51 La. B.J. 338

Louisiana Bar Journal
February/March, 2004

Feature

***338**
A WRIT IN TIME

Raymond P. Ward [FNa1]

Generally, an interlocutory judgment cannot be appealed immediately; any appeal must await entry of a final judgment. But Louisiana's appellate courts have supervisory jurisdiction over trial courts, and sometimes exercise that jurisdiction to review an interlocutory judgment immediately by granting a supervisory writ.

When you are disappointed by a trial court's interlocutory ruling, how long do you have to apply to the court of appeal for a supervisory writ? This seemingly simple question has perplexed many would-be writ applicants. When they miscalculate the answer to this question, the unfortunate result is that the court of appeal deems the writ application untimely and dismisses it.

*339

The purpose of this article is to help you determine your deadline to apply for a supervisory writ. To answer the question correctly, you must understand not only the procedural rules governing writ applications, but also the differences between interlocutory judgments and final judgments.

The 30-Day Rule

The procedure for invoking the court of appeal's supervisory jurisdiction is contained in Rules 4-2 and 4-3 of the Uniform Rules of Louisiana Courts of Appeal. The procedure seems simple. If you are aggrieved by the trial court's interlocutory ruling, you must notify the trial court and opposing counsel that you intend to apply for a supervisory writ, and ask the trial court to set a "return date:" a deadline by which you must file your writ application in the court of appeal. This is usually done by written notice and motion, but can also be done orally in open court. The trial court must immediately set the return date, and you must file your writ application in the court of appeal no later than that return date.

If you file your writ application on or before the return date set by the trial judge, have you filed

timely? Maybe not. In 1995, Rule 4-3 was amended to provide that the return date set by the trial judge must not exceed 30 days from the date of the ruling at issue. This means that, if you wait more than 30 days before notifying the trial court that you intend to apply for a supervisory writ, the court of appeal will not consider your writ application, even if filed by the return date set by the trial judge. [FN1]

Many trial judges seem to be unaware of this 30-day rule; they often set return dates that are more than 30 days after the ruling at issue. When the trial judge does this, can you rely on the return date? The answer depends on when you notified the trial court of your intent to apply for a supervisory writ.

If you file your notice of intent and request for return date within 30 days after the ruling at issue, then your writ application will be deemed timely if filed by the return date, even if the return date is more than 30 days after the ruling at issue. This gloss on Rule 4-3 was established by the Louisiana Supreme Court in Barnard v. Barnard, [FN2] a 1996 decision. In Barnard, the relator or applicant filed a request for return date just 12 days after the ruling at issue. Nine days later, the trial court set a return date that was 50 days after the ruling. The Barnard court reasoned that it was the trial judge, not the relator, who violated Rule 4-3, and that the relator should not be punished for the trial judge's violation. The Barnard court also relied on the trial judge's authority under Rule 4-3 to grant a motion to extend the return date, if the motion for extension is filed before the original return date.

But Barnard applies only if you file the notice of intent and original request to set a return date within 30 days after the ruling at issue. If you wait more than 30 days before filing those papers, the court of appeal will dismiss your writ application, even if you file the writ application before the return date set by the trial judge. [FN3] This is because Rule 4-3 allows an extension of the return date only if the motion for extension is filed before the original or previously extended return date. Once that deadline passes, the trial judge has no authority to set an extended return date.

What do you do if the trial judge refuses to set a return date? The Louisiana Supreme Court answered this question in Rambo v. Willis-Knighton Bossier Health Center, [FN4] a 2000 decision. In Rambo, the trial court permitted the relator to apply for a supervisory writ but failed to fix the return date. The relator filed the writ application within 30 days after the ruling at issue.

