

Tulsa Law Review

Volume 29 | Issue 1

Fall 1993

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Recommended Citation

Charles W. Adams, *Appellate Procedure: Amendments for the Oklahoma and Federal Courts*, 29 *Tulsa L. J.* 31 (2013).

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APPELLATE PROCEDURE: AMENDMENTS FOR THE OKLAHOMA AND FEDERAL COURTS

Charles W. Adams*

I. INTRODUCTION

Both the Oklahoma Statutes governing appellate procedure and the Federal Rules of Appellate Procedure are undergoing substantial revision this year. In the Oklahoma state courts, the date of finality of a judgment, which determines its enforceability and the timing of appeals and post-trial motions, is being shifted from the date of the court's pronouncement of the decision to the date of filing of the judgment with the court clerk. This fundamental change brings Oklahoma appellate procedure into greater conformity with the federal courts and other jurisdictions. In the federal courts, various amendments are being made to reduce litigation over the naming of the parties to an appeal, clarify the timing of appeals, and remove a procedural trap that has caused the dismissal of numerous appeals. Interestingly, a number of the amendments to the Oklahoma Statutes parallel the amendments to the Federal Rules of Appellate Procedure.

This article examines the revisions to Oklahoma and federal appellate procedure that are going into effect this year. It begins with the recent history of appellate reform in Oklahoma, analyzes the newly enacted Judgments and Appeals Act, and then reviews a number of the 1993 amendments to the Federal Rules of Appellate Procedure.

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II. OKLAHOMA APPELLATE PROCEDURE: HISTORICAL BACKGROUND

Before 1991, title 12, section 990 of the Oklahoma Statutes set a deadline of 30 days "from the date of the final order or judgment sought to be reviewed" for the filing of a petition in error with the Supreme Court. The date of a final order or judgment was construed to be the time of its pronouncement by the judge.¹ In a number of cases, it was difficult to ascertain whether a statement by a judge was a pronouncement of judgment, particularly where the judge's pronouncement was accompanied by a direction for the prevailing party's attorney to prepare a journal entry of judgment.² Moreover, in the absence of a written memorialization of the judgment, there could be uncertainty as to its precise terms.

To promote greater clarity concerning the finality of judgments in Oklahoma state courts, the Oklahoma Bar Association approved a comprehensive legislative program³ that eventually became known as the Judgments and Appeals Act.⁴ The Judgments and Appeals Act repealed many of the prior statutes concerning appellate procedure and replaced them with sections 1001-1008 of title 12 of the Oklahoma Statutes. The Act provided that for the purpose of an appeal the date of a judgment was the date of its filing with the court clerk, rather than the date of its pronouncement.⁵ Upon the filing of the judgment the court clerk was required to send a file-stamped copy to all parties, unless the judgment was signed in the presence of all parties.⁶ This

1. See *Depuy v. Hoeme*, 775 P.2d 1339, 1343 (Okla. 1989) ("A judgment or order is rendered and begins its legal life as soon as it is pronounced from the bench and before it is ever reduced to writing for entry of record by the clerk."); *Miller v. Miller*, 664 P.2d 1032, 1034 (Okla. 1983) ("A judgment is rendered and exists as such when it is pronounced from the bench and before it has been reduced to writing and entered by the clerk."); *Arkansas Louisiana Gas Co. v. McBroom*, 526 P.2d 509, 511 (Okla. Ct. App. 1974) ("Judgment is rendered when pronounced by the Court and the Journal Entry is only a record thereof.") (Approved for Publication by Supreme Court).

2. E. Dwight Morgan, *Delayed Attacks on Final Judgments*, 33 OKLA. L. REV. 45, 45 n.1 (1980) ("A judgment is rendered whenever the judge indicates a present intention to adjudicate the matter. Since no particular form is required there is sometimes uncertainty as to exactly when a judgment is pronounced."). See *Shaw v. Sturgeon*, 304 P.2d 341, 343 (Okla. 1956) (holding that court's statement directing parties to prepare journal entry was not sufficiently explicit to qualify as a judgment); *News-Dispatch Printing & Audit Co. v. Board of Comm'rs*, 270 P. 2, 3 (Okla. 1928) (ruling that a minute entry reflecting that the court rendered judgment for the defendants "as per journal entry to be filed" did not constitute a judgment).

3. See *Amendments to the Civil Procedure Code*, 59 OKLA. B.J. 2724, 2729 (1988).

4. See Harvey D. Ellis, Jr., *The 1991 Repeal of the 1990 Judgments and Appeals Act*, 62 OKLA. B.J. 2793 (1991).

5. OKLA. STAT. tit. 12, § 1004(A) (Supp. 1990) (repealed 1991).

6. *Id.* § 1002(B).

assured that the parties would have notice of the date of filing, which was significant because the deadlines for filing post-trial motions and for commencing an appeal were generally measured from the date of filing of the judgment under the Act.⁷

The filing requirement introduced some delay in a judgment's finality because of the additional time it required for preparation, submission to the judge, and filing. It also created an opportunity for mischief, since a losing party could postpone a judgment's enforcement and the deadline for filing an appeal or post-trial motions by stalling approval of the proposed judgment. The Judgments and Appeals Act sought to minimize such stalling tactics by setting out a timetable for attorneys to prepare proposed judgments and submit them to the judge, and for the judge to rule on written objections to proposed judgments. It also provided for simplified judgment forms and urged trial judges to prepare and sign their own judgments after a general verdict or when the relief awarded was a sum certain.⁸

Although parts of the Judgments and Appeals Act were modelled on the Federal Rules of Civil Procedure, it departed substantially from the Federal Rules in the procedure it specified for the preparation of judgments. Federal Rule 58 states that generally attorneys will not participate in the drafting of judgments. While this may be feasible in federal courts, it is not in Oklahoma state courts. The Oklahoma state courts have more severe limitations on clerical support than do the federal courts, and in addition, particularly long and complex judgments are necessary for many of the cases (such as divorce and foreclosure proceedings) that are tried primarily in state courts. Thus, practical considerations necessitated assigning responsibility for preparing judgments to attorneys in at least some of the cases in Oklahoma state courts.

The Judgments and Appeals Act also included a variety of other procedural reforms. Although the Oklahoma Statutes authorized courts to award costs and attorney fees to a prevailing party, they did not specify when a prevailing party should seek such an award.⁹ In addition, Oklahoma law was ambiguous as to whether a judgment

7. See OKLA. STAT. tit. 12, § 1004 (Supp. 1990) (repealed 1991), §§ 653 (new trial motions), 698 (motions for j.n.o.v.), 1031.1 (motions to vacate) (Supp. 1990) (amended 1991, 1993). However, the deadline for commencing an appeal from an appealable interlocutory order was measured from the date of the hearing at which the order was issued. For further discussion see text at notes 87-89, *infra*.

8. *Id.* § 1001(C),(D),(E).

9. *G.A. Mosites Co. v. Aetna Casualty & Sur. Co.*, 545 P.2d 746, 752-53 (Okla. 1976) ("No statute or court rule set the time for filing of the motion to tax costs or attorney's fees and no

could be final and appealable if the trial court had not issued a ruling on an application for attorney fees.¹⁰ The Judgments and Appeals Act prescribed a 30-day deadline from the filing of the judgment for a party to apply for attorney's fees, costs, or interest,¹¹ and it also stated that a judgment's finality would not be prevented on account of the pendency of an application for attorney's fees, costs, or interest.¹² Other procedural reforms enacted in the Judgments and Appeals Act were 1) a provision allowing petitions in error to be filed by certified mail with filing effective on the date of mailing, 2) a bright line rule that post-trial motions filed within ten days of the filing of the judgment extended the time to appeal until they were decided, while post-trial motions filed later did not, 3) savings provisions for prematurely filed appeals, 4) a provision based on Fed. R. Civ. P. 54(b) for appeals in cases involving multiple claims and parties that postponed the time for appeal until all claims were resolved, unless the trial court ordered otherwise, 5) consolidation of the statutes governing stays of judgments and codification of the automatic ten-day stay for money judgments, and 6) authorization for Oklahoma appellate courts to impose sanctions for frivolous appeals.

Shortly after the Judgments and Appeals Act took effect in January, 1991, a number of Oklahoma judges, attorneys, and court clerks began protesting its effects. Most of the complaints were directed at the judgment forms that the Act prescribed for the preparation of judgments. The judgment forms were almost identical to those in the Federal Rules of Civil Procedure, but attorneys whose practices emphasized mortgage foreclosures and probate matters were upset because the judgment forms were not suited to those types of cases.

The objections to the Judgments and Appeals Act could have been resolved by amending the provisions concerning the judgment forms and the procedures for the preparation of judgments. Instead the Oklahoma Legislature overreacted by repealing nearly all of the Judgments and Appeals Act and re-enacting the statutes that the Act had repealed. In doing so, the Legislature condemned a number of innocent statutory reforms along with the guilty judgment forms. The

authority is cited to us as to the necessity to pray for attorney fees before judgment or the right to award them afterwards.”).

10. Cindy Jo Percival, Note, *Procedure: Effect of Attorneys Fees on Finality of Judgment—Amendment to Rule 1.11(c)*, 40 OKLA. L. REV. 145 (1987) (referring to this issue as “a serious question on the the most fundamental level of appellate procedure.”).

11. OKLA. STAT. tit. 12, § 1003 (Supp. 1990) (repealed 1991).

12. *Id.* § 1001(B).

innocent statutory reforms that the Legislature repealed included 1) provisions governing the award of costs, attorney fees, and interest, 2) provisions regarding the timing of post-trial motions, 3) savings provisions for premature appeals, 4) the automatic ten-day stay for money judgments, and 5) authorization for appellate courts to impose sanctions. However, the Legislature spared three key provisions from the original Judgments and Appeals Act. These were:

1. Section 990A “ Specifying the 30-day period for filing a petition in error runs “from the date the final order or judgment is filed.”
2. Section 990A “ Allowing the petition in error to be filed by certified mail, and providing that the date of mailing constitutes the date of filing.
3. Section 1006 “ Postponing the filing of appeals in cases involving multiple claims or parties until all claims are decided, unless the trial court expressly directs the preparation and filing of a judgment before all claims are decided.

