

## APPEALABILITY AND JUSTICIABILITY

### A. OVERVIEW

[2:1] This Chapter addresses the *appealability* of district court orders and judgments. The appealability of a judgment or order is essentially a jurisdictional question—i.e., the appellate court’s power or capacity to hear and determine a particular matter.

#### 1. Importance of Determining Appealability

a. [2:2] **Governs method of seeking appellate review:** There are two possible methods by which the courts of appeals can review district court judgments and orders:

- **Appeal:** On *direct appeal* from the judgment or order; or
- **Writ:** On a petition for *extraordinary writ* (mandamus, prohibition or other).

b. [2:3] **Which method appropriate (appealability question):** Whether review should be pursued by direct appeal or by writ depends on whether the judgment or order is *appealable*:

(1) [2:4] **Immediate appeal from appealable judgments or orders:** “Appealable” orders and judgments fall into two general categories:

- *Final judgments* (including orders considered “final,” ¶2:36 ff.); and
- Certain *interlocutory orders* identified by statute, including injunctive orders (¶2:211 ff.), orders involving receiverships (¶2:484 ff.) and orders determining rights and liabilities in admiralty (¶2:509 ff.).

If an order or judgment is *appealable*, the failure to file an appeal may forever foreclose appellate review (¶3:6 ff., 7:176).

(2) [2:5] **Immediate appeal from nonappealable interlocutory orders:** A party may obtain review of an otherwise nonappealable interlocutory order if the district court subsequently directs entry of judgment as to some parties or claims pursuant to FRCP 54(b) (¶2:112 ff.) or permission is granted pursuant to 28 USC §1292(b) (¶2:156 ff.), 28 USC §1453(c) (¶2:346.10 ff.), 28 USC §158(d) (¶14:97 ff.) or FRCP 23(f) (¶2:402.5 ff.).

[2:6] *Reserved.*

[2:7 — 2:11]

(3) [2:7] **Deferred appeal or immediate writ review of nonappealable judgments or orders:** Unless immediate appeal is available by certification or permission (¶2:5), counsel wishing to obtain appellate court review of *nonappealable* judgments or orders must either:

- *Wait* to file an appeal until there *is* an appealable judgment or order (previous nonappealable orders generally are within the scope of review of an appeal from a final judgment or order, ¶7:22 *ff.*); or
- If the requirements for writ relief are met, seek *immediate review* by *extraordinary writ* (*Ch. 13*).

c. [2:8] **Appealability determined first:** Thus, ascertaining the appealability of the order or judgment in question is of fundamental importance in the appellate process. This issue should be counsel's *first* point of inquiry before contemplating an appeal from a district court judgment, or whenever there has been *any* adverse ruling that counsel wants reviewed by an appellate court.

d. [2:9] **Factors considered:** In determining appealability, counsel must consider:

- Whether the judgment or order is *appealable* (¶2:10 *ff.*);
- Any *statutory constraints* on appellate jurisdiction (¶2:23);
- Any *constitutional constraints* limiting appellate court jurisdiction (¶2:565 *ff.*); and
- Which *federal circuit* is the correct appellate court to which an appeal must be taken (¶2:811 *ff.*).

*Cross-refer:* Jurisdictional issues in connection with review of *bankruptcy court*, *agency* and *tax court* decisions are discussed in *Ch. 14*.

