman" of the California appellate bar.

Justice Lui previously served as a judicial officer between 1975 and 1987 as a member of the Los Angeles Municipal Court, the Los Angeles Superior Court, and as an Associate Justice in Division Three of this District. He also served as a member of the Judicial Council of California and as President of the California Judges Association.

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Speaker Bio—Judy L. McKelvey

Judy L. McKelvey has practiced before the California courts for over 20 years. Her practice is focused primarily in the representation of cities, counties, and other public entities in the areas of tort liability, inverse condemnation, administrative law, mandamus, and employment litigation. She has successfully represented public entity clients in numerous bench and jury trials. Ms. McKelvey has given numerous presentations to public entity audiences on topics such as mandamus process and strategy, writ practice, e-discovery, and elimination of bias. She is a co-author of the current edition of California Civil Writ Practice, a leading practice guide serving the legal profession.

Eric Boorstin is an attorney at Horvitz & Levy LLP, a firm that focuses on civil appeals. He has handled appeals in an array of areas including products, premises, professional, and employer liability, and trademark and copyright infringement. He has appeared as amicus counsel for trade associations in state and federal court, addressing a variety of institutionally important legal issues.

Before joining Horvitz & Levy, Mr. Boorstin served as a law clerk to Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit and to Judge Valerie Baker Fairbank of the United States District Court for the Central District of California.

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Speaker biography—Daniel Barer:

Daniel P. Barer is a partner in the Los Angeles law firm of Pollak, Vida & Barer, which represents public entities, insurance companies, and private defendants in the trial and appellate courts. The State Bar of California Board of Legal Specialization has certified him as a specialist in appellate law. He represents cities, counties, police agencies, school districts, insurance companies, and insured persons in appellate and trial court litigation. He has represented public entities, insurance companies, and insured persons in the California Supreme Court, the Ninth Circuit Court of Appeals, and the lower appellate courts. He is panel appellate counsel for the County of Los Angeles, and has represented the Los Angeles County Board of Supervisors. He is co-author of the annual updates to California Government Tort Liability Practice (C.E.B. 2018). Since 2005, he has been listed as a “Super Lawyer” in appellate law by Southern California Super Lawyers Magazine. He is a 1990 graduate of the University of California, Hastings College of the Law (cum laude). He speaks and writes on the subjects of governmental liability and appellate procedure.

Overview

- Basic Concepts:
 - Cannot acquiesce to a decision and then appeal it
 - Cannot obtain the benefits of a decision and still appeal it
 - There must be something left to appeal—reversal must be able to accomplish something
 - Things done to comply may not be able to be undone; money paid might never be refunded
- Why a Party May Want to Comply with a Decision while Appealing It:
 - Stop interest running
 - There is undisputed amount that will remain owing if reversal occurs
 - Over-policy judgment: pay policy limits to lessen burden on insured and avoid bad faith
 - Writ: agency wishes to improve services to public by complying with court's directions
- Types of Decisions:
 - Money Judgments
 - Voluntary payment or acceptance alone waives right to appeal
 - Payment is not “voluntary” if facing compulsion to pay, e.g. execution
 - Written agreement that compliance does not waive right to appeal
 - Writs
 - Filing return showing compliance waives appeal
 - Partial compliance may not waive appeal
 - Injunctions
 - Additur and Remittitur as Alternative to New Trial
 - Acceptance is acquiescence to judgment, and waives appeal of judgment
 - Exception: Severable portions of judgment, reversal of which will not disturb portion accepted
- Strategy
 - Court's considerations when deciding whether to find waiver
 - Deciding whether to comply with decision
 - Avoiding waiver
 - Arguing against waiver

Unwavering Compliance: Complying with Trial Court Decisions

November 6, 2018

When does complying with a judgment waive the right to appeal?

- A. The general principle:** A party waives its right to appeal by voluntarily complying with the terms of a judgment, by voluntary payment or otherwise, or by accepting the benefits of the judgment. (See (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 64 .)
- B. The exceptions:**
1. **Compliance Under Threat of Enforcement.** The main exception to this rule includes compliance under threat of enforcement. A “waiver of the right to appeal by satisfaction or compliance is implied *only* if the satisfaction or compliance is by way of *compromise*, or is coupled with an *agreement not to appeal*. Where it is compelled or coerced, e.g., by the threat of forfeiture or seizure of property under execution, there is no waiver.” (9 Witkin, *supra*, Appeal, § 66, emphases added [“Payment of a judgment is regarded as compulsory unless it is by way of compromise and settlement, or under an agreement not to appeal, or leaving only a moot question”].)
 - a. It has been held by the California Supreme Court that the voluntary payment of a judgment will not deprive a party of his right to appeal unless it is shown that the payment was by way of compromise or with an agreement not to appeal. (*Reitano v. Yankwich* (1951) 38 Cal.2d 1, 3 (*Reitano*) [“In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal”]; see also *Estate of Merrill* (1946) 29 Cal.2d 520, 524 [“In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal”].)
 - i. In *Reitano*, after entry of judgment, appellee’s counsel wrote to appellant’s counsel threatening to levy execution if appellant did not pay costs and

attorney fees. Appellant paid the costs and fees, and appellee filed a satisfaction of judgment.