The change in Section 990A concerning the timing of appeals partly preserved the primary purpose of the Judgments and Appeals Act, but a number of revisions in other statutes were needed to fully implement this change. The failure to make the necessary revisions to other statutes has led to some disagreeable results in cases decided in the past couple of years.¹³

The Rules of Appellate Procedure in Civil Cases¹⁴ were another source of problems. At the same time that the Oklahoma Legislature adopted the Judgments and Appeals Act, the Oklahoma Supreme Court made extensive amendments to its Rules of Appellate Procedure in Civil Cases to conform to the changes made by the Judgments and Appeals Act. The Supreme Court did not revise the Rules after the Act’s repeal, however. As a result, the Rules of Appellate Procedure now contain a number of references to statutes that have been repealed, and in general, the Oklahoma Statutes and the Rules of Appellate Procedure are out of synch with one other. The Oklahoma

13. See *Jaco Production Co. v. Luca*, 823 P.2d 364 (Okla. 1991) (holding that an appeal must be commenced within 30 days of the filing of the verdict in a common law action); *Rodgers v. Higgins*, 64 Okla. B.J. 1255 (Apr. 14, 1993) (following *Jaco*). See also *Estate of Heimbach*, 827 P.2d 170 (Okla. 1992) (ruling that a motion to modify filed within 10 days of the filing of a judgment, but more than 10 days after its pronouncement, did not extend the time to appeal).

14. The Rules of Appellate Procedure in Civil Cases are codified at OKLA. STAT. tit. 12, ch. 15, app. 1 (1991).

Supreme Court had good reason for not amending the Rules of Appellate Procedure, because it was aware that the Legislature had established an Interim Advisory Committee on Judgments and Post-Judgment Procedure to draft legislation to streamline and clarify the procedures for the rendition of judgments and the filing of appeals in civil cases.¹⁵ Instead of issuing a new set of Rules of Appellate Procedure for the interim period until the new legislation was enacted, the Oklahoma Supreme Court decided to wait until the Legislature completed its reform of appellate procedure before modifying its Rules again. Unfortunately, it has taken two legislative sessions for the latest Judgments and Appeals Act to work its way through the Oklahoma Legislature, but now that it has, the Oklahoma Supreme Court should finally be ready to bring the Rules of Appellate Procedure into line with the Oklahoma Statutes.

The next section of this article examines the latest Judgments and Appeals Act.

III. THE 1993 JUDGMENTS AND APPEALS ACT

A. *Timing of Appeals—In General*

Although the Legislature repealed most of the original Judgments and Appeals Act in 1991, it retained the following provision in section 990A(A): “An appeal to the Supreme Court may be commenced by filing a petition in error with the Clerk of the Supreme Court within thirty (30) days from the date the final order or judgment is filed.”¹⁶ In *P & H Oil Field Serv., Inc. v. Spectra Energy Corp.*,¹⁷ the Oklahoma Supreme Court held that this provision required an appeal to be filed after the filing of the final order or judgment sought to be reviewed. Thus, it ruled that an appeal commenced after the judge’s pronouncement of an order overruling a motion for new trial was premature because the petition in error was filed before the filing of the order.¹⁸ To avoid unfairness and unnecessary hardship to the appellant who was evidently unaware of section 990A’s change in the timing of appeals, however, the Supreme Court gave its ruling only prospective effect.

15. S. Con. Res. 20, 1991 Okla. Sess. Laws 3246.

16. OKLA. STAT. tit. 12, § 990A (1991) (amended 1993).

17. 823 P.2d 365 (Okla. 1991).

18. See also *Patmon v. Block*, 851 P.2d 539, 541, 543 (Okla. 1993) (filing of appeal on May 6 from dismissal order filed on April 7 was timely).

Despite the Oklahoma Supreme Court's reliance on section 990A in the *P & H* case, the Court appeared to disregard the change in the time limit for filing an appeal in *Jaco Production Co. v. Luca*.¹⁹ In the *Jaco* case, the Court held that a petition in error filed within 30 days of the filing of the journal entry of judgment signed by the judge was untimely, because the time to appeal ran from the filing of the jury verdict, rather than from the filing of the journal entry of judgment. The *Jaco* holding was based on title 12, section 696.1 of the Oklahoma Statutes, which provided: "When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless it is special, or the court orders the case to be reserved for future argument or consideration."²⁰ This statute's predecessor²¹ had been repealed by the original Judgments and Appeals Act, and then reenacted when the Judgments and Appeals Act was repealed. Section 696.1 was inconsistent with section 990A's provision regarding the timing of appeals, and it should not have been reenacted when the Judgments and Appeals Act was repealed. Unfortunately, the Oklahoma Supreme Court relied on its reenactment to undercut the reform intended by the timing provision in section 990A. Once again, the Oklahoma Supreme Court gave its decision only prospective effect to avoid unnecessary hardship to the appellants.

Jaco was distinguished in *McGinnis v. Republic-Underwriters Insurance Co.*,²² a case arising out of a special statutory postjudgment garnishment proceeding. The Oklahoma Supreme Court concluded that *Jaco*'s application was restricted to common law actions. Then the Supreme Court reaffirmed *Jaco* in *Rodgers v. Higgins*,²³ in which it dismissed an appeal that was filed within 30 days after the filing of the journal entry on the ground that it was untimely because the petition in error was filed more than 30 days after the jury verdict. *Rodgers* was a close decision - only four Justices concurred with the majority opinion, four Justices dissented, and one concurred by reason of *stare decisis*.

The latest Judgments and Appeals Act supersedes the *Jaco* line of cases by repealing section 696.1²⁴ and providing in section 696.2(C): "The following shall not constitute a judgment, decree or appealable

19. 823 P.2d 364 (Okla. 1991).

20. OKLA. STAT. tit. 12, § 696.1 (1991) (repealed 1993).

21. *Id.* § 696 (1981) (repealed 1990).

22. 830 P.2d 191 (1992).

23. 64 OKLA. B.J. 1255 (Apr. 14, 1993).

24. 1993 Okla. Sess. Laws c. 351, § 29.

order: A minute entry; *verdict*; informal statement of the proceedings and relief awarded, including, but not limited to, a letter to a party or parties indicating the ruling or instructions for preparing the judgment, decree or appealable order."²⁵ In order for the 30-day period for filing a petition in error to begin to run, section 990A²⁶ requires a judgment, decree, or appealable order containing 1) a caption with the name of the court, the names of the parties, the file number of the case, and the title of the instrument, 2) a statement of the disposition of the action, and 3) the signature and title of the court to be filed with the court clerk.²⁷

Section 990A also provides that if a matter was taken under advisement the 30 days to file a petition in error does not begin to run until a file-stamped copy of the judgment, decree, or appealable order is mailed to the appealing party.²⁸ This provision was designed to insure that an appellant will not lose the opportunity to appeal on account of not being given notice that the judgment was filed in a case taken under advisement. If a file-stamped copy of the judgment is not mailed to the appealing party, the judgment's finality would remain suspended indefinitely. In contrast, no notice of the filing of a judgment is required if the judgment is issued at a hearing.

The distinction between decisions taken under advisement and decisions announced at a hearing differs from federal appellate procedure and was the result of a compromise reached with the Oklahoma court clerks before the passage of the original Judgments and Appeals Act. An early version of the original Judgments and Appeals Act included a provision based on Fed. R. Civ. P. 77(d) that required court clerks to mail notices of entry of judgments to all parties as soon as they were entered in their judgment dockets.²⁹ The court clerks in Oklahoma objected to this provision because of the burden that having to mail a notice of entry of judgment for every case would cause them. The court clerks recognized, however, that mailing was necessary in a case where a judge took a matter under advisement and issued a decision out of the presence of the parties.³⁰ They therefore

25. *Id.* § 9 (emphasis added).

26. *Id.* § 18.

27. *Id.* § 10.

28. *Id.* § 18.

29. See *Amendments to the Civil Procedure Code*, *supra* note 4 at 2729.

30. See *McCullough v. Safeway Stores, Inc.*, 626 P.2d 1332, 1335 (Okla. 1981) (ruling that judgment was not "rendered" in a case taken under advisement until notice of its entry was mailed to the parties).

agreed to support the original Judgments and Appeals Act if the mandatory mailing was restricted to cases taken under advisement.

The lack of a provision for notice of the filing of the judgment in cases that are not taken under advisement has the potential for causing problems for attorneys who may not be aware of when the 30 days to file a petition in error starts to run. In most cases, however, the filing will occur soon after either the hearing at which the decision was pronounced or after the attorneys have approved the form of the judgment, and an attorney can readily ascertain the exact date of filing by checking with the court clerk. As a practical matter, therefore, attorneys will have adequate notice of approximately when the judgment is filed. In cases where the filing occurs more than a week after the decision was pronounced or an attorney approved the form of the judgment, the attorney should mail a file-stamped copy of the judgment to opposing counsel in order to avoid a potential due process problem.³¹ In addition, the trial court may direct the attorney filing the judgment to mail copies to opposing counsel.

While most judgments are not effective until they are filed with the court clerk under the latest Judgments and Appeals Act, judgments in some cases are effective as soon as they are pronounced, just as they were under prior Oklahoma law. Section 696.2(D) provides that judgments in the following assortment of actions are effective as soon as they are pronounced by the court: divorce; separate maintenance; annulment; post-decree matrimonial proceedings; paternity; custody; adoption; termination of parental rights; mental health; guardianship; juvenile matters; habeas corpus proceedings; and proceedings for temporary restraining orders, temporary injunctions, permanent injunctions, conservatorship, probate proceedings, special executions in foreclosure actions, quiet title actions, partition proceedings and contempt citations.³² Judgments in these categories of cases were made immediately effective for various reasons. In domestic relations cases, there is a possibility that one of the spouses might die or want to remarry between the time of the pronouncement of a divorce and the filing of a divorce decree, and some parents might be tempted to defy child custody orders if they were not enforceable promptly after being pronounced. The rule in Arkansas, for example, that a

31. Cf CAL. CODE CIV. PROC § 664.5 (West 1987) (“[T]he party submitting an order or judgment for entry shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service by mail.”).