## 2. Appealable Judgments and Orders

a. [2:10] **Appealable final judgments:** Generally, a judgment or order is appealable if it represents the district court's *final disposition* of either a collateral issue or *all issues* as to *all parties* in the proceedings below (so-called "final judgment rule"). [See 28 USC §1291; and ¶2:36 *ff.*]

b. [2:11] **Appealable interlocutory orders:** "Interlocutory" (nonfinal) orders are immediately appealable if they fall within an exception to the "final judgment rule"—e.g., where a particular interlocutory order is expressly made appealable by statute (28 USC §1292) or where the order comes within a long-standing judge-made exception, the collateral order doctrine. [See *Mohawk Industries, Inc. v. Carpenter*, 558 US 100, 103, 106, 110-111, 130 S.Ct. 599, 603, 604-605, 607 (2009); *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F3d 720, 723-724 (9th Cir. 2017)]

*Cross-refer:* For a detailed discussion regarding appealability of nonfinal *agency* orders, see ¶14:331 *ff.*

- ➡ [2:12] **PRACTICE POINTER:** Determining whether an interlocutory order falls within an exception to the final judgment rule demands a fact-specific analysis. Counsel must be thoroughly familiar with the procedural facts of the case in order to effectively analyze the jurisdictional issue.
- (1) [2:13] **Compare—appellate review of nonappealable interlocutory orders:** Otherwise nonappealable interlocutory orders generally *merge* into the final judgment and become reviewable at that time (¶7:179.1). “The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment,” whether or not the particular order or ruling is specifically referenced in the notice of appeal. [FRAP 3, Adv. Comm. Note, 2021 Amend.; see *Dupree v. Younger*, 598 US 729, 734, 143 S.Ct. 1382, 1388 (2023)—“general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated” (internal quotes omitted); *Kamal v. Eden Creamery, LLC*, 88 F4th 1268, 1275 (9th Cir. 2023)—order denying leave to amend complaint is not appealable, but may be reviewed on appeal from final judgment, into which order merges; *American Ironworks & Erectors, Inc. v. North American Const. Corp.*, 248 F3d 892, 897 (9th Cir. 2001) (interlocutory attorney fee order)]
- (2) [2:13.1] **Compare—no review of administrative orders:** The court of appeals has jurisdiction to review only orders that arise out of district court proceedings that are judicial, rather than administrative, in nature. For example, the court could not review a district court decision to deny journalists an exemption from the fee schedule for obtaining documents through PACER. [*In re Application for Exemption From Electronic Public Access Fees by Jennifer Gollan & Shane Shifflett*, 728 F3d 1033, 1039-1040 (9th Cir. 2013)]
- c. [2:14] **Appealable postjudgment orders:** Most district court postjudgment orders (e.g., orders awarding attorney fees or enforcing settlement agreements) are separately appealable final orders. [*Armstrong v. Schwarzenegger*, 622 F3d 1058, 1064-1065 (9th Cir. 2010)—court of appeals has jurisdiction to hear timely appeal from postjudgment order enforcing prior remedial order; *Burt v. Hennessey*, 929 F2d 457, 458 (9th Cir. 1991)—court of appeals has jurisdiction to hear timely appeal from postjudgment order denying request for costs]

[2:15 — 2:17.6]

*Cross-refer:* For a detailed discussion of the appealability of postjudgment orders, see ¶2:538 ff.

3. [2:15] **Limited Jurisdiction of Federal Courts:** All federal courts are courts of *limited jurisdiction*; the legitimate exercise of their judicial power is “confined both by statutes and by Article III of the Constitution.” [*ASARCO Inc. v. Kadish*, 490 US 605, 611, 109 S.Ct. 2037, 2042 (1989); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 US 375, 377, 114 S.Ct. 1673, 1675 (1994); *Coeur d’Alene Tribe v. Hawks*, 933 F3d 1052, 1054 (9th Cir. 2019); see *Steel Co. v. Citizens for a Better Environment*, 523 US 83, 94-95, 118 S.Ct. 1003, 1012 (1998)—“requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception” (internal quotes omitted; brackets in original)]