Because the trial court could have fixed a return date up to 30 days from the date of the ruling at issue ..., relator's filing the writ in the Court of Appeal within that limitation was timely. [FN5]

Shortly after Rambo was decided, Rule 4-3 was amended to add a requirement that the trial judge, in all cases, must set an explicit return date; "an appellate court will not infer a return date from the record." It is unknown what effect this amendment has on the Rambo holding. If you find yourself in a Rambo-like situation, perhaps the safest course is to file your writ application within 30 days after the ruling at issue, accompanied by an alternative application for writ of mandamus ordering the trial court to set a reasonable return date under Rule 4-3.

Exception to the 30-Day Rule

Suppose a trial court issues a preliminary injunction adverse to your client. Twenty-five days later, you notify the trial court that you intend to apply for a supervisory writ, and the trial court dutifully sets a return date 30 days after the order granting the preliminary injunction. You file your writ application before the return date passes. Is your writ application timely?

No, it's not timely, according to City of New Orleans v. Benson, [FN6] a 1995 decision by the Louisiana 4th Circuit. The reason: under La. C.C.P. art. 3612, an order granting a preliminary injunction can be appealed, but the appeal must be taken within 15 days after the order.

While a ruling on a preliminary injunction might be considered under supervisory jurisdiction to expedite its consideration, it should not be done where the applicant was dilatory in filing the application after the appeal time had run. [FN7]

The lesson from City of New Orleans v. Benson: if a statute gives you less than 30 days to appeal an order or judgment, then the 30-day period in Rule 4-3 does not apply. If you elect to apply for a supervisory writ in lieu of appealing, you must file your writ application within the delay for an appeal. If you let the appeal deadline pass without appealing or filing a writ application, you forfeit your right to any appellate review of the order or judgment.

*340
When Does the 30-Day Period Begin to Run?

Knowing that you must act within 30 days doesn't do you much good if you don't know when the 30-day clock starts ticking. Many lawyers assume that the 30 days always starts when the trial court signs a written ruling. This assumption can be fatal.

To understand when the 30-day period starts, you must understand the difference between a final judgment and an interlocutory ruling.

A final judgment must be in writing, must be signed by the judge, must be identified as such by appropriate language, and must be set out in a document separate from the reasons for judgment. [FN8] No appeal from a final judgment can be taken until the judgment is signed. [FN9]

These requirements do not apply to an interlocutory ruling -- the kind of ruling subject to a supervisory writ. An interlocutory ruling can be rendered in open court, in the parties' presence, and is generally reflected in a minute entry. Although in practice the ruling is often later reduced to writing, a written and signed ruling is not necessary.

Under a November 2003 amendment to Rule 4-3, the trial court in a civil case cannot set an original return date for a writ application more than 30 days after "the date of notice, as provided in La. C.C.P. art. 1914." [FN10] And under Article 1914 as amended in 2003, if the trial court rules from the bench, generally the date of notice is the date the trial court makes the oral ruling. [FN11]

Article 1914(B) defines three exceptions to this general rule. The date of notice is the date the clerk mails notice of judgment if:

. the trial court orders the judgment to be reduced to writing;

. a party, within 10 days of rendition in open court, requests that the judgment be reduced to writing; or

. the trial court takes the interlocutory matter under advisement before ruling. [FN12] If none of these three exceptions applies, then the general rule applies, and the 30-day clock starts ticking when the trial court rules orally in open court.

Many lawyers, failing to understand the distinction between a final judgment and an interlocutory ruling, fail to realize that the 30-day period under Rule 4-3 normally begins when the trial court rules. Lawyers who make this mistake frequently see their writ applications dismissed as untimely. [FN13]

On rare occasions, the Supreme Court has rescued a writ applicant from the consequences of this mistake. For example, in Nungesser v. Nungesser, the court inferred that the trial court and parties "contemplated" a written judgment "[i]n light of the complexity" of the discovery-ruling at issue. [FN14] And in Cheron v. LSC Corrections Services, Inc., the court found that "[b]ased on the transcript, it appears the trial court and the parties contemplated that a written judgment would be signed [emphasis added]," making the signing date the date of the "ruling at issue" for purposes of Rule 4- 3. [FN15]

