

Presented:
18th Annual Conference on State and Federal Appeals
May 29-30, 2008
Austin, Texas

**CROSS APPEALS, CROSS POINTS
AND OTHER STRATEGIES FOR APPELLEES**

Anne M. Johnson

Anne M. Johnson
Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, TX 75202-3789

www.haynesboone.com
anne.johnson@haynesboone.com
214-651-5378 – telephone
214-200-0487 – facsimile

ANNE M. JOHNSON
Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789

Telephone: (214) 651-5376
E-mail: anne.johnson@haynesboone.com

EMPLOYMENT

Partner, Haynes and Boone, LLP, Appellate Section (1995 – present)

BOARD CERTIFICATION

Board Certified - Civil Appellate Law - Texas Board of Legal Specialization (2002)

PROFESSIONAL ACTIVITIES

Council Member, State Bar of Texas Appellate Section (2006-09)

Dallas Bar Association – Appellate and Business Litigation Sections (1995- Present), Bar None Productions (1998-2000), Dallas Bar Foundation (2005- present)

EDUCATION

B.A., with honors, University of Pennsylvania, 1992

J.D., The University of Texas School of Law, 1995
Associate Editor, TEXAS INTERNATIONAL LAW JOURNAL, 1994-95
Teaching Quizmaster, 1994-95

REPRESENTATIVE PUBLICATIONS AND SPEECHES

“Jury Charges – The Minefield Approach” Austin Bar Association (2008)

“Arbitration – Still Speedy and Final?” Tarrant County Bar Association (2006)

“Gauging the Odds of Success on Appeal” State Bar Advanced Appellate Seminar (2006)

The 2003 Legislative Amendments to Prejudgment and Postjudgment Interest Law in Texas, 46 S. TEX. L. REV. 1191 (2005)

“Formation of the Judgment and Calculation of Interest” The University of Texas School of Law 14th Annual Conference on State and Federal Appeals (2004)

“Removal and Remand” State Bar 23rd Annual Advanced Civil Trial Course (2000)

TABLE OF CONTENTS

	PAGE
A. Cross Appeals Prior to 1997 Amendments to Texas Rules of Appellate Procedure	1
B. 1997 Amendments to Texas Rule of Appellate Procedure 25.1(c).....	3
C. What does it mean to “alter the trial court’s judgment?”	4
1. An appellee must file a notice of appeal in order to advance any argument seeking greater relief than that awarded by the trial court.....	4
2. An appellee need not file a notice of cross appeal to assert theories for affirmance that do not alter the trial court’s judgment and do not ask for greater relief than that granted by the trial court.....	6
3. An appellate court may consider an appellee’s request for more favorable relief, even in absence of notice of appeal, for “just cause.”	8
D. What is a “cross-point?”	8
E. Federal Law on Cross Appeals.....	9
1. A notice of cross appeal is necessary only when a party seeks to alter the district court’s judgment or seek additional relief.....	9
2. The circuits are split as to whether the requirement of a notice of cross-appeal is a rule of practice, which can be waived at the court's discretion, or a jurisdictional requirement.....	10
F. Safest Course – File a Notice of Cross Appeal	11

CROSS APPEALS AND CROSS POINTS

One of the most difficult issues facing an appellee at the outset of the appellate process is whether to perfect a cross-appeal. Even if an appellee is generally satisfied with the trial court's judgment, he must consider every possible way that he might seek to "alter the trial court's judgment" on appeal. Even worse, the appellee must make this determination just 14 days after the appellant's notice of appeal is filed, long before he sees the appellant's brief. This paper explores the state of the law in Texas state and federal courts regarding cross appeals, including the historical context of current Texas Rule of Appellate Procedure 25.1 (c).¹

A. Cross Appeals Prior to 1997 Amendments to Texas Rules of Appellate Procedure.

Prior to 1997, an appellant perfected an appeal by executing a cost bond. TEX. R. APP. P. 40. An appellee was required to perfect its own appeal in only two situations:

- (1) When the appellant had limited its appeal under former TEX. R. APP. P. 40(1)(4) and the appellee wanted to complain about error relating to some portion of the judgment that was not raised in the limited appeal, *Hernandez v. City of Fort Worth*, 617 S.W.2d 923, 924 (Tex. 1981);

or

- (2) In a multiparty appeal, when the appellee wanted to complain about error involving a party to the judgment who was not designated as an appellee in the appellant's cost bond. *Lone Star Ford v. McCormick*, 838 S.W.2d 734, 741 (Tex. App. -- Houston [1st Dist.] 1992, writ denied).

