

Questions About Answers: Problems with Answers to Appeals and Protective Cross-Appeals Under Louisiana Procedure

By S. Mark Tatum



Under Louisiana civil procedure, an appellee who seeks to change a trial court's judgment may file either an answer to the appeal or a cross-appeal. However, an appellee can make a costly procedural error by filing an answer when a cross-appeal should have been filed. Another costly error can be made by an appellee who assumes that if he is satisfied with the trial court's judgment allocating fault, he does not need to file a cross-appeal or answer to protect his position against reallocation of fault on appeal. This article discusses problems with answers to appeals and protective cross-appeals,¹ explains how costly errors can be avoided, and suggests how the current law might be improved.

Traps for the Unwary

In *Foster v. Unopened Succession of Smith*,² the plaintiff was injured when he tripped on a pipe extending from under a curb; he filed suit against the landowner and the Department of Transportation and Development (DOTD) which had built the curb. The trial court apportioned fault 15 percent to the landowner, 70 percent to DOTD and 15 percent to the plaintiff. DOTD appealed, and both the plaintiff and the landowner filed answers. The appellate court reversed DOTD's fault and held that because neither the plaintiff nor the landowner cross-appealed, the plaintiff's 15 percent award against the landowner would not be disturbed. This holding follows the well-settled rule, based on the language of La. C.C.P. art. 2133, that an answer cannot be used to seek a change in any portion of the judgment rendered in favor of another appellee.³ Not knowing this important limitation on answers is one trap for the unwary.

At the same time, the scope of this limitation is complicated because Article 2133 does allow an appellee to use an answer to demand modification, revision or reversal of the judgment insofar as it did not allow or consider relief prayed for by an incidental action filed in the trial court; if an appellee files such an answer,

then all other parties to the incidental demand may file similar answers.⁴

Another trap awaits the unwary appellee who is satisfied with the trial court's allocation of fault among the parties and fails to cross-appeal to protect his position against reallocation of fault on appeal. Although the appellate court in *Foster, supra*, explained its refusal to reallocate fault by citing plaintiff's ineffective answer, no answer would have been necessary if DOTD's appeal of the fault allocated to it had brought the entire fault allocation up for review. As a general rule, however, even though a party appeals the portion of a judgment that is adverse to him, the judgment nevertheless becomes definitive as to portions of the judgment that are adverse to a party who has neither appealed nor properly answered.⁵ Application of this rule in fault allocation cases yields results like those in *Foster*.

This point is illustrated in *Nunez v. Commercial Union Ins. Co.*,⁶ where the Louisiana Supreme Court reversed the circuit court's allocation of 10 percent fault to defendant Hoffpauir, whom the jury had found to be without fault. Only the Louisiana Department of Public Safety and Corrections (DPSC), another of the three defendants, had appealed the trial court judgment holding DPSC 100 percent at fault and dismissing the other two defendants. The Supreme Court held that DPSC's appeal brought up on appeal only the portions of the judgment adverse to DPSC and in favor of the appellees; the appeal did not bring up the portion of the judgment adverse to plaintiffs. Thus, when the plaintiffs failed to appeal, the portion of the judgment dismissing Hoffpauir and the third defendant acquired the authority of the thing adjudged.

Avoiding Costly Errors

An appellee can easily avoid the problems associated with an answer by filing a cross-appeal. The advantages of a cross-appeal in multiparty litigation are significant; the advantages of an answer are few. One advantage of an answer is the difference (\$50-\$60)⁷ between the fee

for filing a cross-appeal and the fee for filing an answer. Another is the additional time to file an answer beyond the time allowed for a cross-appeal.⁸ A third is an answering appellee's freedom from payment of appellate record preparation costs.⁹ However, these advantages are somewhat dubious. The filing fee savings are trivial; the additional filing time is unnecessary; and, while the record preparation costs sometimes are significant, a cross-appealing appellee often escapes payment of those costs.¹⁰ Furthermore, all three advantages would be little consolation to a plaintiff/appellee who lost most or all of his trial court award by mistakenly filing an answer instead of a cross-appeal.