- a. [2:16] **Jurisdictional issue raised on party motion or sua sponte:** Every federal court, including the court of appeals, has an obligation to consider its own jurisdiction, upon motion of a party *or sua sponte*. [*Henderson ex rel. Henderson v. Shinseki*, 562 US 428, 434, 131 S.Ct. 1197, 1202 (2011); *Bender v. Williamsport Area School Dist.*, 475 US 534, 541, 106 S.Ct. 1326, 1331 (1986); see *Poulos v. Caesars World, Inc.*, 379 F3d 654, 662 (9th Cir. 2004)—“This is so even in the context of an interlocutory appeal”; and ¶7:18.10 ff.]
- b. [2:17] **Jurisdiction subject to challenge at any time:** An objection to the court’s jurisdiction to entertain an appeal is not waivable. Both the district court’s subject matter jurisdiction and the Ninth Circuit’s appellate jurisdiction are subject to challenge at any stage of the proceedings. [*Henderson ex rel. Henderson v. Shinseki*, 562 US 428, 434-435, 131 S.Ct. 1197, 1202 (2011); see ¶7:188]

[2:17.1-17.4] *Reserved.*

- c. [2:17.5] **Jurisdiction to determine appellate jurisdiction:** The court always has jurisdiction to determine whether it has jurisdiction over the appeal. “Any other rule would place the court and potential litigants in an untenable ‘Catch-22’ situation, stripping the courts of the ability to weigh and consider the merits of the jurisdictional argument, and depriving citizens of a fair adjudication of their claims.” [*Bingue v. Prunchak*, 512 F3d 1169, 1172, fn. 5 (9th Cir. 2008); *BNSF Ry. Co. v. O’Dea*, 572 F3d 785, 788 (9th Cir. 2009); see *Bank of New York Mellon v. Watt*, 867 F3d 1155, 1157 (9th Cir. 2017)—“We have jurisdiction to determine our jurisdiction”]

➡ [2:17.6] **PRACTICE POINTER:** The Ninth Circuit customarily examines its own jurisdiction very carefully. Thus, before investing time and resources in an appeal, be certain all jurisdictional prerequisites have been met.

**APPENDIX:** See the “Jurisdictional Checklist” in Appendix A at the close of this Chapter for a quick reference guide regarding jurisdictional matters.

- d. [2:18] **Compare—state law cannot affect federal court jurisdiction:** State law cannot preclude, or otherwise affect, federal court jurisdiction over an appeal. [*BNSF Ry. Co. v. O’Dea*, 572 F3d 785, 788-789 (9th Cir. 2009)—“However extensive their power to create and define substantive rights, the states have no power directly to enlarge or contract federal jurisdiction”]
4. [2:19] **Constitutional Constraints on Jurisdiction:** The U.S. Constitution limits federal judicial power to matters arising in the context of a genuine “case” or “controversy.” [U.S. Const. Art. III, §2; *Rucho v. Common Cause*, 588 US 684, 695, 139 S.Ct. 2484, 2493-2494 (2019)]
- a. [2:20] **“Justiciability” doctrine:** Fundamentally, federal courts have power to entertain only those disputes of a *justiciable* character:
- “Embodied in the words ‘cases’ and ‘controversies’ are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context . . . [a]nd in part those words . . . assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation . . .” [*Flast v. Cohen*, 392 US 83, 94-95, 88 S.Ct. 1942, 1949-1950 (1968)]
- [2:21] *Reserved.*
- b. [2:22] **Several limitations involved:** “Justiciability” embraces certain well-settled (although not necessarily well-defined) limitations on federal court jurisdiction:
- A party must have *standing* to sue and to appeal (¶2:574 *ff.*);
  - The claim must be *ripe* for review (¶2:753 *ff.*);
  - The question must *not have been mooted* by subsequent developments (¶2:650 *ff.*).
5. [2:23] **Statutory Constraints on Jurisdiction:** In addition to the “justiciability” limitation (¶2:20), several statutory jurisdictional constraints restrict appellate review even in cases where jurisdiction would otherwise exist. For example:
- [2:24] An otherwise final order remanding a case on *jurisdictional* grounds to the state court from which it was removed is generally not reviewable by appeal or otherwise. [28 USC §1447(d); *see discussion at* ¶2:346.6 *ff.*]

