# Reviewability of Interlocutory Orders on Appeal From a Final Judgment: Navigating the Shoals

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*Not every order that can be appealed on an interlocutory basis "necessarily affects the final judgment." In practice, it can be difficult to tell what does and what does not—and the Court of Appeals has admitted that its jurisprudence on this issue "may not all be consistent."*

Interlocutory appeals—that is, appeals from nonfinal orders—are a ubiquitous feature of practice in New York state courts. But what if a party chooses not to file an interlocutory appeal? Under CPLR 5501(a)(1), an appeal from a final judgment brings up for review "any nonfinal judgment or order which necessarily affects the final judgment." That means that, at least in some cases, a party who is unhappy with an interlocutory order has a choice: appeal right away, or wait for a final judgment, and (if the judgment is adverse) appeal that judgment and seek review of the interlocutory order in connection with that appeal.

There is a catch, though: not every order that can be appealed on an interlocutory basis "necessarily affects the final judgment." In practice, it can be difficult to tell what does and what does not—and the Court of Appeals has admitted that its jurisprudence on this issue "may not all be consistent." See *Oakes v. Patel*, 20 N.Y.3d 633, 644 (2013). This has led the Advisory Committee on Civil Practice to recommend that the statute be amended to remove the phrase "which necessarily affects the final judgment," making any nonfinal judgment or order reviewable on appeal from the final judgment. (See Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, January 2024, at 156-57). But unless that happens, counsel seeking to determine whether an order will be reviewable on a later appeal from a final judgment must ask themselves two questions: whether the order will necessarily affect that judgment; and if so, whether the right to appellate review will be preserved. Those questions are not always easy to answer. This article explores why.

## Will the Order Necessarily Affect a Final Judgment?

There are undoubtedly some orders whose impact on any final judgment is sufficiently obvious that counsel can defer an appeal with confidence. For many others, however, reviewability is much harder to predict.

Three Court of Appeals holdings offer some basic guidance. An order granting a motion to dismiss a claim is generally reviewable on an appeal from a final judgment because such an order "necessarily remove[s]" issues from the case. See *Siegmund Strauss v. East 149th Realty*, 20 N.Y.3d 37, 42-43 (2012). By the same token, because an order denying summary

judgment based on the existence of factual questions does not remove any issues from the case, such an order is not reviewable on an appeal from a final judgment. See *Bonczar v. American Multi-Cinema*, 38 N.Y.3d 1023, 1026 (2022). An order granting or denying a motion for leave to amend a pleading may be reviewable on an appeal from the final judgment, but only if the amendment would add (or would have added) a new cause of action or defense that would not necessarily have been disposed of by the court's ruling with respect to the existing ones. *Oakes*, 20 N.Y.3d at 644.

These cases suggest that an order "necessarily affects the final judgment" if its reversal would inject one or more issues into the case that the final judgment did not address. *See Zaepfel v. Town of Tonawanda*, 227 A.D.3d 1387, 1389 (4th Dep't 2024) (determination that a claim was timely was reviewable on appeal from final judgment because it removed the issue of timeliness from the case; determination that a claim was supported by sufficient evidence to raise a triable issue of fact was not, because it "did not deprive the defendant of the further opportunity to litigate the issue in question"). But other case law suggests that this is not the only governing principle.

Some courts have held, for example, that an order denying a request for a jury trial is reviewable on an appeal from the final judgment. See *Herbil Holding v. Mitrany*, 11 A.D.3d 430 (2d Dep't 2004); accord *Cotazino v. New York State Adirondack Park Agency*, 214 A.D.3d 1137, 1140 (3d Dep't 2023) (denial of motion for a jury trial under CPLR 7804(h) "necessarily affects the final judgment"). The Court of Appeals, however, has indicated (albeit under prior law) that an order directing a jury trial does not "necessarily affect[]" the final judgment. *Matter of Satterlee*, 2 N.Y.2d 285, 290 (1957) (case decided under Civil Practice Act). An order denying a motion to change venue may be reviewable on an appeal from the final judgment, but perhaps only in certain kinds of proceedings. See *Matter of Aho*, 39 N.Y.2d 241, 248 (1976) (change of venue in proceeding to determine competency "would strike at the foundation on which the final judgment was predicated"); accord *Tyrone D. v. State*, 24 N.Y.3d 661, 666 (2015) (petition under Mental Hygiene Law presented "unique circumstances" where "motion for a change of venue necessarily affected the final order").