32. 1993 Okla. Sess. Laws c. 351, § 9.

judgment is not effective until it is entered in the appropriate docket has led to unhappy consequences in several divorce cases.³³

Section 696.2(D) provides that even though a judgment in one of these types of actions is immediately effective, the appeal time does not start until the judgment is filed with the court clerk.³⁴ Under prior Oklahoma law, the effectiveness and the appealability of a judgment were both tied to the date of its rendition; however, the effectiveness and appealability of judgments are not always linked under the Oklahoma Judgments and Appeals Act.³⁵ Thus, in certain types of actions, there will be a gap between the time a judgment becomes effective and the time it becomes reviewable on appeal. For most cases, the preparation and filing of a judgment or decree will take no longer than a few weeks, and therefore, this gap should generally be fairly short. In addition, if circumstances warrant, the trial court may grant a stay of enforcement of the judgment under sections 990.3(C) and 990.4(C)³⁶ in order to eliminate any problems that the gap might cause in a particular case. Alternatively, a party may seek relief through an extraordinary writ before the judgment becomes appealable.³⁷

B. *Timing of Post-Trial Motions*

An alternative means besides appeal for attempting to overturn a judgment is to seek relief from the trial court through a post-trial motion, such as a motion for new trial,³⁸ a motion for judgment notwithstanding the verdict (judgment n.o.v.),³⁹ or a motion to vacate the judgment.⁴⁰ Before 1991, the time limits for filing these post-trial motions were all based on the rendition of the judgment. The original Judgments and Appeals Act amended the various statutes governing

33. See *Standbridge v. Standbridge*, 769 S.W.2d 12, 14 (Ark. 1989) (holding that second marriage was void, because it was performed before the divorce decree of one of the spouses was filed, even though the divorce proceedings were heard two days before the marriage ceremony); *Childress v. McManus*, 668 S.W.2d 9 (Ark. 1984) (ruling that divorce decree filed after spouse's death was invalid even though divorce was orally granted two weeks before the spouse died); *Cook v. Lobianco*, 648 S.W.2d 808 (Ark. 1983) (holding that divorce action abated upon death of spouse, even though divorce was granted before spouse died).

34. 1993 Okla. Sess. Laws c. 351, § 9.

35. Cf. TEXAS RULES OF CIVIL PRACTICE AND REMEDIES, Rule 306a (in Texas, judgments and orders are effective upon rendition, but the periods for the filing of post-trial motions and appeals do not start to run until the judgment is signed).

36. 1993 Okla. Sess. Laws c. 351, §§ 20, 21.

37. OKLA. STAT. tit. 12, §§ 1451-1462 (1991).

38. *Id.* § 653 (1991) (amended 1993).

39. *Id.* § 698.

40. *Id.* §§ 1031, 1031.1.

post-trial motions to make the time for filing these motions parallel the timing of appeals by having all the deadlines run from the filing of the judgment with the court clerk, rather than its rendition. When the original Judgments and Appeals Act was repealed, the Legislature restored the statutes governing post-trial motions to their pre-1991 forms so that the times for filing the post-trial motions ran from their rendition, rather than from their filing with the court clerk. The provision in section 990A setting the deadline for filing a petition in error at 30 days after the filing of the judgment applied only to appeals. As a result, the Oklahoma Supreme Court held in *Estate of Heimbach*,⁴¹ that a motion to modify that was filed within ten days of the filing of the judgment, but more than ten days after its pronouncement, was not a timely post-judgment motion that would extend the time for appeal. However, as in the *P & H* and *Jaco* cases, the Court found that the enactment and repeal of the Judgments and Appeals Act and the absence of published case law on point had created a procedural trap, and therefore, it decided to give its ruling only prospective effect.

The latest Judgments and Appeals Act brings the times for filing post-trial motions back into line with the deadline for filing an appeal. Sections 653, 698, 1031.1, and 1038 of title 12 of the Oklahoma Statutes have all been amended so that effective October 1, 1993, the time limits are based on the filing of the judgment with the court clerk.⁴² Under sections 653 and 698, as amended, motions for new trial and for judgment n.o.v. must be filed within ten days after the judgment is filed with the court clerk.⁴³ If the judgment has been taken under advisement, the ten days runs from the date of mailing of a file-stamped copy of the judgment to the moving party, rather than from its filing.⁴⁴ The amended version of section 1031.1 allows 30 days after the filing of a judgment for the filing of a motion to correct, open, or modify the judgment under its provisions.⁴⁵ Similarly, the one-, two-, and three-year periods in section 1038 for proceedings to vacate or modify a judgment are now measured from the time of filing of the judgment with the court clerk, rather than from its rendition.⁴⁶

41. 827 P.2d 170 (Okla. 1992).

42. 1993 Okla. Sess. Laws c. 351, §§ 8, 12, 25, 27.

43. *Id.* §§ 8, 12.

44. *Id.*

45. *Id.* § 25.

46. *Id.* § 27.

Section 1031.1 has also been amended to clarify the timing of motions to correct, open, or modify judgments under its provisions.⁴⁷ Although the prior statutory language was not clear on the point, Oklahoma appellate courts had allowed trial courts to vacate or modify a judgment under section 1031.1 more than 30 days after the rendition of the judgment in response to a motion filed less than 30 days after rendition.⁴⁸ The amended language of Section 1031.1 makes clear that the trial court has this term-time authority.

One potential problem with the specification of deadlines in sections 653, 698, and 1031.1 for filing post-trial motions is that it creates the possibility that some motions will be premature if they are filed after the judgment is pronounced, but before it is filed. The statutes all require the motions to be filed within ten (or 30) days *after* the judgment has been filed with the court clerk.⁴⁹ This pitfall could be eliminated by adding a sentence to the various statutes that a motion filed before the filing of the judgment but after its pronouncement would still be effective.

C. *Filing of Appeals by Certified Mail*

Another of the changes made by the original Judgments and Appeals Act that the Oklahoma Legislature retained after its repeal was the authorization in section 990A for filing petitions in error by certified mail with return receipt requested. Under prior Oklahoma law, a petition in error needed to be received by the Clerk of the Supreme Court within the 30-day period for filing in order to be timely.⁵⁰ Thus, an appellant who mailed a petition in error to the Oklahoma Supreme Court took the risk of late delivery by the post office, which would cause the appeal to be dismissed as untimely. Attorneys for appellants who wished to file petitions in error toward the end of the appeal period and who wanted to avoid exposure for malpractice had to incur the expense of utilizing means other than the mail for delivering petitions in error to the Oklahoma Supreme Court.

47. *Id.* § 25.

48. *See, e.g.,* Schepp v. Hess, 770 P.2d 34, 38 (Okla. 1989) ("Once timely invoked, the trial court's term-time power may be exercised after the thirty-day period."); Colquitt v. Hill, 680 P.2d 994, 995 (Okla. Ct. App. 1984).

49. In contrast, FED. R. Civ. P. 50(c)(2) & 59(b) provide for the filing of motions for judgment as a matter of law and for new trial "*not later than 10 days after entry of the judgment.*" (emphasis added).

50. *See* Turrell v. Continental Oil Co., 466 P.2d 643, 644 (Okla. 1970) (holding that petition in error mailed from Tulsa on the Friday before the filing deadline on Monday was untimely because it was not delivered to the Supreme Court until Tuesday).

Section 990A changed the rule from previous Oklahoma law by providing that the date of mailing a petition in error is deemed to be the date of its filing with the Oklahoma Supreme Court, so that an appeal is timely as long as the petition in error is mailed within 30 days from the filing of the judgment with the court clerk.⁵¹ Section 990A also provides that the date of mailing is to be established from the postmark or other proof from the post office. In the absence of proof from the post office of the date of mailing, the date of filing will be the date the petition in error is received by the Oklahoma Supreme Court.⁵² An appellant who does not want to have to rely on the Oklahoma Supreme Court's making a record of the date of the postmark or its preserving the envelope in which the petition in error is mailed should obtain a sender's receipt from a postal employee showing the date of mailing.⁵³

It is important to note that a postmark or some other record from the post office is necessary to establish the date of mailing under Section 990A; the record from a private postal meter will not suffice. In addition, the envelope containing the petition in error must be properly addressed to the Clerk of the Supreme Court,⁵⁴ and the envelope must bear sufficient postage for delivery.⁵⁵ The Oklahoma Supreme Court has made an exception to section 990A's requirements for *pro se* prisoners, however. Following the United States Supreme Court case of *Houston v. Lack*,⁵⁶ the Oklahoma Supreme Court held in *Woody v. State ex rel. Department of Corrections*,⁵⁷ that a *pro se* prisoner's petition in error is deemed to be filed when it is placed in the prison mailbox or otherwise delivered to the prison authorities for forwarding to the Clerk of the Supreme Court.

It should be noted that the mailing provision applies only to the filing of petitions in error, and it does not apply to the filing of other

51. 1993 Okla. Sess. Laws c. 351, § 18.

52. *Id.*

53. See United States Postal Service, DOMESTIC MAIL MANUAL § 912.44(d) (1992) (sender of certified mail may obtain a receipt from the post office showing the time an article is accepted for mailing).

54. *Woods v. Woods*, 830 P.2d 1372, 1373 (Okla. 1992) (dismissing an appeal because petition in error that was addressed to the Court of Appeals was forwarded to and received by the Supreme Court one day after the 30-day deadline).

55. *Eagle Life Ins. Co., Inc. v. Rush*, 832 P.2d 1224 (Okla. 1992) (dismissing as untimely an appeal where petition in error mailed on the 30th day after filing of the final order was returned to the appellant's attorney for insufficient postage and not delivered to the Supreme Court until several days later).