[2:25 — 2:37]

- [2:25] Appellate courts have *no jurisdiction* to hear appeals from district court judgments abating jeopardy assessments made by the IRS. [See 26 USC §7429(f)—“Any determination made by a court under this section shall be final and conclusive and shall not be reviewed by any other court”; *Stites v. United States*, 978 F2d 1091, 1092, 1093 (9th Cir. 1992)]  
[2:26-27] *Reserved.*

➡ [2:28] **PRACTICE POINTER:** If a case concerns a *particular* federal statute, check for a specific appellate review provision within that statutory scheme. Also be aware that legislation affecting federal court jurisdiction is subject to congressional amendment. Consequently, counsel should be alert for legislative developments altering or otherwise specifying the nature and extent of appellate jurisdiction.

6. [2:29] **Choosing Proper Court:** Though a case is subject to federal appellate court jurisdiction, counsel must determine which *circuit* is empowered to entertain the matter.

Generally, a circuit court of appeals will have appellate jurisdiction over appeals from district courts within its geographic area (*see* ¶1:17). However, in certain cases (e.g., patent cases), appeals must be taken to the Federal Circuit (*see* ¶2:820 *ff.*). And some appeals must be taken directly to the U.S. Supreme Court (*see* ¶2:814 *ff.*).

*Cross-refer:* For a detailed discussion of the proper federal court, *see* ¶2:811 *ff.*

[2:30] *Reserved.*

7. [2:31] **Special Issues in Bankruptcy, Tax Court or Agency Appeals:** Special provisions govern appealability and review of judgments and orders rendered in bankruptcy, tax court and agency cases. *See Ch. 14.*

[2:32-35] *Reserved.*

## B. BASES FOR APPELLATE JURISDICTION

1. [2:36] **Final Judgments:** The circuit courts of appeals have jurisdiction over appeals from all *final decisions* of the district courts (except in those limited cases where direct review lies with the U.S. Supreme Court, ¶2:814 *ff.*). [See 28 USC §1291]

Generally, “a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.” [*Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 US 863, 868, 114 S.Ct. 1992, 1996 (1994)]

- a. [2:37] **Purpose of “final judgment rule”:** This “final judgment rule” serves several important purposes:
  - It emphasizes the deference given to district court de-

cisions on questions of law and fact which arise before judgment;

- It promotes efficient judicial administration; and
- It avoids the harassment and cost of a succession of separate appeals from various rulings made during the course of litigation. [*Microsoft Corp. v. Baker*, 582 US 23, 36-37, 137 S.Ct. 1702, 1712 (2017); *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F3d 720, 723 (9th Cir. 2017)—final judgment rule promotes judicial efficiency, avoids multiplicity of litigation, and minimizes delay by forbidding piecemeal disposition of what for practical purposes is a single controversy]

- b. [2:38] **“Final decisions”**: A “final decision” is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” [*Catlin v. United States*, 324 US 229, 233, 65 S.Ct. 631, 635 (1945); *Ray Haluch Gravel Co. v. Central Pension Fund of Int’l Union of Operating Engineers & Participating Employers*, 571 US 177, 183, 134 S.Ct. 773, 779 (2014); see also *Mohawk Industries, Inc. v. Carpenter*, 558 US 100, 106, 130 S.Ct. 599, 604-605 (2009)—final decision “is typically one by which a district court disassociates itself from a case” (internal quotes omitted)]

For jurisdictional purposes (¶2:16), the court of appeals is required to determine the “finality” of a decision on appeal. [*Andersen v. United States*, 298 F3d 804, 807, fn. 2 (9th Cir. 2002)]

- (1) [2:39] **Adjudication of all claims and parties required**: An order that adjudicates fewer than all claims of all parties is not final. [*M.M. v. Lafayette School Dist.*, 681 F3d 1082, 1089 (9th Cir. 2012); *Chacon v. Babcock*, 640 F2d 221, 222 (9th Cir. 1981)]