At least one court of appeal, on one occasion, has followed suit. In that case, In re 601 Canal Street Trust, [FN16] the trial court rendered judgment orally at a Jan. 24 hearing and signed a written judgment on Feb. 24. The relator filed the writ application on March 10 -- more than 30 days after the hearing but less than 30 days after the judgment was signed. The 4th Circuit found that:

because a written judgment was signed on February 24, it can be presumed that the court ordered one prepared. Therefore, the 30-day maximum return date period ran from February 24, the date the judgment was signed [emphasis added]. [FN17]

Notwithstanding these decisions, you should not rely on "contemplation" of a written judgment to delay the start of the 30-day period under Rule 4-3. Under the plain language of Rule 4-3 and Article 1914(B), the start of the 30-day period is delayed only in the three specific instances tabulated above. Unless your case *341 falls squarely under one of those exceptions, you should assume that the general rule applies, under which the 30-day period begins as soon as the trial court decides the matter.

New Trial?

An interlocutory judgment differs from a final judgment in another important way: the

availability of a motion for new trial.

When a trial court signs a final judgment, the party aggrieved has seven days (excluding holidays) to apply for a new trial. A timely motion for new trial tolls the delay for taking an appeal until the motion is decided. [FN18]

The new-trial procedure does not apply to interlocutory rulings. Louisiana's appellate courts uniformly hold that the Code of Civil Procedure permits a motion for new trial only after final judgment, not after an interlocutory ruling. A purported motion for new trial filed before entry of final judgment is premature and has no legal effect. Thus, a purported motion for new trial seeking reconsideration of an interlocutory ruling does not delay the 30-day period for seeking a supervisory writ under Rule 4-3. [FN19]

Many lawyers aggrieved by an interlocutory ruling seek reconsideration in the trial court by filing a motion for new trial. As one appellate judge has observed, this practice is so common in New Orleans that it may rise to the level of a "custom" establishing law under Civil Code Articles 1 and 3. [FN20] Worse, these lawyers often err again by thinking that their motion for new trial delays the start of the 30-day period to apply for a supervisory writ under Rule 4-3.

Lawyers who make these mistakes usually miss the writ-application deadline. By the time the motion for new trial is filed, heard and decided, and the notice of intent is filed, usually more than 30 days will have elapsed since the original ruling. And a notice of intent filed more than 30 days after the original ruling will be untimely, notwithstanding the intervening motion for new trial.

Don't make the same mistakes. If your client is aggrieved by an interlocutory ruling and you want the court of appeal to review the matter, do not file a motion for new trial. Instead, proceed directly with filing your notice of intent and writ application.

Conclusion

Remember that an interlocutory judgment is not a final judgment; hence, a writ application is not an appeal. The time to act is shorter; the clock starts ticking sooner, and you can't stop the clock with a motion for new trial. If you remember these things, and if you consult Rule 4-3 as soon as you get an adverse interlocutory ruling, then you will probably avoid the kinds of mistakes that lead to an untimely writ application.

[FNa1]. Raymond P. Ward is special counsel with Adams and Reese, L.L.P., in New Orleans, practicing with the firm's Appellate Practice Team. He is a member of the Defense Research Institute's Appellate Advocacy Committee, which he serves as chair of publications. He has written several articles for DRI publications on appellate practice and legal writing. He is one of four co-editors of an appellate-practice manual being published by DRI, for which he wrote one chapter (on writing style) and co-wrote another (on standards of review). He received a BA degree from the University of Steubenville, now known as the Franciscan University of Steubenville. He graduated from Loyola University Law School in 1990, where he was a member of the Loyola Law Review and served as a moot court teaching assistant. In his spare

time, he maintains a legal-writing Web site: http://home.earthlink.net/~thelegalwriter. (One Shell Square, Ste. 4500, 701 Poydras St., New Orleans, LA 70139)

[FN1]. See, e.g., Ross v. City of New Orleans, 96-1853 (La. App. 4 Cir. 9/13/96), 694 So. 2d 973.

