

emerge LA

AFAs are driving change in the legal profession.
Are you ready?
A summit series centered on alternative fees in law firms today.

An ALM Web site

30 Day FREE
Web Trial

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES



This Site | Law.com Network | Legal Web

[Contact](#) [RSS](#) [Twitter](#) [Facebook](#)
[Home](#) [News](#) [Firms & Lawyers](#) [Courts](#) [Judges](#) [Surveys/Lists](#) [Columns](#) [Verdicts](#) [Public Notices](#) [Advertise](#) [Subscribe](#)
[View Today's Articles](#) [Download Today's Paper \(PDF\)](#)

Home > For Whom the Post-Judgment Motion Tolls:

Appellate Law

Font Size: [+](#) [-](#)

For Whom the Post-Judgment Motion Tolls:

Avoiding a Trap in Federal Court

Howard J. Bashman | [Contact](#) | [All Articles](#)

The Legal Intelligencer | June 14, 2011

[Print](#) [Share](#) [Email](#) [Reprints & Permissions](#) [Post a Comment](#)


Howard Bashman

In a civil case pending in federal court, a party's timely filing of any specified post-judgment motion will serve to postpone the deadline applicable to all parties for filing a timely notice of appeal until at least 30 days from the date on which the federal district court disposes of the post-judgment motion.

Assume, hypothetically, that a federal district court has entered a final judgment in a civil case on August 1. Assume further that the deadline for filing a timely appeal would therefore be August 31. If any of the parties to that suit filed a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), the deadline for filing a timely notice of appeal would then be postponed until 30 days after the district court entered an order disposing of that motion.

RELATED ITEMS

- Defining and Identifying Greatness in Appellate Advocacy
- You Call *That* a Trial? A Costly Superior Court Waiver Ruling

Regrettably, on at least rare occasion, a federal district court will fail to rule on a timely filed post-judgment motion within a reasonable period. When faced with an unexpected delay in the disposition of a timely filed post-judgment motion, the losing party may question whether continuing to await a ruling from the district court is worthwhile, given that the delay serves to postpone any progress toward seeking possible victory on appeal. At some point, the party that filed the timely

post-judgment motion may even consider the possibility of withdrawing the motion so that appellate review of the district court's adverse ruling may commence without further delay.

In a ruling issued last year in a case titled *Vanderwerf v. SmithKline Beecham Corp.*, the 10th U.S. Circuit Court of Appeals considered an appeal in which the plaintiffs eventually decided that the district court was taking too long to decide their timely filed post-judgment motion. Frustrated with that delay, the plaintiffs eventually decided to withdraw their post-judgment motion and then promptly thereafter filed an appeal to the 10th Circuit.

The district court had resolved the case against the plaintiffs by means of a summary judgment ruling issued on Jan. 9, 2008. The plaintiffs filed their timely post-judgment motion on Jan. 17. On Aug. 8, the plaintiffs withdrew their post-judgment motion and simultaneously filed a notice of appeal.

The question presented in *Vanderwerf* was whether the timely post-judgment motion that the plaintiffs filed served to toll the time to appeal from the district court's summary judgment ruling until that motion was withdrawn on Aug. 8, 2008.

By a vote of 2-1, the 10th Circuit answered "no," and instead ruled that the plaintiffs' appeal filed Aug. 8, 2008 was untimely because the notice of appeal was not filed within 30 days of the entry of the district court's final judgment on Jan. 9, 2008. The majority reasoned that in order for a timely filed post-judgment motion to toll the time for

Advertisement

Right Steps,
Wrong Outcome –
What *Harkabi* Teaches
webinar is on-demand
sponsored by IBM
Click Here to Register

Find similar content

- Companies, agencies mentioned ▶
- Key categories ▶
- Most viewed stories ▼
- Superior Court Upholds \$187.6 Mil. Class Action Against Wal-Mart
 - Judge Nixes Kindergartner's Expulsion for Touching Teacher
FREE WITH REGISTRATION
 - 3rd Circuit: Students' Off Campus Use of MySpace Not Punishable
FREE WITH REGISTRATION
 - Judge Rules Against Injunction for School District Ex-Attorney
FREE WITH REGISTRATION
 - Attorney General's Race Could Be Close in 2012, Politicos Say
FREE WITH REGISTRATION

Advertisement

appeal, the motion must result in a district court's order disposing of the motion. In the absence of a district court's order disposing of the motion, the majority reasoned, the timely filed post-judgment motion did not toll the time for appeal. As a result, the 10th Circuit dismissed the appeal without considering the merits.