Appellate review of such orders may proceed only upon adjudication of the remaining claims in a final judgment or certification that there is no just reason to delay entry of judgment (FRCP 54(b), ¶2:112 ff.). [See *Special Investments, Inc. v. Aero Air Inc.*, 360 F3d 989, 993 (9th Cir. 2004)—order dismissing suit against fewer than all defendants not appealable, and not made appealable by later order remanding remaining claims to state court, since that order was not appealable either]

- (a) [2:40] **Partial summary judgment orders**: Orders granting *partial* summary judgment are *not final* appealable orders because they *do not dispose of all claims*. [*American States Ins. Co. v. Dastar Corp.*, 318 F3d 881, 884 (9th Cir. 2003); see ¶2:303 ff.]

The above rule applies even if the unadjudicated claims could have been brought in a completely

separate action. Once the parties choose to bring their claims in a single action, the “fiction” that the claims could have been brought separately cannot be relied upon to undermine the final judgment rule’s important purpose of avoiding piecemeal litigation. [*American States Ins. Co. v. Dastar Corp.*, supra, 318 F3d at 891—although plaintiff insurer’s declaratory relief claim regarding its duty to defend was independent of its duty to indemnify claim, allowing appeal of partial summary judgment on duty to defend claim “would defeat judicial efficiency” by requiring future appellate panel to become familiar with case in order to resolve duty to indemnify claim]

- (b) [2:41] **Consolidated and coordinated actions:** When two or more actions are consolidated in the district court, they are not treated as a single, indivisible case. The dismissal of any one such action is final and appealable. [See *Hall v. Hall*, 584 US 59, 67-72, 77, 138 S.Ct. 1118, 1125-1128, 1131 (2018) (consolidation of trust case and individual claims related to trust); *Gelboim v. Bank of America Corp.*, 574 US 405, 413, 135 S.Ct. 897, 904-905 (2015) (MDL consolidation for “pretrial proceedings”)]
- (c) [2:41.1] **Unresolved issues related to merits:** All issues *encompassed within the merits* of the action (including, e.g., a claim for prejudgment interest) must be resolved before there is a final appealable judgment. [See *Osterneck v. Ernst & Whinney*, 489 US 169, 175-176, 109 S.Ct. 987, 991-992 (1989); but see also *SEC v. Carrillo*, 325 F3d 1268, 1272-1273 (11th Cir. 2003)—although district court’s failure to calculate prejudgment interest amount does not affect judgment’s finality when calculation is a “ministerial act,” no finality where judgment amount, interest rate and accrual date are undetermined]

However, requests for attorney fees and costs are deemed *collateral* to the merits of the action and thus need *not* be resolved for the judgment in the action to be final. [*Osterneck v. Ernst & Whinney*, supra, 489 US at 175-176, 109 S.Ct. at 991; see ¶2:41.3; and more detailed discussion at ¶2:547 ff.]

[2:41.2] *Reserved.*

- (d) [2:41.3] **Compare—attorney fees and other collateral matters:** Issues collateral to the merits of the case need not be resolved before an appeal can be taken. For example, a “final judgment” can be entered even though a request for attorney fees remains unresolved (¶2:547 ff.). Similarly, the

unresolved claim by a qui tam relator does not prevent entry of a final, appealable judgment with respect to the remainder of the case. [*United States ex rel. Shutt v. Community Home & Health Care Services, Inc.*, 550 F3d 764, 766 (9th Cir. 2008); see ¶2:521]

- (2) [2:42] **Decision resolving entire proceeding before court:** A district court order is “final” for appeal purposes if it resolves the *entire proceeding before that court*. Thus, even a seemingly nonappealable order may be an *appealable final* judgment if it is a final judgment in *legal effect* (¶2:56).