An appellee also can easily avoid the problem of failing to file a protective cross-appeal, but not if the appellee fails to recognize when such a cross-appeal is required. Consider a plaintiff who files a tort suit against several defendants jointly and prays for reasonable damages. Suppose a judgment for reasonable damages subsequently is rendered against the defendants jointly, and suppose the plaintiff is happy with both the amount of the award and the allocation of fault. Such a plaintiff might consider that he got the relief for which he prayed, might not consider the judgment as partially adverse to him, and might fail to recognize the problem posed by the appeal of a defendant.¹¹ Consider how unusual an appeal by such a plaintiff would be if, without any defendant having appealed, he sought only to have the defendants' percentages of fault reallocated.

Even though such a plaintiff is happy with the judgment, once a defendant has appealed, the plaintiff ordinarily should file a timely cross-appeal in order to protect his award. He should ask himself if, in the event the fault allocated to the appellant were reduced or reversed on appeal, he would still be happy with the fault allocated to the other defendants in the trial court judgment. Of course, the answer virtually always will be "no," indicating the plaintiff should cross-appeal.

Continued next page

Improving the Current Law

While the procedural traps discussed above can be avoided, they also can be eliminated. Both can deprive an appellee of the constitutional right of judicial review.¹² As explained below, their elimination would not be particularly difficult, and even though they are longstanding, they are not inherent in an effective system of appellate review.

Answers to appeals appear to be unique to Louisiana and date back to the Code of Practice.¹³ However, no particularly good reason exists for having both cross-appeals and answers to appeals, and the problems associated with answers arguably outweigh their dubious advantages. Answers to appeals could be eliminated.

Cross-appeals are a common feature of both Louisiana and federal civil procedure, and their complete elimination is not suggested here. However, the subset of protective cross-appeals could be eliminated so that a party satisfied with the allocation of fault would not have to appeal merely to request that any reallocation total 100 percent. Before considering how such protective cross-appeals could be done away with, it is interesting to consider why no cross-appeal requirement is necessary for effective appellate review.

From the perspective of legal theory, failure to file a timely devolutive appeal is a jurisdictional defect; neither the court of appeal nor any court has jurisdictional power and authority to reverse, revise or modify a final judgment after the time for filing a devolutive appeal has elapsed.¹⁴ Thus, when a devolutive appeal is not timely filed, the judgment acquires the authority of the thing adjudged.¹⁵ In an extension of this concept, an appeal by one party ordinarily does not stop the judgment from becoming definitive as to another party who has not appealed or properly answered.¹⁶ *Foster* and *Nunez*, *supra*, are examples. However, a system of appellate review does not have to incorporate this extension.

A system could be set up so that an appeal by any party would prevent the judgment from becoming definitive in any respect until the conclusion of the

appellate process, thus eliminating the need for cross-appeals. Consider that the federal courts, like Louisiana state courts, have a well understood general rule requiring a cross-appeal in order to modify a judgment; then consider what *Federal Practice and Procedure*,¹⁷ the highly respected treatise on federal jurisdiction and procedure, has to say about the rule:

As well understood as the general rule is, there is an astounding lack of reasoned explanation for the cross-appeal requirement. Some explanations are easy to imagine, but difficult to carry very far. One obvious concern is to foster repose, providing early notice to the parties of the extent to which a judgment will be challenged by appeal. The value of ensuring partial repose once at least one party has chosen to file a notice of appeal may be real, but it is difficult to suppose that much would be lost by a rule that permitted all parties to raise all arguments in the course of a timely appeal taken by any party. The minor nature of the loss is emphasized by reflecting on the equally obvious need to ensure that the appeal is prepared, briefed, and argued by the parties who are aware of all the issues to be met. There are better means of accomplishing notice of the issues to be raised than a relatively uninformative notice of cross-appeal. Even in cases in which cross-appeals are taken, indeed, notice of the issues is more effectively accomplished by later steps. The loss of repose that would result from deferring full identification of the issues to be raised on appeal would not be great, and would not endure long.¹⁸

Even though effective appellate review could be had without any cross-appeal requirement, Louisiana could eliminate the need for protective cross-appeals without eliminating the cross-appeal requirement altogether. One way would be to amend La. Civ.C. art. 2323(A), which currently provides that in cases of comparative fault

the court must determine the percentage of fault of all persons contributing to injury, death or loss, including nonparties and insolvent parties.¹⁹ Those provisions currently do not address reallocation of fault on appeal, but could be amended to state that if an appellate court finds the trial court's determination of the percentage of fault to be erroneous as to any person, then the appellate court must redetermine the percentage of fault of all responsible persons, even in the absence of a cross-appeal. Likewise, procedural provisions referencing Article 2323 could be enacted to state that no cross-appeal is necessary to obtain the redetermination of fault provided for in Article 2323.