56. 487 U.S. 266 (1988).

57. 833 P.2d 257, 259 (Okla. 1992).

papers with the Supreme Court. Rule 1.15(c) of the Rules of Appellate Procedure provides: "All briefs, pleadings, motions, petitions for rehearing, and petitions for certiorari to the Court of Appeals are deemed filed on date of receipt of the Clerk of the Supreme Court."⁵⁸ In addition, the Oklahoma Supreme Court has held that the mailing provision is not applicable to a proceeding for review of an order by a three-judge panel of the Workers' Compensation Court.⁵⁹

D. *Appeals from Appealable Orders*

Besides covering appeals from judgments and decrees, section 990A also governs the filing of petitions in error to review appealable orders. There are two categories of appealable orders: final orders and appealable interlocutory orders.

A final order is defined in section 953 of title 12 as one "affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment."⁶⁰ Rule 1.10(a) of the Rules of Appellate Procedure lists the following as examples of final orders: orders denying motions for new trial, orders granting or denying motions for judgment notwithstanding the verdict, orders denying leave to intervene,⁶¹ and orders modifying or refusing to vacate or modify final judgments.⁶² Other examples of final orders include orders granting summary judgment motions,⁶³ and orders granting motions to dismiss, whether for failure to state a claim,⁶⁴ insufficiency of service of

58. OKLA. STAT. tit. 12, ch. 15, app. 2, R. 1.15(c) (1991).

59. *Ireton v. Saint Francis Hosp.*, 844 P.2d 151, 151 (Okla. 1992). See also OKLA. STAT. tit. 12, § 696.2(E) ("The preparation of orders, decisions and awards and the taking of appeals in workers' compensation cases shall be governed by the provisions of Title 85 of the Oklahoma Statutes.").

60. OKLA. STAT. tit. 12, § 953 (1991).

61. *Gettler v. Cities Serv. Co.*, 739 P.2d 515, 518 (Okla. 1987) ("Denial of a petition for mandatory intervention by the trial court is an appealable final order."); *Stubblefield v. General Motors Acceptance Corp.*, 619 P.2d 620, 624 n.11 (Okla. 1980) ("An order that denies leave to intervene is appealable.").

62. See *Avery v. Jayhawker Gasoline Co.*, 225 P. 544, 547 (Okla. 1924) (ruling that an order denying motion to set aside an order of dismissal was appealable as a final order); *Vann v. Union Central Life Ins. Co.*, 191 P. 175, 176-77 (Okla. 1920) (holding that an order overruling a motion to vacate is a final order, but an order vacating a judgment is not, unless it is on the ground that the judgment is void on its face).

63. *Carr v. Braswell*, 772 P.2d 915, 917 (Okla. 1989).

64. See *Thompson v. Thompson*, 86 P.2d 286, 287 (Okla. 1939) (ruling that an order sustaining motion to dismiss action for equitable relief based on plaintiff's unclean hands was a final order).

process,⁶⁵ or on *forum non conveniens* grounds.⁶⁶ Also, orders approving the summary report of a receiver⁶⁷, and a post-judgment order vacating the appointment of a receiver are final orders.⁶⁸ An order that either grants or denies an application for costs, attorney's fees, or interest under section 696.4(B)⁶⁹ would also appear to be a final order.⁷⁰ However, an order of dismissal for failure to state a claim would not be a final order if the plaintiff were permitted to amend the petition.⁷¹ The characteristic that the final orders listed above have in common is that, unless the order is set aside, either by the trial court or on appeal, it will conclude the litigation for the party affected by the order.

Appealable interlocutory orders are orders for which a statute authorizes an immediate appeal before judgment. The following statutes authorized appeals from various interlocutory orders:⁷² sections 952 (b)(2), (b)(3) and 993 of title 12; section 817 of title 15 (appeals arising from arbitration proceedings);⁷³ and section 721 of title 58 (appeals in probate cases).⁷⁴ The interlocutory orders from which immediate appeals are authorized by these statutes include orders granting new trials⁷⁵ or vacating judgments;⁷⁶ orders that discharge, vacate, or

65. See *Armstrong v. Trustees of Hamilton Inv. Trust*, 667 P.2d 985, 987 (Okla. 1983) (holding that an order granting a plea to jurisdiction and a motion to quash was an appealable final order).

66. *St. Louis-S.F. R.R. v. Superior Court*, 290 P.2d 118, 120 (Okla. 1955) (dictum).

67. *Kawfield Oil Co. v. Illinois Refining Co.*, 35 P.2d 961, 963 (Okla. 1934).

68. *Exchange Trust Co. v. Oklahoma State Bank*, 259 P. 589, 594 (Okla. 1927).

69. 1993 Okla. Sess. Laws c. 351, § 11.

70. *But cf. Timmons Oil Co., Inc. v. Norman*, 794 P.2d 400, 401 (Okla. 1990) (ruling that a motion for new trial on a reserved attorney fee issue extended time for appeal) (decided before the adoption of § 696.4).

71. See *Frazier v. Bryan Memorial Hosp. Auth.*, 775 P.2d 281, 285-86 (Okla. 1989) (ruling that an order of dismissal for failure to state a claim was not a final order where plaintiff was later given leave to file an amended petition); *Merchants Delivery Serv. v. Joe Esco Tire Co.*, 497 P.2d 766, 767 (Okla. 1972) (holding that an order of dismissal is not a final order if the plaintiffs are still free to amend their petition); OKLA. STAT. tit. 12, § 2012(G) (1991) (trial court is required to grant leave to amend if defect in petition can be remedied).

72. See OKLA. STAT. tit. 12, ch. 15, app. 2, R. 1.60 (1991) (listing interlocutory orders that are appealable by right).

73. See *Shawnee Hosp. Auth. v. Dow Constr., Inc.*, 812 P.2d 1351, 1352 n.7 (Okla. 1990) ("The denial of a motion to compel arbitration is an appealable interlocutory ('midstream') order."); *Long v. DeGeer*, 753 P.2d 1327, 1328 n.1 (Okla. 1987) (holding that a denial of motion to compel arbitration is an appealable interlocutory order).

74. *In re Estate of Johnson*, 780 P.2d 692, 694 (Okla. 1989) ("The various orders for which § 721 provides appellate review are in the nature of interlocutory orders made in the course of the administration of an estate.").

75. See *Shriver v. Dolph*, 580 P.2d 144, 146 (Okla. 1978) (holding an order granting a new trial is an appealable interlocutory order).

76. *Chemco Prods., Inc. v. Moley Produce Co., Inc.*, 615 P.2d 300, 301 (Okla. 1980) ("An order which vacates a judgment is analogous to, or the functional equivalent of, one that grants a new trial. It is hence reviewable by right.").

modify or refuse to vacate or modify attachments or other provisional remedies that affect substantial rights of parties; orders granting, refusing, vacating, modifying, or refusing to vacate or modify temporary injunctions;⁷⁷ orders appointing receivers, or refusing to appoint, or vacating or refusing to vacate the appointment of receivers;⁷⁸ orders directing the payment of money *pendente lite*,⁷⁹ or refusing to direct, or vacating or refusing to vacate orders directing the payment of money *pendente lite*, orders certifying or refusing to certify class actions, and any other order that the trial court certifies for an immediate appeal.⁸⁰

Most appealable interlocutory orders may be reviewed on appeal from the judgment at the conclusion of the case as well as before the judgment. Section 952(b) of title 12 provides for appellate review after judgment of appealable interlocutory orders listed in its subdivisions 2 and 3.⁸¹ These include nearly all of the appealable interlocutory orders with the exception of orders certifying or refusing to certify class actions,⁸² and appealable interlocutory orders in connection with arbitration proceedings⁸³ and probate cases⁸⁴ that do not involve injunctive relief or provisional remedies affecting the substantial rights of parties. As a consequence, appellate review for most interlocutory orders will only be postponed, rather than lost entirely, on account of a failure to file a petition in error within 30 days after the filing of the order.⁸⁵

77. See *Board of Regents v. NCAA*, 561 P.2d 499, 501-02 (Okla. 1977) (reviewing appeal from grant of temporary injunction).

78. *Panama Timber Co. v. Barsanti*, 619 P.2d 872, 873 (Okla. 1980) (“[A]n appeal from the trial court’s refusal to vacate an order appointing a receiver, although an interlocutory order, is appealable, as such an appeal is specifically authorized by the provisions of 12 O.S.1971 § 993.”).

79. See *Teachers Ins. & Annuity Ass’n of Am. v. Oklahoma Tower Assocs. Ltd. Partnership*, 798 P.2d 618, 619 (Okla. 1990) (reviewing interlocutory order enforcing an assignment of rents by appeal under 12 O.S. § 993(A)(5)).

80. For a discussion of appealable interlocutory orders in Oklahoma, see Jerry R. Parkinson, *Interlocutory Appeals in Oklahoma*, 61 OKLA. B.J. 1397 (1990).

81. OKLA. STAT. tit. 12, § 952(b) (1991).

82. See *Id.* § 993(6).

83. *Id.* § 817 (1991).

84. *Id.* § 721 (1991).

85. See, e.g., *In re Estate of Johnson*, 780 P.2d 692, 694 (Okla. 1989) (holding that an appeal from an order refusing to admit will to probate can be filed either after the initial refusal or after entry of the final accounting and distribution); *Shriver v. Dolph*, 580 P.2d 144, 146-147 (Okla. 1978) (“[T]he garnishee had the option of appealing the new trial direct or after final judgment.”). *But see Williams v. Mulvihill*, 846 P.2d 1097, 1104 (Okla. 1993) (holding that a probate court order declaring the sale of an estate asset a nullity resolved a controversy separate from the probate’s mainstream and would not be reviewable on appeal from the final accounting).

The original Judgments and Appeals Act handled appealable interlocutory orders differently than judgments and final orders for purposes of the timing of appeals. Under former section 1004(A),⁸⁶ the time to appeal from an interlocutory order began to run at the time of the hearing at which it was issued, if the appellant was present or represented at the hearing.⁸⁷ In contrast to judgments and final orders, appealable interlocutory orders did not have to be filed with the court clerk in order for them to be effective and their appeal time to expire.