Circuit Judge Carlos F. Lucero dissented. In his view, the mere act of a party's timely filing of a specified post-judgment motion served to toll the time for appeal indefinitely until the district court disposed of the motion. Although an order disposing of such a motion served to trigger the 30-day period in which a notice of appeal must be filed, the absence of such an order should not be treated as retroactively depriving a timely filed post-judgment motion of the ability to toll the time for filing an appeal.

In the *Vanderwerf* case, it was the plaintiffs who originally filed and then later withdrew a post-judgment motion, and it was the plaintiffs whose appeal was thereafter ultimately rejected as untimely. Thus, the result in *Vanderwerf* could be justified as an appropriate penalty for parties who arguably were seeking to take improper advantage of procedures to delay the time in which they could appeal. However, the tolling of the deadline in which to appeal under the federal procedural rules in civil litigation does not only apply to the party that filed a timely post-judgment motion. Rather, the tolling of the deadline in which to appeal applies to all parties.

What if in the *Vanderwerf* case the opposing parties had each wished to appeal? Assume, for example, that the plaintiffs had brought two distinct claims against SmithKline, one alleging physical injury from having ingested a medication and another alleging defamation for statements that the drug maker had made about the plaintiffs to the media. Assume further that the district court had dismissed the defamation claim on summary judgment but had allowed the physical injury claim to reach the jury, which then ruled in favor of the plaintiffs.

Under this hypothetical, assume further that it was SmithKline that had filed a timely post-judgment motion, thereby tolling the time for all parties to file a timely notice of appeal. If, some six months later, the drug maker were to withdraw its post-judgment motion, what effect would that withdrawal have on SmithKline's and the plaintiffs' ability to appeal from the district court's final judgment and dismissal of the plaintiff's defamation claim?

Under the 10th Circuit's ruling in *Vanderwerf*, SmithKline would not be able to appeal because its post-judgment motion would not have tolled the time for appeal. Whether the plaintiffs could appeal after the post-judgment motion was withdrawn in this hypothetical scenario is not absolutely clear, but under the 10th Circuit's rationale in *Vanderwerf*, the most likely outcome is that the plaintiffs' appeal would likewise be time-barred because the post-judgment motion lacked any tolling effect once it had been withdrawn.

Fortunately, there is a way to avoid the trap for the unwary that the 10th Circuit's ruling in *Vanderwerf* has revealed. Although a timely filed post-judgment motion in a federal civil case can toll the time in which an appeal may be filed, parties that are aggrieved by a district court's final judgment or earlier rulings have the ability to file a notice of appeal within the original 30-day period after the entry of a final judgment. The federal appellate court will hold those appeals in suspense pending a district court's ruling on a timely filed post-judgment motion. But after the district court rules, or the timely filed post-judgment motion is withdrawn, any previously filed notices of appeal will spring back into effect, so long as the orders appealed from have not been erased by the district court's ruling on the post-judgment motion.

Thus, the ultimate impact of the 10th Circuit's ruling in the *Vanderwerf* case would appear to be that parties that have reason to appeal will want to file their notices of appeal within 30 days of the district court's entry of final judgment, because the ultimate tolling effect of any timely filed post-judgment motions may not be known until far into the future, at a time when it will be far too late to appeal from the final judgment if the post-judgment motion, in retrospect, had no tolling effect whatsoever. •

Howard J. Bashman operates his own appellate litigation boutique in Willow Grove, Pa. and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate Web log at <http://howappealing.law.com/>.

[Subscribe to The Legal Intelligencer](#)

Print Share Email Reprints & Permissions Post a Comment

CORPORATE COUNSEL

Enter for a chance to win a FREE
Netbook from CorpCounsel.com

[Click here](#)

NO PURCHASE NECESSARY. VOID WHERE PROHIBITED.
Ends 7/15/11

lawjobs.com

TOP JOBS

Commercial Litigation Attorney
Smith Giacometti
Malvern, Pennsylvania

Chester County, PA - Environmental Law
Associate
Fox Rothschild LLP
Exton, Pennsylvania

[MORE JOBS](#)
[POST A JOB](#)

Advertisement

**Alleviate Discovery Pain:
Revive Your Enterprise Information
Management Approach**

Wednesday, June 22, 2011
1 PM EDT / 10 AM PDT [Register Today](#)

From the Law.com Network

New Jersey Law Journal

ALM LEGAL INTELLIGENCE

New York Law Journal

The Legal Intelligencer

Connecticut
LawTrib