

Taking a Toll: The Effect of Post-Judgment Motions on Appeal Deadlines

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Counsel contemplating an appeal often depend on the “tolling” effect of authorized post-judgment motions, which can extend an otherwise-applicable appeal deadline. In particular, in most federal civil cases, the appellant has 30 days from the rendition of the applicable final order or judgment in which to file its notice of appeal; see Federal Rule of Appellate Procedure 4(a)(1)(A), but Rule 4(a)(4)(A)(i)-(vi) also provides

that the following authorized post-judgment motions, if filed within 28 days of the entry of that final order or judgment, extend the time in which to appeal until 30 days from the date on which the district court rules on the last such remaining motion:

- a motion for judgment under Rule 50(b);
- a motion to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
- a motion for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- a motion to alter or amend the judgment under Rule 59;
- a motion for a new trial under Rule 59; or
- a motion for relief under Rule 60.

However, a recent Ninth Circuit decision, *U.S. ex rel. Hoggett v. University of Phoenix*, 863 F.3d 1105 (9th Cir. 2017), demonstrates that substance will likely control over form in this context. Specifically, merely calling a motion one seeking to “alter or amend the judgment” under Rule 59(e) when the motion does not actually seek that relief will mean that the motion might not extend the 30-day, jurisdictional appeal deadline under Rule 4(a). In *Hoggett*, a group of relators brought a *qui tam* False Claims Act suit against a private, for-profit university, alleging that the university, during a settlement

period in an earlier *qui tam* action, continued to knowingly submit false certifications and make false statements to the government that it was complying with a recruiter-incentive compensation ban. The district court dismissed for lack of subject-matter jurisdiction based on a later-amended public-disclosure bar, which had previously been interpreted as depriving federal courts of jurisdiction when the alleged fraud had been publically disclosed, unless the relator was an “original source.” The relators then filed a post-judgment motion captioned “Relators’ Motion, Pursuant to FRCP Rule 59(e), to Stay the Order Dismissing and Final Judgment, Pending Ninth Circuit Court of Appeals Decision” in a separate, but related *qui tam* appeal (*United States ex rel. Lee v. Corinthian Colleges*). The relators did not appeal the original dismissal order within 30 days of its entry. Instead, they believed that their Rule 59(e) motion “tolled” the time to appeal until 30 days after the district court ruled on that motion. They therefore appealed within 30 days after the denial of their Rule 59(e) motion. On appeal, the Ninth Circuit dismissed for lack of jurisdiction because the relators’ appeal was untimely. It did so because the Rule 59(e) motion to alter or amend judgment was, essentially, merely a motion to stay entry of judgment. Therefore, it did not toll the appeal time period. The post-judgment motion did not ask to substantively alter the district court’s decision, nor did it contend that the district court clearly erred, or present the district court with newly discovered evidence, or assert an intervening change in controlling law. Rather, the motion exclusively sought a stay until the court of appeals decided a then-pending appeal in another action. That is not the function of a Rule 59(e) motion. **Preservation Issue** When calculating an appeal deadline be doubly sure that any “tolling” post-judgment motion is, in fact, a “tolling” motion. It must not only be denominated as such, but must also fulfill a tolling motion’s true function. Substance will likely control over form. **Tip** If you are contemplating an appeal and have filed what you believe is a “tolling” post-judgment motion, but it is debatable whether the motion actually fits the bill, it is advisable to file a potentially early notice of appeal rather than risk that your post-judgment motion does not actually “toll” the otherwise-applicable, jurisdictional appeal deadline.

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