In all other situations, an appellee could complain about any error in the trial court's judgment simply by raising a cross-point; there was no need to perfect a separate appeal. *Hernandez*, 617 S.W.2d at 924; *Lone Star Ford*, 838 S.W.2d at 741-42. In fact, an appellee who was satisfied with the trial court's judgment, but who had alternative grounds for affirming the judgment in its favor, could wait and raise those issues for the first time in a motion for rehearing, if the appellate court had reversed the trial court's

¹ The author relies substantially on an excellent Note by Shelly J. White, *A Critique of Texas Rule of Appellate Procedure 25.1*, 57 BAYLOR L. REV. 937 (Fall 2005). Ms. White is currently an associate at the Houston law firm of Wright Brown a& Close, LLP.

judgment. *Oak Park Townhouses v. Brazosport Bank*, 851 S.W.2d 189, 190 (Tex. 1993); *Chesshir v. First State Bank*, 620 S.W.2d 101, 102 (Tex. 1981).

Hernandez v. City of Fort Worth, 617 S.W.2d 923 (Tex. 1981) illustrates the pre-1997 rules for perfection of appeal. In *Hernandez*, the park-ranger appellants won a damages award against the City of Fort Worth in the trial court. Only the city perfected an appeal. The park rangers, as appellees, included two cross-points in their brief challenging the trial court's failure to render judgment for all of the relief to which they were entitled and for which they pled. The appellate court overruled the park rangers' cross-points holding that an appellee could not gain additional relief merely by filing cross-points. The Texas Supreme Court disagreed. While the park rangers' writ of error was refused for want of harm, the court stated that the perfection of two separate and distinct appeals was unnecessary where the appellant had not strictly limited the scope of his appeal to a severable portion of the trial court's judgment. Thus, even though the park rangers sought to change the trial court's judgment in a manner more favorable to their cause, their assertions were permitted as cross-points rather than as an independent appeal from the lower court's decision. *See also Warren v. Triland Inv. Group*, 779 S.W.2d 808, 809 (Tex. 1989) (per curiam) (permitting seventeen cross points of error appealing the trial court's ruling on recovery of damages in an appellee's brief because the appellant had not filed a limited appeal).

There remained, however, significant confusion over the use of cross-points prior to 1997. In *Archuleta v. International Ins. Co.*, 667 S.W.2d 120, 123 (Tex. 1984), the Texas Supreme Court found that cross-points were not sufficient to preserve a point of error seeking a different or more favorable judgment in the absence of a notice of cross appeal. *See also Dallas Indep. Sch. Dist. v. Porter*, 759 S.W.2d 454, 457 (Tex. App.--Dallas 1988, writ denied), overruled by, *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634 (Tex. 1989); *Essex Crane Rental Corp. v. Striland Constr. Co.*, 753 S.W.2d 751, 758 (Tex. App.--Dallas 1988, writ denied), overruled by, *Donwerth*, 775 S.W.2d at 634; *Speed v. Eluma Int'l, Inc.*, 757 S.W.2d 794, 801 (Tex. App.--Dallas 1988, no writ), overruled by, *Donwerth*, 775 S.W.2d at 634.

In *Donwerth v. Preston II Chrysler-Dodge, Inc.*, Justice Ray addressed this confusion in his concurring opinion, writing of the need to “adopt a single, consistent procedure for perfection of appeals in Texas courts[,]” so that litigants may have their disputes “resolved on the merits” rather than on “unnecessary and arcane points” of procedure. 775 S.W.2d at 643. To that end, Justice Ray proposed two alternative solutions. Justice Ray's first proposal was to give the filing of a cost-bond by any party the effect of invoking the jurisdiction of the appellate court for the benefit of all parties. *Id.* at 644. This first recommendation was consistent with the practice in most appellate courts and would have made the practice uniform in all Texas courts. Justice Ray's second recommendation was to require any party seeking more or different relief from that provided by the trial court to perfect his own appeal. *Id.* Under this method, the appellee

could urge any ground in support of the trial court's judgment but could not complain of the judgment merely because some other party had already appealed. *Id.*

B. 1997 Amendments to Texas Rule of Appellate Procedure 25.1(c).

In 1997, the Texas Rules of Appellate Procedure were significantly amended, including new rules related to cross-appeals. Rule 25.1(c) now provides:

A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.

