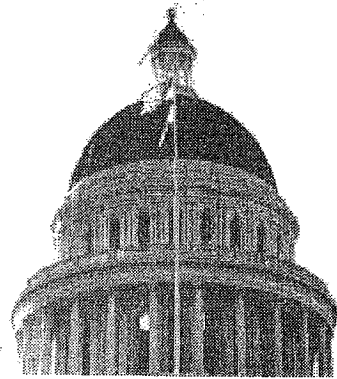


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**APPELLATE  
INSIGHT**

*Peg Carew Toledo*



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## *Notices of Appeal Redux*

*A few months ago this column discussed the timely filing of notices of appeal and the events that trigger the clock beginning to run on the deadline to file a notice of appeal. Here we will discuss a recent case on that issue and some practical advice to avoid litigating the issue of whether the notice of appeal is timely.*

**Bi-Coastal Payroll Services, Inc. v.  
California Insurance Guarantee  
Association**

*In Bi-Coastal Payroll Services, Inc. v. California Insurance Guarantee Association, 174 Cal. App. 4th 579 (2009), the Second Appellate District had the opportunity to interpret*

*California Rule of Court 8.104, which establishes the deadline for filing a notice of appeal*

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# Toledo

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from a judgment or appealable order.

The procedural facts of the case can be summarized as follows. Defendant and respondent California Insurance Guarantee Association ("CIGA") filed a demurrer and motion to strike to plaintiffs' and appellants' second amended complaint. The trial court sustained the demurrer without leave to amend, leaving only a declaratory relief cause of action.

To facilitate an appeal from the trial court's ruling on the demurrer, plaintiffs agreed to dismiss the remaining declaratory relief cause of action. The parties then stipulated to entry of judgment in favor of CIGA. The parties' stipulation was filed on December 12, 2007. On that same day, the court clerk mailed copies of a minute order to the parties. The minute order contained the caption of the case and below the caption, the minute order provided: "NATURE OF PROCEEDINGS: COURT ORDER RE: STIPULATED JUDGMENT. The court is in receipt of the stipulated judgment submitted by the parties on 12/12/07. The court accepts the stipulated judgment. Judgment is entered in favor of defendant CIGA against plaintiffs according to the terms as set forth therein and the court adopts those terms as the court's judgment by reference. The trial date of 1/07/08 is advanced to this date and vacated. Counsel for plaintiffs to give notice."

Directly below the substantive text of the minute order, it read: "CLERK'S CERTIFICATION OF MAILING/NOTICE OF ENTRY OF ORDER. I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am

not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12/12/07 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein."

Two weeks later, on December 26, 2007, plaintiffs served by mail a "Notice of Entry of Order of Stipulated Judgment in Favor of Defendant" that was filed in the trial court on December 27, 2007. A copy of the December 12, 2007 minute order was attached to the plaintiffs' notice of entry of order.

On February 20, 2008, plaintiffs filed their notice of appeal. The notice of appeal was filed more than 60 days after the December 12, 2007 minute order. On June 30, 2008, the appellate court issued an "Order to Show Cause Re: Dismissal."

The appellate court began its analysis by reviewing California Rule of Court 8.104(a), which provides as follows: "(a) Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or (3) 180 days after entry of judgment."

The plaintiffs contended that their appeal was timely based on the California Supreme Court's recent decision in *Alan v. American Honda Motor Co.*, 40 Cal. 4th 894 (2007), which requires strict compliance with the requirements of Rule 8.104(a)(1). The plaintiffs argued that the December 12th minute order failed to strictly comply with the requirements of the rule because

the document was not entitled "Notice of Entry of Judgment" and it was not a file-stamped copy of the stipulated judgment.

CIGA contended that the December 12th minute order was the judgment itself and, therefore, the "Notice of Entry of Order" language on the minute order complies with Rule 8.104(a)(1).

The appellate court relied on the Alan decision to hold that the December 12th minute order did not commence the 60-day period for filing a notice of appeal because the order did not comply with Rule 8.104(a)(1). The minute order was not entitled "Notice of Entry" of judgment or order. In addition, "even assuming the minute order is the judgment itself, as CIGA contends, it is not file stamped as required under Rule 8.104(a)(1)." The court concluded that "neither of the two alternative means of giving notice that are required under Rule 8.104(a)(1) when a clerk gives notice of entry of judgment has been satisfied in this case."

The appellate court noted that the "Notice of Entry of Order" language created an ambiguity because the minute order's title was "Court Order Re: Stipulated Judgment" and expressly provided "counsel for plaintiffs to give notice." The court recognized that this ambiguity placed plaintiffs' counsel in the position of guessing whether the minute order triggered the 60-day time period within which to file the notice of appeal. The court concluded: "Because Rule 8.104(a)(1) was intended to obviate the need for such guesswork when calculating jurisdictional time limits, we conclude that the December 12, 2007, minute order did not commence the 60-day time period for filing the notice of appeal in this case."

## How to Avoid Litigating the Issue of Dismissal of an Appeal

We can all imagine the sinking feeling in the pit of the stomach that plaintiffs' counsel must have felt upon receiving the Order to Show Cause Re Dismissal from the appellate court. No attorney wants that experience. Moreover, no attorney wants to waste his or her client's money litigating the issue of whether the notice of appeal was timely.

The Bi-Coastal Payroll Services case has important lessons for appellate practitioners. First, if it is ambiguous whether a document commences the time to file an appeal from an appealable order or judgment, always err on the side of caution and construe the document as a triggering document. Second, in most cases there is no reason to delay in filing a notice of appeal. Don't procrastinate. Don't wait until the 60th day. It is a simple process. Indeed, there is a Judicial Council form that can be filled out in less than an hour's time. Third, regardless of whether you represent the appellant or respondent, it almost always makes sense to promptly file and serve a "Notice of Entry" of the judgment or appealable order to attempt to create certainty as to when the time to appeal expires.

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