The fundamental purpose of Louisiana's comparative fault scheme is to ensure that each tortfeasor is responsible only for that portion of the damage he has caused.²⁰ Thus, Louisiana's pure comparative fault system requires a trial court determination of the fault of all responsible persons. Logically, no less should be required of an appellate court that finds the trial court determination clearly wrong.

Conclusion

Under Louisiana's current law allowing both cross-appeals and answers to appeals, a procedural trap awaits the appellee who is unaware that an answer ordinarily will not allow him to seek relief against another appellee. Another trap awaits the appellee who is satisfied with the trial court's judgment, including apportionment of fault among the parties, and thus fails to cross-appeal to protect his position. Although both traps can be avoided by filing a timely cross-appeal, both also can be eliminated. The former can be eliminated by doing away with answers to appeals. The latter can be eliminated by amending Article 2323 to provide that if an appellate court finds the trial court's determination of the percentage of fault to be erroneous as to any person, then the appellate court must redetermine the percentage of fault of all responsible persons, even in the absence of a cross-appeal.

FOOTNOTES

1. The term “protective cross-appeal” as used in this article refers to a cross-appeal that is taken merely to protect a party in case of reapportionment of fault on appeal; it includes a cross-appeal from a judgment that finds no fault on the part of one or more parties.

2. 38,386 (La. App. 2 Cir. 5/20/04), 874 So.2d 400, writ denied, 2004-1547 (La. 11/8/04), 885 So.2d 1137.

3. La. C.C.P. art. 2133(A); Official Revision Comment (b) to La. C.C.P. art. 2087; Howard v. Insurance Co. of North America, 159 So.2d 560 (La. App. 3 Cir. 1964).

4. La. C.C.P. art. 2133(A).

5. See Justice Lemmon’s concurring opinion in Logan v. Louisiana Dock Co., Inc., 543 So.2d 1336 (La. 1989), fn. 2.

6. 2000-3062 (La. 2/16/01), 780 So.2d 348.

7. See the Fee Schedules of the Courts of Appeal, available at www.lacoa2.org by clicking on “Filing Fees.”

8. Compare La. C.C.P. art. 2133(A) and La. C.C.P. art. 2087(B).

9. See La. C.C.P. art. 2126 concerning payment of costs by the appellant.

10. If the first appeal is taken early in the appeal delay period, the first appellant may have already paid the record preparation costs before an appellee files a cross-appeal. Additionally, note that any

advantage an answering appellee might have over a cross-appealing appellee arguably is inequitable considering that under La. C.C.P. art. 2133(A) an answer is equivalent to an appeal on the appellee’s part from any portion of the judgment rendered against him in favor of the appellant.

11. The jurisprudence prohibits an appeal by a party in whose favor a judgment has been rendered in strict accordance with his prayer for relief. See Official Revision Comment (i) to La. C.C.P. art. 2085; State ex rel. Moore Planting Co. v. Howell, 139 La. 336, 71 So.529 (1916). This prohibition implies that a party who is satisfied with a judgment need not appeal; indeed, a party who is “perfectly satisfied” with a judgment (a judgment exactly as prayed for) cannot appeal. Likewise, La. C.C.P. art. 2082 defines an appeal as the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside or reversed by an appellate court; this definition implies that a party who seeks no change need not appeal.

12. La. Const. Art. 1, § 19.

13. See Official Revision Comment (a) to La. C.C.P. art. 2133.

14. Baton Rouge Bank & Trust Co. v. Coleman, 582 So.2d 191 (La. 1991).

15. Harper v. Eschenazi, 04-863 (La. App. 5 Cir. 12/28/04), 892 So.2d 671.

16. See *supra*, note 5.

17. Wright, Miller & Cooper, *Federal Practice & Procedure, Jurisdiction 2d* (2d ed. 1992).

18. *Id.*, § 3908 (2d ed. 1992) at 206.

19. La. Civ.C. art. 2323(A) provides in pertinent part:

In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person’s insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable.

20. Miller v. LAMMICO, 2007-1352 (La. 1/16/08), 973 So.2d 693.

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