

By Richard Lee Stavins

Voluntary Dismissals post-*Hartney v. Bevis*

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## **Appeal Dismissed: Can It Be Refiled?**



## Your client is an appellant in an appeal pending before the Appellate Court or the Supreme Court, and you receive an order or opinion dismissing your appeal, either in response to appellee's request that the court dismiss or on the court's own motion. Momentary panic sets in. Then perhaps you convince yourself there is no need to panic because this was really a dismissal for want of prosecution (DWP) and therefore you can refile the appeal within one year—or can you?

The right to refile an appeal was recently discussed in *Hartney v. Bevis*, 2018 IL App (2d) 170165, where the Appellate Court of Illinois articulated the rights of an appellant to refile a dismissed appeal. Surprisingly, until *Hartney*, there was very little law on the topic in Illinois. *Hartney* is now the definitive authority. Here are the rules:

The *voluntary* dismissal of an appeal has no preclusive effect whatsoever on a subsequent appeal involving the same issues. Every appellant has the right to voluntarily dismiss his or her appeal before a decision on the merits by the reviewing court. The appellant is then in the same position as before the appeal was filed. The appellant is free to perfect another appeal in any authorized manner. *Hartney*, ¶ 11. Whether that second appeal will be deemed timely will be determined without regard to the first appeal that was voluntarily dismissed.

What about an *involuntary* dismissal? The involuntary dismissal of an appeal where the defect is attributable to the appellant, whether on a technicality or otherwise, leaves the judgment of the lower court in full force as an estoppel. *Hartney*, ¶¶ 12-14. This would be where the appellant fails to properly conduct the appeal of an otherwise appealable order. Examples: appellant fails to provide an adequate record on appeal, or fails to file

an opening brief for appellant and the appeal is dismissed. The dismissal of the appeal has a preclusive effect on subsequent appeals.

Involuntary dismissal of an appeal where the defect is not attributable to the appellant will not have this effect, but the *Hartney* court does not specifically say what effect it will have. Presumably, the effect will be the same as a voluntary dismissal: no adverse consequence.

Sometimes the reviewing court will phrase its dismissal of an appeal as a DWP. In the circuit court a DWP is not an adjudication on the merits, because of the existence of the statute allowing for refiling within one year. 735 ILCS 5/13-217; *Flores v Dugan*, 91 Ill.2d 108, 114-15 (1982). But in a reviewing court there is no such statute. As a consequence, dismissal for failure to prosecute an appeal acts as a judgment on the merits and becomes *res judicata*, barring further direct appeal. There is no statutory right to refile the DWP of an appeal, and there is a duty imposed on an appellant to pursue his appeal once filed and not let it be dismissed. *Hartney*, ¶ 15.

Sometimes, the reason for dismissal of an appeal is that the appeal was premature, i.e. there was no appealable order and therefore no appellate jurisdiction. Such a dismissal is not a judgment on the merits, and thus a second appeal from the dismissal is not barred by *res judicata*.

*Hartney*, ¶ 12. The appeal may properly be pursued at such time as an appealable order is entered. This is in keeping with the principle that an involuntary dismissal for lack of jurisdiction is not deemed to be on the merits and therefore is not *res judicata*. S. Ct. Rule 273; *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 303 (1998).

The principles discussed in this article generally will arise only when the appellant attempts to bring before the reviewing court in a subsequent appeal the same issues as were raised in the prior appeal. Ascertaining whether the issues raised in the second appeal are the same issues as raised in the first appeal can be problematic, because by its nature the dismissal of the first appeal often occurs before appellant's brief was filed. In that scenario, the court in the second appeal will examine the notice of appeal and the docketing statement filed in the first appeal to determine what the issues were in that first appeal and compare those issues to the issues raised in the second appeal. *Hartney*, ¶ 16. ■

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