The latest Judgments and Appeals Act eliminates the distinction between appealable interlocutory orders and final orders for purposes of the timing of appeals. Appealable orders, whether final or interlocutory, are appealable only after they have been prepared in written form, signed by the court, and filed with the court clerk.⁸⁸

E. *Appeals in Cases with Multiple Claims or Parties*

The third provision from the original Judgments and Appeals Act that the Legislature retained when it repealed the Act was section 1006, which governed cases involving multiple claims or parties. The latest Judgments and Appeals Act renumbered this section as section 994 to move it closer to the other provisions dealing with appellate procedure.

Under Oklahoma law prior to 1991, the disposition of one of several claims in a case was immediately appealable if it arose out of a separate transaction from the other claims; however, if it was interrelated with the other claims, it was not appealable until they were decided.⁸⁹ If a case involved multiple parties and a trial court's ruling had the effect of letting one of the parties out of the case, then the ruling would be final and immediately appealable.⁹⁰ Applying these principles caused confusion for attorneys and judges, because it was sometimes difficult to decide whether a particular claim arose from a

86. OKLA. STAT. tit. 12, § 1004(A) (Supp. 1990) (repealed 1991).

87. See *In re Estate of Nation*, 834 P.2d 442, 443 (Okla. 1992) ("Appeals of interlocutory orders appealable by right in a probate proceeding must be commenced within thirty days from the date of the hearing at which the order was issued."). See also *Williams*, 846 P.2d at 1099 n.1 (dismissing appeal from interlocutory order as untimely because it was filed more than 30 days after the order's rendition).

88. 1993 Okla. Sess. Laws c. 351, §§ 9, 18.

89. Compare *Oklahomans for Life, Inc. v. State Fair of Oklahoma*, 634 P.2d 704, 706 (Okla. 1981) (ruling that two claims were distinct causes of action because they were based on separate transactions or wrongs) with *Eason Oil Co. v. Howard Eng'g, Inc.*, 755 P.2d 669, 672 (Okla. 1988) (ruling that no appeal could lie where claim and counterclaim were interrelated).

90. See *Ritter v. Perma-Stone Co.*, 325 P.2d 442, 443 (Okla. 1958) (ruling that an order sustaining demurrer as to one of two defendants was immediately appealable as a final order).

transaction that was separate from the other claims in a case or was interrelated with them.⁹¹

Section 1006 eliminated many of the difficulties previously encountered with the timing of appeals in cases involving multiple claims or parties by adopting a simple rule: a decision as to only a part of a case is not appealable until the trial court decides all the issues in the case.⁹² Some flexibility is provided, though, with an exception that authorizes the trial court, after finding that there is no reason for delaying the appeal until the end of the case, to expressly direct the preparation of a judgment as to fewer than all the claims and parties.⁹³ Where such an express direction has been made by the trial court, it will be clear that a party seeking appellate review must file a petition in error promptly; on the other hand, in the absence of such an express direction, it will be clear that the appeal should not be filed until the judgment determining all the issues in the case is filed with the court clerk.

Section 1006 (now section 994) authorizes the trial court to order an immediate appeal only where the trial court lets one of the parties out of the case or it disposes of an entire claim. A trial court should not order an immediate appeal from a ruling that disposes of only a single theory of recovery against a party who remains in the case.⁹⁴ As under prior law, the scope of a claim is determined by a transactional approach.⁹⁵ However, section 1006 (now section 994) places

91. See generally Don G. Holladay, *Appellate Jurisdiction in Cases Involving Multiple Claims*, 60 OKLA. B.J. 3227 (1989) (discussing prior Oklahoma law and recommending adoption of a provision like section 1006).

92. See *Dotson v. Rainbolt*, 835 P.2d 870 (Okla. 1992) (ruling that an order dismissing two defendants and granting summary judgment in favor of the remaining defendants on all but one of the claims against them was not final and appealable); *DeLuca v. Mountain States Financial Resources Corp.*, 827 P.2d 171 (Okla. 1992) (holding that the dismissal of a counterclaim was not a final appealable order when the main claims remained to be litigated); *Mayabb v. Price by Price*, 836 P.2d 117 (Okla. Ct. App. 1992) (refusing review of the dismissal of claims against a vehicle's owner while the claims against the vehicle's driver remained pending).

93. See *Eskridge v. Nalls*, 852 P.2d 818, 819 n.1 (Okla. Ct. App. 1993) (hearing an appeal from the adjudication of fewer than all claims where the trial court made an express finding that there was no reason for delay of the appeal); *Hart v. Board of County Commissioners*, 842 P.2d 777, 778 n.1 (Okla. Ct. App. 1992) (allowing an appeal after the trial court entered an order directing entry of final judgment). See also *Tuttle & Assocs. v. Scoufos*, 854 P.2d 388, 390 (Okla. Ct. App. 1993) ("While the § 1006 finding and direction may be in a separate order, the better practice seems to be to include it in the journal entry of judgment.").

94. See *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir. 1988) (holding that counts which were dismissed were intertwined with counts which were not dismissed, and so immediate judgment should not have been entered under FED. R. CIV. P. 54(b)).

95. See generally *Retherford v. Halliburton Co.*, 572 P.2d 966, 968-69 (Okla. 1978) (discussing scope of cause of action).

the responsibility for deciding whether a ruling disposes of an entire claim on the trial judge, rather than on the appealing party.

Despite the fact that section 1006 (now section 994) does not contain any exceptions, the Oklahoma Supreme Court has ruled that section 1006 did not apply in particular types of proceedings.⁹⁶ In neither of the cases where the Court disregarded the plain language of the statute did it give any reasons to support its conclusion. The Court's creation of exceptions is hard to justify and because the Court did not express its reasoning it is difficult to predict what other exceptions the Court will read into section 994 in the future.

F. *Effect of Post-Trial Motions on Appeal Time*

The time for commencing an appeal is extended under Section 990.2(A) by the filing of various post-trial motions within ten days after the filing of the judgment.⁹⁷ Until the post-trial motions are resolved, there is the possibility that the appeal may become moot by the trial court's alteration of the judgment. This possibility is recognized in section 991 of title 12, which provides that if a motion for new trial is filed, an appeal should not be taken until after the trial court has ruled on the motion.⁹⁸ Section 991 is limited to motions for new trial, but other motions, such as motions to vacate a judgment, can give the trial court an opportunity to alter a judgment and moot an appeal. Section 991 does not permit the filing of motions to vacate a judgment to extend the time for appeal, because some of these motions may be filed years after a judgment and the time to appeal might therefore be prolonged for an inordinate period.

Problems in applying section 991 have arisen, because it is often difficult to distinguish a motion for new trial from a motion to vacate a judgment, since the relief sought by these motions can be overlapping. Section 651 of title 12 lists nine grounds for new trial,⁹⁹ but there are no restrictions on a trial court's power to vacate a judgment under section 1031.1 of title 12.¹⁰⁰ Moreover, the first of the grounds given in section 1031 for vacating a judgment incorporates the grounds for

96. Williams, 846 P.2d at 1104 n.27 ("The terms of 12 O.S.1991 § 1006 are not applicable to probate proceedings."); Central Plastics Co. v. Barton Indus., Inc., 818 P.2d 900, 900 (Okla. 1991) ("The court finds that 12 O.S. 1991 § 1006 does not apply to postjudgment proceedings.")

97. 1993 Okla. Sess. Laws c. 351, § 19.

98. OKLA. STAT. tit. 12, § 991 (1991).

99. OKLA. STAT. tit. 12, § 651 (1991).

100. See Schepp v. Hess, 770 P.2d 34, 38 (Okla. 1989) ("*Neither the terms of § 1031.1 nor those of its common-law antecedents restrict the exercise of term-time power to any specific grounds.*") (emphasis in original).

granting a new trial by express reference.¹⁰¹ Consequently, the Oklahoma Supreme Court has treated some motions that were labelled "motions to vacate" as motions for new trial for purposes of extending the time to appeal under section 991.¹⁰² A post-trial motion labelled a "motion to reconsider" may be especially difficult to categorize as either a motion for new trial or another type of motion for purposes of section 991. The Oklahoma Supreme Court alluded to this difficulty in *Salyer v. National Trailer Convoy, Inc.*¹⁰³

[The so-called "motion to reconsider"] causes great confusion. If timely filed, a motion to reconsider may be regarded as one for new trial under 12 O.S. 1981 § 651 and hence effective to extend appeal time for review of a final order or judgment, *Horizons, Inc. v. KEO Leasing Co.*, 681 P.2d 757, 758 (Okla. 1984); or it may be treated as one to modify or to vacate a final order or judgment under 12 O.S. §§ 1031 and 1031.1. If the motion is deemed to fall into the latter class, it will not extend the time to seek review of the final order or judgment to which it is directed.) (emphasis in original).

Section 990.2(A)¹⁰⁴ does not attempt to distinguish between motions for new trial and motions to vacate a judgment; instead, it provides for a ten day bright line rule. If a motion for new trial, a motion for a judgment n.o.v., or a motion to vacate a judgment (whether denominated as a motion to reconsider, alter, vacate, or amend a judgment) is filed not later than ten days after the filing of the judgment, then it will extend the time for appeal until the trial court's ruling on the motion.¹⁰⁵

An exception to the rule extending the time for appeal is made for motions to amend a judgment, decree, or final order to include the award of costs, attorney's fees, or interest that are ancillary to the judgment. A motion seeking any of these items will not extend the

101. OKLA. STAT. tit. 12, § 1031 (1991) provides in pertinent part:

The district court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter: First. By granting a new trial for the cause, within the time and in the manner prescribed in Section 653 of this title.