The Supreme Court found that appellant had not waived its right to appeal by paying the costs and fees: “ ‘it is difficult to conceive how his (appellant’s) payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. * * * The better view, we think, is, that though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination.’” (*Reitano, supra*, 38 Cal.2d at pp. 3-4.)

- b. There is substantial agreement that payment or performance of a judgment is not voluntary where it follows execution or other legal processes issued for enforcement of the judgment. (See *Reitano, supra*, 38 Cal.2d at pp. 1-4; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 521-522.)
- c. There appears to be agreement among the Courts of Appeal that the existence of an enforceable judgment is a coercive factor in and of itself—i.e. that there is no need for appellant to demonstrate it was under an immediate threat of execution when it paid the judgment in order to preserve its right to appeal. However, a few courts (and practice guides), have suggested that payment or performance prior to issuance of execution results in a loss of the right of appeal.
 - i. Authority supporting no waiver where payment of judgment is made without threat of immediate execution
 - (a) *Retzloff v. Moulton Parkway Residents' Assn., No. One* (2017) 14 Cal.App.5th 742, 748 (finding no waiver of right to appeal where appellee failed to offer any arguments or evidence that appellants entered into a compromise or agreement not to appeal; it

was respondent's burden to demonstrate. Appellant's satisfaction of the judgment on its own was not enough to demonstrate waiver of right to appeal.).

- (b) *Donahue v. LeVesque* (1985) 169 Cal.App.3d 620, 625, fn. 1 (although plaintiffs satisfied the judgment, no waiver of plaintiffs' right to appeal occurred because deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal).
- (c) *People v. Silva* (1981) 114 Cal.App.3d 538, 549 ("It is clear that, in cases where judgment has been satisfied, there is no deprivation of the right to appeal unless the payment was by way of compromise or via an agreement not to take an appeal").
- (d) *Vaughn v. Dekreek* (1969) 2 Cal.App.3d 671, 680 ("Defendants contend that by reason of the payment of the judgment this action became moot. Plaintiff contends that as execution could have issued, the payment of the judgment was compulsory and not voluntary and therefore the appeal may be maintained. We conclude that the appeal was not made moot.").
- (e) *People By and Through Dept. of Public Works v. Richman* (1966) 242 Cal.App.2d 380, 384-385 ("though the execution has not issued the payment of a judgment must be regarded as compulsory, and therefore as not releasing error, nor depriving the payer of the right to appeal").
- (f) *Haddad v. Pazar* (1958) 156 Cal.App.2d 695, 698 (in the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that payment of the judgment was by way of compromise or with an agreement not to take or

prosecute an appeal; the showing is to the contrary where the notice of motion for an order to enter satisfaction of judgment shows on its face that *payment was made to stop the running of interest on the judgment* and the appeal was to remain in force)

- ii. Authority suggesting payment of judgment, without immediate threat of execution, waives right to appeal
 - (a) *Security Pacific Nat. Bank v. Lyons* (1994) 25 Cal.App.4th 706, 710 (suggesting that payment must be made under threat of execution or other judgment debtor proceedings for exception to general rule to apply).
 - (b) *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 521 (defendants did not waive their right to appeal because record established that payment was coerced by threat of execution on defendant's property).
 - (c) 9 Witkin, *supra*, Appeal § 64 ("A satisfaction that is compelled does not constitute a waiver of the right to appeal. . . . However, the mere fact that a party may find it more profitable to comply with a judgment than to suffer the losses incident to an appeal does not make the compliance compulsory." (quoting *Mt. Shasta Power Corp. v. Dennis* (1924) 66 Cal.App. 186, 190-191 (*Dennis*)).)
 - (d) However, Witkin's use of *Dennis* in this section is misleading because *Dennis* was an eminent domain proceeding to condemn certain riparian rights to the waters of a stream. After a judgment fixing the amount of defendants' damages on account of the proposed taking, plaintiff paid the damages awarded and took possession, but also appealed the judgment. *Dennis* held that the plaintiff had the option of paying the

damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid. The fact that the plaintiff may find it more profitable to comply with the judgment and accept the fruits thereof than to suffer the losses incident to an appeal cannot be said to render such compliance compulsory. Thus, there is a good argument *Dennis* does not extend to cases where an appellant pays a judgment while an appeal is pending, but does not accept any “benefits” of the judgment (i.e., by taking possession of property).

- (e) Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:326 (***PRACTICE POINTER:*** Sometimes judgment debtors elect to pay a judgment because they cannot or do not want to post security . . . and want to avoid the harassment of enforcement proceedings. It might be possible for the debtor to preclude an implied waiver by seeking a *written agreement* with the judgment creditor that the payment does *not thereby waive the right to appeal* (although it might also be argued that such an agreement renders the payment consensual and thus a waiver). If the creditor declines to so agree, payment should be accompanied by the debtor's written statement that the judgment is being paid *under threat of execution and without intent to waive the right to appeal*. (Some debtors may want to postpone payment until there is a demonstrable threat of execution.).”).

d. **Exceptions to the exception**—where payment impliedly waives the right to appeal.