(a) **Application**

- [2:43] Under the Longshore & Harbor Workers’ Compensation Act (LHWCA), the district court’s jurisdiction extends only to *enforcement* of compensation orders. Consequently, if the district court dismisses a party’s application for enforcement of an attorney fees order (the *only* claim before it), the dismissal judgment is “final.” [*Thompson v. Potashnick Const. Co.*, 812 F2d 574, 576 (9th Cir. 1987)—“We have appellate jurisdiction because the district court has dismissed the entire action before it”]
  - [2:44] While orders to produce documents are ordinarily interlocutory and nonappealable (¶2:404 *ff.*), a district court order compelling the government to release documents to a party, or an order denying a party’s right to such release, pursuant to the Freedom of Information Act (FOIA) is a “final decision,” immediately appealable under 28 USC §1291. [*American Civil Liberties Union of Northern Calif. v. United States Dept. of Justice*, 880 F3d 473, 480, fn. 3 (9th Cir. 2018)—orders in FOIA action are *end result* of action; cf. *Church of Scientology Int’l v. IRS*, 995 F2d 916, 921 (9th Cir. 1993)—no final order to appeal where court did not order IRS to produce document]
- [2:45-46] *Reserved.*
- [2:47] A foreclosure judgment establishing the debtor’s liability for the secured obligation and identifying the property to be sold in satisfaction of the debt is a final appealable decision even though the amount of the debtor’s personal liability for any postsale deficiency remains open. The foreclosure judgment conclusively determines the rights of the parties to the litigation. [*Citicorp Real Estate, Inc. v. Smith*, 155 F3d 1097, 1101 (9th Cir. 1998)]

[2:47.1 — 2:49.2]

- [2:47.1] An order that nominally adjudicated the claims as to fewer than all served parties was final where its reasoning was “fatal” to the claims against all parties and the district court dismissed with prejudice. [*Shields v. Credit One Bank, N.A.*, 32 F4th 1218, 1221, fn. 1 (9th Cir. 2022)]

[2:47.2-47.4] *Reserved.*

- [2:47.5] *Compare*: A district court’s grant or denial of interim attorney fees pending litigation on the merits is generally a *nonappealable* order (see ¶2:464 ff.).
- [2:47.6] In a foreclosure case, an order of sale that does not specify how the sale will be conducted or the proceeds will be divided is not final and appealable. [*United States v. Allahyari*, 99 F4th 486, 493 (9th Cir. 2024) (also discussed at ¶2:65)]

- (3) [2:48] **Effect of unserved defendants:** A judgment’s finality for appeal purposes is not defeated by the district court’s failure to dispose of claims against *unserved defendants*. [*Patchick v. Kensington Publishing Corp.*, 743 F2d 675, 677 (9th Cir. 1984); see also *Flores v. County of Los Angeles*, 758 F3d 1154, 1158, fn. 9 (9th Cir. 2014) (applying *Patchick* to unserved Doe defendants); and ¶2:117, 2:272]

[2:48.1-48.4] *Reserved.*

- (4) [2:49] **Effect of unresolved claims:** In most cases, where a district court has failed to adjudicate all claims as to all served parties, its “judgment” is not final and there can be no appellate jurisdiction (¶2:39). However, there are exceptions:

- (a) [2:49.1] **Claims over which district court lacked jurisdiction:** An unresolved claim as to which the district court lacked subject matter jurisdiction may be ignored in assessing whether the district court’s decision finally resolved all claims that were properly before it. [*Bianchi v. Walker*, 163 F3d 564, 569 (9th Cir. 1998)—sole unresolved claim was complaint for writ of mandamus against government over which Court of Federal Claims had exclusive jurisdiction]

- (b) [2:49.2] **Subsidiary claims:** Where disposition of some claims in an action necessarily disposes of others, the court’s failure to explicitly adjudicate the secondary claims does *not* defeat finality of the ruling disposing of the primary claims. [See *Mc-*