102. *Hall v. Edge*, 782 P.2d 122, 124 (Okla. 1989) ("A motion seeking vacation of a judgment which is filed within 10 days of the decision may be regarded as the functional equivalent of a motion for new trial."); *Horizons, Inc. v. KEO Leasing Co.*, 681 P.2d 757, 759 (Okla. 1984) ("Plaintiff's 'motion to vacate', filed below within 10 days of the judgment date, was properly treated as one for new trial.")

103. 727 P.2d 1361, 1362 n.1 (Okla. 1986). See also *Pierson v. Canupp*, 754 P.2d 548, 550 n.1 (Okla. 1988) (similar language).

104. 1993 Okla. Sess. Laws c. 351, § 19.

105. *Id.*

time for appeal.¹⁰⁶ Section 696.4(A)¹⁰⁷ provides that these items do not need to be included in a judgment, decree, or appealable order and that the preparation and filing of a judgment, decree, or appealable order is not to be delayed for their determination.¹⁰⁸ These items will have to be determined soon after a judgment, though, since section Section 696.4(B) requires an application for any of these items to be filed within 30 days after the filing of the judgment, decree, or appealable order.

The other side of the bright line rule is that a motion filed more than ten days after the filing of the judgment, decree, or final order will not extend the time for appeal. A motion for new trial or judgment n.o.v. filed more than ten days after the filing of a judgment, decree, or final order should be summarily denied as untimely. A motion to vacate filed more than ten days after the filing of a judgment may be timely and eventually it may result in the alteration of the judgment, but section 990.2(B)¹⁰⁹ makes clear that the motion will not extend the time for appeal. Instead, the appeal will go forward, while the trial court is ruling on the motion, and the parties have the obligation to inform the Oklahoma Supreme Court of the trial court's disposition of the motion.

G. *Savings Provisions for Premature Appeals*

The use of the date of filing as the beginning of the 30-day period for commencing an appeal creates a possibility that premature appeals may be filed.¹¹⁰ Premature appeals may also arise on account of the extension of the time for appeal resulting from the filing of post-trial motions. For example, appeals were dismissed as premature in *Timmons Oil Co., Inc. v. Norman*,¹¹¹ and *Delhi Gas Pipeline Corp. v. Mayhall*,¹¹² when a petition in error was filed before the filing of a

106. See generally Percival, *supra* note 11, at 154 (recommending amendment to Rule for Appellate Procedures in Civil Cases so "as to leave no question as to when a petition in error must be filed where the trial court has decided all issues except attorney fees.").

107. 1993 Okla. Sess. Laws c. 351, § 11.

108. In *Fleet v. Sanguine, Ltd.*, 854 P.2d 892, 899 & n.37 (Okla. 1993), the Oklahoma Supreme Court ruled that prejudgment interest differed from costs because it was a part of the judgment, while costs are merely ancillary to the judgment. The newly-added section 696.4 of title 12 supersedes the *Fleet* case.

109. 1993 Okla. Sess. Laws c. 351, § 19.

110. See *P & H Oil Field Serv., Inc.* 823 P.2d at 365 (holding that appeal was premature because the petition in error was filed prior to the filing of the order overruling a motion for new trial).

111. 794 P.2d 400 (Okla. 1990).

112. 546 P.2d 1019 (Okla. Ct. App. 1976).

motion for new trial, and a subsequent petition in error was not filed after the trial court denied the new trial motion. The Supreme Court and the Court of Appeals ruled in each case that the petition in error was ineffective because it was filed before the trial court's ruling on the new trial motion, and since no petition in error was filed within 30 days after the trial court's ruling, there was no appellate jurisdiction.

The savings provisions in section 990A(F)¹¹³ attempt to alleviate the problem of premature appeals by giving an appellant 30 days after being sent notice of the dismissal of an appeal as premature in which to file a new petition in error. Section 990A(F) also provides that an appellant may salvage a premature appeal before it is dismissed by filing a supplemental petition in error after the trial court rules on the post-trial motion. Allowing an appellant to file a new or supplemental petition in error so that a premature appeal can go forward causes no prejudice to an appellee, since even a prematurely filed petition in error gives adequate notice that an appeal is being sought.

H. *Effect of Judgments and Appeals Act on Pending Cases*

The original Judgments and Appeals Act had a transition provision stating that it "shall govern all judgments and appealable orders rendered on or after" its effective date.¹¹⁴ The latest Judgments and Appeals Act has no such provision. Nevertheless, the latest Judgments and Appeals Act ought to be applied to litigation pending on its effective date, because procedural changes are generally given immediate effect.¹¹⁵ In *Patmon v. Block*,¹¹⁶ a recent case that involved a question as to which law of appellate procedure applied, the Oklahoma Supreme Court ruled as follows: "A litigant's *right of appeal is governed by the law in effect when the appealable event takes place.*"¹¹⁷

Several of the issues that the Oklahoma Legislature resolved by adopting the latest Judgments and Appeals Act were also problems in

113. 1993 Okla. Sess. Laws c. 351, § 18.

114. 1990 Okla. Sess. Laws 910, 922; *In re Estate of Dalzell*, 813 P.2d 537 (Okla. Ct. App. 1991) (holding that the original Judgments and Appeals Act did not apply to a judgment rendered before its effective date).

115. See NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.09 (4th ed. 1986) ("Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases.").

116. 851 P.2d 539 (Okla. 1993).

117. *Id.* at 542. (emphasis in original).

the federal court system that are now being resolved by the amendments to the Federal Rules of Appellate Procedure. While the Judgments and Appeals Act and the amendments to the Federal Rules deal with a number of the same problems, the approaches taken to resolve them differ in interesting ways. The amendments to the Federal Rules are discussed below and compared to the revisions to Oklahoma appellate procedure made by the Judgments and Appeals Act.

IV. AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

A. *Effect of Post-Trial Motions on Appeal Time*

The time allowed in federal courts for filing a notice of appeal is 30 days from the entry of judgment,¹¹⁸ but this time is extended by the filing of various post-trial motions that are listed in Fed. R. App. P. 4(a)(4). Not all post-trial motions extend the time to appeal, however, and before the 1993 amendments to the Federal Rules of Appellate Procedure, it was not always clear which post-trial motions extended the time to appeal and which did not. By providing that motions for relief from judgment that are filed within ten days of the entry of judgment extend the time for appeal, the 1993 amendments have clarified the timing of appeals in federal court.

The Federal Rules of Civil Procedure authorize the filing of various post-trial motions (including motions for new trial,¹¹⁹ motions for judgment as a matter of law,¹²⁰ and motions for relief from judgment¹²¹) at different times following entry of a judgment. The original version of the Federal Rules that was adopted in 1938 did not address whether the pendency of a post-trial motion would affect the time for filing a notice of appeal.¹²² It was soon recognized in the federal cases, however, that the filing of some post-trial motions ought to suspend a judgment's finality because of the possibility that they would have a substantial effect on the underlying judgment.¹²³

118. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(A) (1988). *see also* FED. R. APP. P. 4(a)(1).

119. *See* FED. R. CIV. P. 59.

120. *See* FED. R. CIV. P. 50.

121. *See* FED. R. CIV. P. 60.

122. *See* FED. R. CIV. P. 73(a); 28 U.S.C. app. p. 2651 (1940).

123. *See* *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943) (filing of

In 1948, Fed. R. Civ. P. 73(a), the predecessor to today's Fed. R. App. P. 4(a), was amended to provide that the time to appeal was extended by the filing of the following categories of post-trial motions: motions for judgment under Fed. R. Civ. P. 50(b), motions to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), motions to alter or amend a judgment under Fed. R. Civ. P. 59, and motions for new trial under Fed. R. Civ. P. 59.¹²⁴

Fed. R. Civ. P. 73(a) was incorporated into Fed. R. App. P. 4(a) without substantial change when the Federal Rules of Appellate Procedure were adopted in 1968. Although a number of amendments to the Federal Rules of Appellate Procedure were made in 1979, the list of post-trial motions in Fed. R. App. P. 4(a) that extended the time for appeal was not altered until 1993.

Post-trial motions come in many varieties, and determining which post-trial motions fit into the categories listed in Fed. R. App. P. 4(a)(4) has occupied a number of federal appellate courts. One issue that has arisen is whether motions directed at items of ancillary relief, such as costs, attorney fees, or interest, were motions to alter or amend a judgment which under Fed. R. Civ. P. 59 would extend the time to appeal. In a line of cases, the United States Supreme Court has ruled that a motion seeking ancillary relief is not a motion to alter or amend a judgment for purposes of Fed. R. Civ. P. 59 if it is collateral to the judgment on the main claim,¹²⁵ but that it would constitute a judgment if directed at a part of the judgment on the merits.¹²⁶

The U.S. Supreme Court first distinguished a motion for ancillary relief from a motion to alter or amend a judgment in *White v. New Hampshire Department of Employment Security*.¹²⁷ Over four months after the entry of judgment pursuant to a consent decree, the plaintiff filed a motion for the award of attorney fees under the Civil Rights

motion to amend findings of fact "deprived the judgment of that finality which is essential to appealability"); *Gulf Ref. Co. v. Mark C. Walker & Son Co.*, 124 F.2d 420, 423 (6th Cir. 1942) (ruling that motion for new trial extended time for appeal), *cert. denied*, 316 U.S. 683 (1942); *Reliance Life Ins. Co. v. Burgess*, 112 F.2d 234, 240 (8th Cir. 1940) (holding that a motion for judgment n.o.v. extended time for appeal); *Neely v. Merchants Trust Co.*, 110 F.2d 525, 525 (3d Cir. 1940) (ruling that a motion to amend a judgment extended time for appeal).

124. FED. R. CIV. P. 73(a); 28 U.S.C. app. p. 6157 (1964).

125. See *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268-69 (1988) (holding that a motion for costs did not extend time to appeal); *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451 (1982) (ruling that a motion for award of attorney fees as costs was not a motion to alter or amend a judgment).

126. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 (1989) (ruling that a motion for an award of discretionary prejudgment interest was a motion to alter or amend the judgment).

127. 455 U.S. 445 (1982).