- i. **Payment of a money judgment with knowledge that restitution after reversal of the amount paid would be practically**

impossible may waive the right to appeal. (See *Miller v. Cabral* (1970) 13 Cal.App.3d 503, 507 [where, by court order, judgment in favor of plaintiff could be satisfied only by payment of part of judgment money to third parties, and defendants appealed and satisfied judgment, estoppel or implied waiver of right by defendants to appeal arose on satisfaction of judgment].)

- ii. **Settlement before or after judgment is entered.** (See *Rancho Solano Master Ass'n v. Amos & Andrews, Inc.* (2002) 97 Cal.App.4th 681 [construction company waived its right to appeal a jury's findings of liability and to seek indemnification from codefendant home builders by settling with plaintiff before filing its opening brief and making full satisfaction of judgment]; see also *A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank* (1986) 182 Cal.App.3d 356, 357 [bank waived right to appeal by settling with company before judgment was entered and signed; it could not challenge amount of interest computed on appeal].).

2. **Partial payment of a judgment does not waive the right to appeal.** (*Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736 [university did not waive right to appeal adverse judgment in action in which physician who had worked at university hospital sought writ of mandate compelling university to provide a defense to him in a civil action, even though university paid most of award on writ and attorney fee award; university made only partial payment, and did not file return professing compliance with writ, or so comply].)

C. Voluntary compliance with a trial court's writ of mandate generally may waive the right to appeal those portions of the writ complied with.

1. Voluntary compliance with a trial court's writ of mandate generally can waive the right to appeal.
 - a. *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 865-866 (a city's voluntary compliance with trial court's judgment and writ of mandate while appeal was pending rendered appeal of

the judgment moot; “appellants had two available options, i.e., to appeal the judgment or to comply with it. [Citation.] Appellants chose to voluntarily comply with the judgment, thereby waiving their right to challenge it.”).

- b. *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033 (“Within the context of a party’s voluntary compliance with a judgment granting a peremptory writ of mandate, the party is deemed to have waived its right to appeal from those portions of the writ with which it voluntarily complied or purported to do so”).
 - c. *City of Carmel-By-The-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 970 (“Upon the trial court’s issuance of its judgment granting the peremptory writ, the Board had two options available to it: either to appeal that judgment or to comply with it. To the extent that the Board voluntarily elected to follow the latter course, it waived its right to appeal. [Citations.] Here the Board’s return to the writ stated that it had complied with the directions of the court. Therefore, we deem the Board to have waived its right to appeal from those portions of the writ with which it voluntarily purported to comply.”).
2. However, other authorities hold there is no waiver where appellant complies with judgment pursuant to a trial court’s order to do so. (See *Cunningham v. Magidow* (2013) 219 Cal.App.4th 298, 302-303 [where trial court ordered appellant to execute an acknowledgment of full satisfaction of the judgment, “her execution (through counsel) of the acknowledgment does not render the appeal moot or otherwise constitute a waiver or forfeiture of her right to challenge the court’s order deeming the judgment satisfied in part. [Respondent] cites no authority for the proposition that, in order to preserve her right to appeal, [appellant] was required to defy the court’s order and thereby risk being held in contempt. We are aware of no such authority.”]; see also *Mackay v. Whitaker* (1952) 112 Cal.App.2d 112, 117 [“appellants’ compliance with the judgment by delivering up possession of the property and by the execution and delivery of the . . . deed, in no way can operate to bar the appeal. The delivery of possession by the [appellants] was made under the compulsion of the restitution and contempt proceedings.”].)

D. Compliance with an injunction may waive the right to appeal, depending on whether it is a prohibitory or mandatory injunction.

1. Mandatory injunctions are automatically stayed pending appeal while prohibitory injunctions are not automatically stayed by an appeal. (See *URS Corp. v Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884 [analyzing distinction between mandatory and prohibitory injunctions].)
2. In theory, a party may waive its right to appeal by complying with a mandatory injunction because the party may be deemed to have “voluntarily complied” with the terms of the judgment. If it is unclear whether an injunction is mandatory (automatically stayed) or prohibitory (stayed only by court order), it may be wise to file a motion seeking clarification with the court whether an injunction is stayed. You may also file a precautionary petition for writ of supersedeas. (See Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 7:266.)

E. Noncompliance with an injunction may waive the right to appeal under the disentitlement doctrine.

1. A party who has purposefully defied court orders in the case may be penalized by denial of the right to take an appeal. (See *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265 [“Under the disentitlement doctrine, a reviewing court has inherent power to dismiss an appeal when the appealing party has refused to comply with the orders of the trial court”].) “The rule applies even if there is no formal adjudication of contempt.” (*Ibid.*)
2. The disentitlement doctrine “is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed,” but may also apply to “cases in which the appellant has violated orders other than the one from which the appeal has been taken.” (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶¶ 2:340-2:340.1.)