Orders denying class certification are also not reviewable on an appeal from a final judgment. See *Karlin v. IVF America*, 93 N.Y.2d 282, 290 (1999). And orders denying discovery have received mixed treatment. See *Compare Greater N.Y. Mututal Insurance v. Utica First Insurance*, 172 A.D.3d 588, 590 (1st Dep't 2019) (declining to review order that denied motion to issue a subpoena on appeal from final judgment, but noting that party "was able to independently obtain" the relevant information through other means) with *Cotazino*, 214 A.D.3d at 1140 (order denying discovery in an Article 78 proceeding reviewable on appeal from final judgment). This is only a partial list, but it illustrates the difficulty of extrapolating clear rules. Moreover, whether an order "necessarily affects" the final judgment may depend on factors that cannot be known when counsel is deciding whether to perfect an interlocutory appeal. For example, if the court ultimately disposes of the case in a manner that recognizes more than one alternative basis for its result, an interlocutory order that would impact only one of those bases

may not be reviewed on an appeal from the final judgment. See *Rupert v. Rupert*, 97 N.Y.2d 661 (2001). This possibility adds another layer of risk.

## Has the Right to Appellate Review Been Preserved?

Whether an order "necessarily affects the final judgment" is not the only question counsel contemplating delaying an appeal until the end of the case must try to answer. Even for orders that cleanly pass this test, the right to appellate review can be lost. There are two main ways this can happen.

First, if a party notices an interlocutory appeal but does not timely perfect it, the appeal is deemed abandoned. An order that was the subject of a previously abandoned interlocutory appeal may not be reviewed on an appeal from the final judgment. See I*n re Estate of Arrathoon*, 38 A.D.3d 305 (1st Dep't 2007). Fortunately, it is relatively easy to avoid this result: a party who files an interlocutory notice of appeal but decides not to perfect the appeal should formally withdraw it before the time to perfect expires.

A second way the right to review can be lost is somewhat more complicated. Under CPLR 5501(a)(1), a "nonfinal" order may be reviewed on an appeal from a final judgment. But some orders that are entered before the conclusion of a case may actually be final. For example, an order that "disposes of some but not all of the causes of action in a litigation" may be considered final if "the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same relationship as the unresolved causes of action." See *Burke v. Crosson*, 85 N.Y.2d 10, 16 (1995). Such orders are not common, but they do exist—and parties who wish to seek appellate review of them cannot wait until final judgment. See *Crystal v. Manes*, 130 A.D.2d 979 (4th Dep't 1987) (prior order that was "final" could not be brought up for review on appeal from final judgment).

## Some Takeaways

It can be hard to tell whether an order entered during the course of litigation will ultimately be reviewable on an appeal from a final judgment. Although case law provides some guideposts, in many instances those guideposts are not clear enough to rely upon with confidence.

Sometimes strategic or financial considerations may outweigh any risk. But absent such considerations, the safest course to ensure the availability of appellate review of an order that can be appealed on an interlocutory basis is to timely notice and perfect the interlocutory appeal—and to take steps to ensure that the appeal is decided before final judgment is entered. See *Aho*, 39 N.Y.2d at 248 (because the right of direct appeal from an interlocutory order terminates with the entry of a final judgment, an interlocutory appeal that is pending but not yet decided when final judgment is entered must be dismissed).

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