Attorney's Fees Awards Act of 1976. The trial court awarded the attorney fees, but the Court of Appeals reversed on the grounds that the motion was untimely, having been filed outside of the ten day time limit set in Fed. R. Civ. P. 59(e). The Supreme Court reversed, holding that Fed. R. Civ. P. 59(e) did not apply to an award of attorney fees under the civil rights statute, because the trial court's decision regarding the attorney fees was separate from its decision on the merits.¹²⁸ In explaining its holding the Supreme Court quoted the following language from a Fifth Circuit decision:¹²⁹ "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment."¹³⁰

The next case to reach the Supreme Court involving the characterization of a post-trial motion was *Buchanan v. Stanships, Inc.*¹³¹ *Buchanan* was concerned with whether an application for allowance of costs extended the time for filing a notice of appeal under Fed. R. App. P. 4(a)(4). One day after the entry of judgment of dismissal, the plaintiffs filed a notice of appeal. Two days later, the defendants filed their application for costs, which they styled as a "Motion to Alter or Amend Judgment." The plaintiffs did not file a second notice of appeal and as a result, the Court of Appeals dismissed the appeal on the ground that the motion for costs was a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e), which rendered the first notice of appeal void under Fed. R. App. P. 4(a)(4). Following its decision in *White*, the Supreme Court held that "a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply."¹³² The Court also determined that the style of the motion was not determinative of how it should be categorized for purposes of the timing of appeal. Despite the motion's label, the Supreme Court concluded that it was a motion for costs rather than a motion to alter or amend a judgment. Consequently, the notice of appeal was effective, and the Supreme Court reversed the dismissal of the appeal.

*Budinich v. Becton Dickinson & Co.*¹³³ was concerned with whether a decision on the merits was appealable while a motion for

128. *Id.* at 451-452.

129. *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980).

130. *White*, 455 U.S. at 452.

131. 485 U.S. 265 (1988).

132. *Id.* at 268-69.

133. 486 U.S. 196 (1988).

attorney fees remained pending before the trial court. After being awarded a verdict for a substantially smaller amount than he had sought in a diversity of citizenship case, the plaintiff moved for new trial and also filed a motion for attorney fees. The trial court denied the motion for new trial, ruled that the plaintiff was entitled to attorney fees under state law, and requested further briefing and documentation before awarding the fees. The plaintiff did not file his notice of appeal until after the trial court issued its final order with respect to the fees several months after the denial of the new trial motion. The Court of Appeals dismissed the appeal as to all issues other than the award of attorney fees on the ground that the plaintiff needed to have filed a notice of appeal within 30 days after the denial of the motion for new trial in order for the decision on the merits to be reviewed. Once again relying on *White*, the Supreme Court affirmed, holding that a motion for attorney fees was collateral to and separate from the decision on the merits, even if the award of attorney fees were based on state law.¹³⁴

The Supreme Court distinguished *White*, *Buchanan*, and *Budinich* in *Osterneck v. Ernst & Whinney*,¹³⁵ where it held that a motion for discretionary prejudgment interest extended the time for appeal because it was a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). After the entry of judgment on a verdict, the plaintiffs filed a motion for prejudgment interest, and while their motion was pending, they filed a notice of appeal. The Court of Appeals dismissed the appeal on the ground that the notice of appeal was ineffective because it was filed before the disposition of the plaintiffs' motion for prejudgment interest. In affirming, the United States Supreme Court ruled that prejudgment interest was an element of the plaintiffs' complete compensation and therefore, it differed from attorney fees, which were traditionally treated as a part of costs that were separate from the merits of the case. Accordingly, a motion for prejudgment interest involved a reconsideration of the merits of the judgment and thus was a motion to alter or amend a judgment that extended the time for appeal under Fed. R. App. P. 4(a)(4).¹³⁶

The 1993 amendments to the Federal Rules make only a minor modification to this line of cases. Under the 1993 amendment to Fed.

134. *Id.* at 200-202.

135. 489 U.S. 169 (1989).

136. *Id.* at 176 (“[W]e conclude that a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply.”).

R. Civ. P. 58, the trial court is authorized to order that a timely motion for attorney fees filed before a notice of appeal is filed will have the same effect on the timing of the appeal as a motion for new trial.¹³⁷ The Advisory Committee Notes to this amendment state that extending the time to appeal until after the determination of the motion for attorney fees may promote efficiency in some cases by permitting an appeal from the fee award to be taken up at the same time as the appeal from the merits.¹³⁸ In the absence of an order from the trial court, the *Budinich* decision will continue to be controlling authority so that a motion for attorney fees would not extend the time to appeal.

The other difficulty with categorizing motions for purposes of Fed. R. App. P. 4(a)(4) arises because of the overlapping grounds for motions for new trial or to alter or amend a judgment under Fed. R. Civ. P. 59 and motions for relief from judgment under Fed. R. Civ. P. 60. One distinction between a Rule 59 motion and a Rule 60 motion for relief from judgment is that a Rule 59 motion must be filed within ten days of the entry of judgment, while a motion for relief from judgment may be filed later.¹³⁹ However, a motion for relief from judgment filed within ten days of the entry of judgment is often indistinguishable from a motion for new trial and so a number of appellate courts have treated all motions filed within ten days of the entry of judgment that are directed to the correctness of the judgment as Rule 59 motions.¹⁴⁰ The 1993 amendments adopted this approach by adding a “motion for relief under Rule 60 if the motion is served within 10 days after the entry of judgment” to the list of motions in

137. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 480 (1993) (hereafter FRCP AMENDMENTS).

138. *Id.* at 705.

139. Compare FED. R. CIV. P. 59(b),(e) with FED. R. CIV. P. 60(b) (one year limitation for some categories of motions; no time limit for other categories).

140. See, e.g., *Skagerberg v. Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (“[R]egardless of how it is characterized, a post-judgment motion made within ten days of the entry of judgment that questions the correctness of a judgment is properly construed as a motion to alter or amend judgment under Fed.R.Civ.P. 59(e).”); *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 670 (5th Cir. 1986) (en banc) (“[W]e hold that any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4).”), cert. denied, 479 U.S. 930 (1986). See also *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 68 (1982) (Marshall, J., dissenting) (“[M]otions captioned under Rule 60(b), but filed within 10 days of judgment, are normally deemed Rule 59 motions.”).

Fed. R. App. P. 4(a)(4) that extend the time for appeal.¹⁴¹

As a result of the 1993 amendments to the Federal Rules of Appellate Procedure and the adoption of the latest Judgments and Appeals Act in Oklahoma, the provisions governing the effect of post-trial motions on the timing of appeals are fairly similar in the two court systems. Both systems have a ten day bright line rule separating motions that extend the time for appeal from those that do not.¹⁴² In addition, a motion involving costs will not extend the time for appeal in either the federal¹⁴³ or Oklahoma state courts.¹⁴⁴ There are differences between the two court systems, however, with respect to the effect of motions for attorney's fees and for interest on appeal time. In Oklahoma, a motion for either attorney's fees or interest will not affect the time for appeal.¹⁴⁵ In the federal courts, a motion for attorney fees will not affect the time for appeal¹⁴⁶ unless the trial court orders otherwise pursuant to Fed. R. Civ. P. 58,¹⁴⁷ but a motion for interest is treated as a motion to alter or amend a judgment for purposes of appeal time.¹⁴⁸

B. *The Elimination of Adverse Consequences From Premature Appeals*

The 1993 amendments to the Federal Rules of Appellate Procedure have also removed the severe penalty that Fed. R. App. P. 4(a)(4) has exacted for premature appeals since it was added in 1979. By allowing various post-trial appeals to extend the time to appeal, Fed. R. App. P. 4(a)(4) opens up the possibility of premature appeals being filed before disposition of the post-trial motions. The 1948 version of the Federal Rules¹⁴⁹ did not indicate whether a prematurely filed notice of appeal would be effective, but most cases that were decided under it gave effect to a prematurely filed notice of appeal, unless the prematurity of the notice of appeal had caused prejudice to

141. AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE, 147 F.R.D. 287, 297, 363 (1993) (hereafter FRAP AMENDMENTS).

142. *See id.* *See also* 1993 Okla. Sess. Laws c. 351, § 19.

143. *See Buchanan v. Stanships, Inc.*, 485 U.S. 265, 269 (1988).

144. *See* 1993 Okla. Sess. Laws c. 351, § 19(A).

145. *See* 1993 Okla. Sess. Laws c. 351, § 19(A).

146. *See Budinich*, 486 U.S. at 202.

147. FRAP AMENDMENTS, *supra* note 142 at 297 and 363-64; FRCP AMENDMENTS *supra* note 138 at 480.

148. *See Osterneck*, 489 U.S. at 176.

149. FED. R. Civ. P. 73(a); 28 U.S.C. app. p. 6157 (1964).

the appellee.¹⁵⁰ The 1979 amendments to Fed. R. App. P. 4(a) superseded the prior case law by stating that “[a] notice filed before the disposition of any of the [post-trial motions extending the time for appeal] shall have no effect.”¹⁵¹ Unfortunately, an appellant who files a premature appeal may not learn of the mistake until it is too late to file a timely notice of appeal.