[FN2]. 96-0859 (La. 6/24/96), 675 So. 2d 734.

[FN3]. See, e.g., Lafferty v. Allstate Ins. Co., 36, 119 p. 2 (La. App. 2 Cir. 2/28/02), 806 So. 2d 1000, 1002, writ denied, 02-0718 (La. 3/22/02), 811 So. 2d 938; Ross v. City of New Orleans, 96-1853 (La. App. 4 Cir. 9/13/96), 694 So. 2d 973; Lawyer v. Succession of Kountz, 97-2320 (La. App. 4 Cir. 12/10/97), 703 So. 2d 233; Levert v. St. Bernard Parish School Bd., 00- 2216 (La. App. 4 Cir. 10/20/00), 772 So. 2d 236.

[FN4]. 00-2157 (La. 7/28/00), 766 So. 2d 1262.

[FN5]. Id., 766 So. 2d at 1262-63.

[FN6]. 95-2436 (La. App. 4 Cir. 12/14/95), 665 So. 2d 1202.

[FN7]. Id. p. 6, 665 So. 2d at 1205.

[FN8]. La. C.C.P. arts. 1911 and 1918.

[FN9]. Id. art. 1911.

[FN10]. You can find the amended version of Rule 4-3 on the Louisiana Supreme Court's web site. Go to www.lasc.org, move your pointer to "Court Rules," click on "Appellate Courts," and click on "Uniform Rules of Courts of Appeal." Once there, click on "Rule 4. Writs," or just scroll down to Rule 4-3.

[FN11]. La. C.C.P. art. 1914(A), as amended by Acts 2003, No. 545, § 1.

[FN12]. La. C.C.P. art. 1914(B), as amended by Act No. 545.

[FN13]. See, e.g., Spangler v. Chiasson, 95-2113 (La. App. 1 Cir. 4/22/96), 681 So. 2d 956, 957; Clement v. American Motorists Ins. Co., 98- 0504 (La. App. 3 Cir. 2/3/99), 735 So. 2d 670, 671-72, writ denied, 99-0603 (La. 4/23/99), 742 So. 2d 886; Lawyer v. Succession of Kountz, 97-2320 (La. App. 4 Cir. 12/10/97). 703 So. 2d 233, 234-35.

[FN14]. Nungesser v. Nungesser, 02-1027 (La. 6/7/02), 818 So. 2d 778.

[FN15]. Cheron v. LSC Corr. Servs., 02-2146 (La. 11/8/02), 828 So. 2d 1117. See also Schenck v. Owens-Illinois, 02-0922 (La. 5/31/02), 816 So. 2d 862 (date judgment signed started the 30-day period under Rule 4-3 "[b]ecause a written judgment was contemplated by the trial court and the parties ....").

[FN16]. 03-0481 (La. App. 4 Cir. 4/3/03). 847 So. 2d 650.

[FN17]. Id. p. 2 n. 1, 847 So. 2d at 651 n. 1.

[FN18]. See La. C.C.P. art. 2087A(2) (devolutive appeal); id. art. 2123A(2) (suspensive appeal).

[FN19]. Carter v. Rhea, 01-0234 (La. App. 4 Cir. 4/25/01), 785 So. 2d 1022, 1023; Clement, 735 So. 2d at 672. But see Lowenburg v. Entergy New Orleans, Inc., 99-1270 p. 1 n. 1 (La. App. 4 Cir. 5/17/00), 763 So. 2d 751, 751 n. 1, writ denied, 00-1577 (La. 8/31/00), 766 So. 2d 1279 (Louisiana Supreme Court ordered consideration of writ application following motion for new trial due to the "unique facts of this case ....").

[FN20]. Carter, 785 So. 2d at 1025 (Tobias, J., concurring).