In *Griggs v. Provident Consumer Discount Co.*,¹⁵² the United States Supreme Court held that the 1979 amendments to Fed. R. App. P. 4(a) resulted in the appellate courts’ losing jurisdiction over prematurely filed appeals. *Griggs* arose out of the refinancing of a consumer loan. The plaintiffs sued the lender seeking damages for violations of the Truth in Lending Act and Regulation Z of the Federal Reserve Board, and the lender counterclaimed for setoff of the loan it had made to the plaintiffs. The trial court granted the plaintiffs’ motion for summary judgment and awarded statutory damages of \$1,000 under the Truth in Lending Act to each plaintiff. After the trial court directed the entry of a final judgment with respect to the plaintiffs’ claim, the lender filed a motion to alter or amend the judgment, and while its motion was pending, also filed a notice of appeal. Four days after the filing of the notice of appeal, the trial court denied the lender’s motion to alter or amend the judgment. The Third Circuit allowed the appeal to proceed despite the prematurity of the notice of appeal, but the U.S. Supreme Court reversed. The Supreme Court held that the filing of the post-trial motion caused the appellate court to lose jurisdiction over the appeal, because the premature notice of appeal “was not merely defective, it was a nullity” so that it was “as if no notice of appeal were filed at all.”¹⁵³

Many appeals have been dismissed over the years on account of the procedural trap in Fed. R. App. P. 4(a)(4),¹⁵⁴ particularly those

150. See e.g., *Williams v. Town of Okoboji*, 599 F.2d 238, 239 (8th Cir. 1979) (“Although such premature appeals are subject to dismissal, . . . generally the appellant may proceed unless the appellee can show show prejudice resulting from the prematurity of the notice.”), *cert. denied*, 450 U.S. 925 (1981); *Stokes v. Peyton’s Inc.*, 508 F.2d 1287, 1288 (5th Cir. 1975) (denying motion to dismiss appeal in absence of prejudice to appellee on account of prematurity of notice of appeal). *But see Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 567 (10th Cir. 1979) (“A notice of appeal filed while . . . a [post-trial] motion is still pending in the trial court is prematurely filed and does not transfer jurisdiction to the court of appeals.”), *cert. dismissed*, 444 U.S. 987 (1979).

151. FED. R. APP. P. 4(a)(4), 28 U.S.C. app. p. 515 (1988).

152. 459 U.S. 56 (1982).

153. *Id.* at 61.

154. One indication of the problems that litigants have had with FED. R. APP. P. 4(a)(4) is the large number of appellate decisions that have dealt with it. Over 1,000 cases are generated by Westlaw in response to the keyword “4(a)(4).”

filed by *pro se* appellants.¹⁵⁵ To eliminate this trap, the 1993 amendments have made the prematurely filed notice of appeal automatically effective once the trial court rules on the post-trial motion.¹⁵⁶ The appellate court needs to be informed of the district court's ruling in order to know when the appeal is effective, and so Fed. R. App. P. 3(d) was also amended to require the clerk of the district court to mail a copy of any docket entry in the case after the filing of the notice of appeal to the Court of Appeals.¹⁵⁷ In some cases, the district court's ruling on a post-trial motion may substantially modify the judgment and cause the appeal to become moot. If this occurs, the appellant is likely not to pursue the appeal, and it will be dismissed for failure to meet the briefing schedule; alternatively, the appellee may move to strike the appeal. A party may also want to appeal from a district court's modification of a judgment, and this may be done by filing an amended notice of appeal within 30 days after the entry of the modified judgment.¹⁵⁸

The federal solution to the problem of premature appeals is possibly more elegant than the Oklahoma solution, which requires the appellant to file either a supplemental petition in error or a new petition in error after the trial court files its order deciding a post-trial motion.¹⁵⁹ However, the federal solution of having a premature appeal simply ripen into an effective appeal once a post-trial motion is decided requires the clerk of the trial court to mail copies of all docket entries subsequent to the notice of appeal to the appellate court clerk. Because the Oklahoma state court system lacks the level of clerical support that the federal system has, requiring Oklahoma court clerks to mail copies of docket entries to the Oklahoma Supreme Court probably is not feasible. In addition, it is not unreasonable to impose the burden of notifying the Oklahoma Supreme Court of the trial court's disposition of a post-trial motion on the appellant who was responsible for prematurely filing the petition in error.

C. *Filing of Appeals by Inmates*

Another change made by the 1993 amendments to the Federal

155. See *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985) ("[FED. R. APP. P. 4(a)(4)] is a trap for the unwary into which many appellants, especially those not represented by counsel . . . have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely.").

156. FRAP AMENDMENTS, *supra* note 142, at 297, 362-63.

157. *Id.* at 293, 348-49.

158. *Id.* at 298, 354-55.

159. See *supra* text accompanying notes 112-14.

Rules of Appellate Procedure is to codify the result in *Houston v. Lack*¹⁶⁰ that fixes the time of filing of a *pro se* appeal by a prisoner as the time of delivery to the prison authorities for forwarding to the court clerk.¹⁶¹ The Supreme Court noted in the *Houston* case the general rule that the district court's receipt of the notice of appeal is required within the 30-day time to appeal, and that an appellant's placing the notice of appeal in the mail is not sufficient.¹⁶² The Court pointed out that this general rule should not apply to a filing by a *pro se* prisoner, however, because a prisoner loses all control over a notice of appeal once it is delivered to the prison authorities. Besides codifying the result from the *Houston* case, Fed. R. App. P. 4(c) also specifies the timing for cross-appeals to run from the district court's receipt of a prisoner's notice of appeal.¹⁶³ As noted previously,¹⁶⁴ the Oklahoma Supreme Court also deems a *pro se* prisoner's petition in error to be filed when it is delivered to prisoner authorities.

D. Naming of Parties in the Notice of Appeal

An issue that has produced a surprising amount of litigation in the federal courts in recent years is the identification of the parties to an appeal in the notice of appeal. This litigation has arisen in response to the United States Supreme Court's decision in *Torres v. Oakland Scavenger Co.*¹⁶⁵ that the use of the phrase "*et al.*" in a notice of appeal was not sufficient to confer appellate jurisdiction over a party who was not otherwise identified in the notice of appeal.

The *Torres* case arose out of an employment discrimination case in which Jose Torres was one of 16 plaintiffs seeking to intervene. The trial court dismissed the complaint for failure to state a claim, but the Court of Appeals reversed and remanded for further proceedings. On remand, the trial court granted the defendant's motion for partial summary judgment as to Jose Torres, because his name did not appear in either the notice of appeal or the order of the Court of Appeals. The Supreme Court affirmed the dismissal, holding that the requirement in Fed. R. App. P. 3(c) that a notice of appeal "shall specify the party or parties taking the appeal" was jurisdictional, and that a failure to identify a party in an appeal constituted a failure of that party

160. 487 U.S. 266, 276 (1988).

161. See FRAP AMENDMENTS, *supra* note 142, at 301-02, 366.

162. *Houston*, 487 U.S. at 274.

163. See FRAP AMENDMENTS, *supra* note 142, at 302, 366.

164. See *supra* text accompanying notes 57-58.

165. 487 U.S. 312 (1988).

to appeal.¹⁶⁶ The Court also decided that the use of the phrase “*et al.*” in the notice of appeal did not satisfy the specificity requirement in Fed. R. App. P. 3(c), because it did not give fair notice of the specific individual who was seeking to appeal.

The *Torres* rule created a trap for unwary appellants because it differs from Fed. R. Civ. P. 10, which provides that for all pleadings filed in the district court other than the complaint “it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.” In order to prevent appellants from inadvertently losing their right to appeal, the Advisory Committee decided to amend Fed. R. App. P. 3(c) by authorizing the notice of appeal to indicate generally which parties are appealing without naming them individually.¹⁶⁷ To avoid uncertainty as to the identities of the appellants, an attorney filing a notice of appeal is required to file a representation statement that names each party whom the attorney represents on the appeal.¹⁶⁸ In contrast to the notice of appeal, the representation statement is not jurisdictional and therefore may be amended during the course of the appeal.¹⁶⁹

The Oklahoma Judgments and Appeals Act does not address whether the appellants must be specified individually in the petition in error. Generally, a petition in error may not be amended to add another appellant after the expiration of the time to appeal.¹⁷⁰ However, the Oklahoma Supreme Court allowed such an amendment in *Bane v. Anderson, Bryant & Co.*,¹⁷¹ where the additional appellant was represented by the attorney who represented an appellant who was listed in the petition in error, the attorney submitted an affidavit that all papers he filed in the appeal were on behalf of both appellants, and an order of the trial court included a reference to an appeal filed by both appellants. Because the holding in the *Bane* case will probably be limited to its particular circumstances, attorneys should be careful to name each appellant in the petition in error and not rely

166. *Id.* at 314-15.

167. See FRAP AMENDMENTS, *supra* note 142, at 291, 332-35, 347.

168. See AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE, FED. R. APP. P. 12(b), 147 F.R.D. 287, 307-08, 374-75 (1993).

169. *Id.* at 375.

170. *Ogle v. Ogle*, 517 P.2d 797, 799 (Okla. 1973) (“[Rule 1.17(a)] does not contemplate amendment to substitute appellants.”); *Davis v. Howard*, 803 P.2d 1172, 1174 (Okla. Ct. App. 1990) (quoting *Ogle*).

171. 786 P.2d 1230 (Okla. 1989).

on the general phrase “*et al.*” to confer appellate jurisdiction over persons who are not named in either the caption or text of a petition in error.¹⁷²

V. CONCLUSION

The 30-day deadline for appealing a judgment appears straightforward enough, but a number of uncertainties have perplexed appellants in both the federal and Oklahoma appellate systems. In the Oklahoma state courts, the time of rendition of a judgment was frequently ambiguous, it was not always clear whether a particular post-trial motion extended the time for appeal, and an appeal could be dismissed because the appellant inadvertently filed the petition in error prematurely. Federal appellate procedure was somewhat less uncertain, because the date of a judgment’s effectiveness was based on its date of entry in the judgment docket, rather than on its pronouncement by a judge. Nevertheless, federal appellate procedure had problems similar to those of Oklahoma appellate procedure with respect to determining which post-trial motions extended the time to appeal and the dismissal of premature appeals. By a remarkable coincidence, both Oklahoma and federal appellate procedures are being revised to correct problems that they had in common, albeit in somewhat different ways. It remains to be seen whether the revisions will be effective or will generate additional problems that the drafters did not envision.

172. J. Michael Medina, *Avoiding Procedural Traps in the Appellate Process: The Proper Care and Feeding of a Petition in Error*, 64 OKLA. B.J. 933, 934 (1993). Cf. *Vickers v. Boyd*, 836 P.2d 1269, 1270-71 (Okla. 1992) (ruling that misdesignation of appellants in caption was not fatal where correct appellant was identified in the text of the petition in error).