The Comment to the 1997 Amendment to Rule 25 provided, in pertinent part:

This is former Rule 40. In civil cases, the requirement of an appeal bond is repealed. A notice must be filed by any party seeking to alter the trial court's judgment.

Rule 26.1(d) set forth the time for perfecting a cross appeal in civil cases:

[I]f any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

The issues that have arisen under Rule 25.1(c) include:

- (1) What does it mean to “alter the trial court’s judgment?” Does a party that wins at trial still need to file a notice of cross appeal if it wishes to complain of any aspect of the judgment on appeal, even if it is not seeking “greater relief?”
- (2) In what situations, if any, are cross-points (without a notice of cross appeal) still viable?

These issues are addressed below.

C. What does it mean to “alter the trial court’s judgment?”

1. An appellee must file a notice of appeal in order to advance any argument seeking greater relief than that awarded by the trial court.

The following cases find that an appellee’s failure to file a notice of cross appeal waived their appellate complaints seeking greater relief than that awarded by the trial court:

- *Quimby v. Texas Dept. of Transp.*, 10 S.W.3d 778 (Tex. App. -- Austin 2000, pet. denied). Trial court denied plaintiff’s declaratory judgment claims against appellee DOT concerning interpretation of administrative rule governing DOT’s release of motor vehicles from vehicle storage facility. On appeal, DOT asserted that because the plaintiff’s suit was based on hypothetical facts, the trial court’s judgment was an advisory opinion. This argument was waived by DOT’s failure to file a notice of appeal.
- *Wal-Mart Stores v. Garza*, 27 S.W.3d 64 (Tex. App. – San Antonio 2000, pet. denied). Trial court entered judgment on jury’s verdict in favor of plaintiff on personal injury claims against Wal-Mart. On appeal, plaintiff asserted that the trial court should have granted JNOV finding a non-party employee negligent as a matter of law, claiming that “she only wants to use this result to support the judgment against Wal-Mart, not to pursue a claim against the employee.” Finding that it is “not bound by what [plaintiff] claims she will do with a revised judgment,” the court of appeals found plaintiff’s cross appeal waived because she did not file a notice of appeal.
- *Wagner & Brown, Ltd., v. Horwood*, 58 S.W.3d 732 (Tex. 2001). The trial court applied the four-year statute of limitations to all the plaintiffs' claims (including their unjust enrichment claims) and held that any claim accruing more than four years before suit (*i.e.*, before April 9, 1992) was time-barred. Although the defendants argued in the trial court that the two-year limitations statute should have applied (barring any claims accruing before April 9, 1994), the defendants did not file a notice of appeal. While the appeal was pending, the Texas Supreme Court issued an opinion in which it noted for the first time that a two-year statute governed unjust enrichment claims. When the defendants subsequently argued on appeal that the trial court should have applied the two-year statute to the plaintiffs' unjust enrichment claims (with the effect being that *more* of the plaintiffs' claims would have been time-barred), the Texas Supreme Court held that the defendants

waived their contention under Rule 25.1(c), requiring a “party who seeks to *alter the trial court's judgment*” to file a notice of appeal.

- *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004). Trial court granted summary judgment in favor of plaintiff/appellee, a homeowner’s association, on its declaratory judgment claims against lot owners. The summary judgment declared that the appellee could raise the assessments on certain lots and could charge late fees without a vote of the homeowners. On appeal, the appellee sought an alternative holding that its authority to increase assessments was also premised on its ability to amend the bylaws. In seeking this alternative holding, appellee challenged the portion of the trial court’s judgment providing that “the bylaws may only be amended by the members.” This challenge was waived by appellee’s failure to file a notice of appeal.
- *City of Houston v. Boyle*, 148 S.W.3d 171 (Tex. App. -- -Houston [1st Dist.] 2004, no pet.). The City of Houston appealed the trial court's denial of its pleas to the jurisdiction. Boyle did not file his own notice of appeal, but included within his brief, four cross-points, two of which were the basis of dispute. In his first cross-point, Boyle challenged the conclusion of the trial court that it lacked jurisdiction to address his claims of inverse condemnation. *Id.* In his second cross-point, Boyle attempted to raise a threshold challenge based on the city's failure to verify the pleas to the jurisdiction. The Court of Appeals refused to consider these cross-points because Boyle sought to alter the rulings of the trial court. The Court reasoned that the first cross-point, if granted, would result in the trial court retaining Boyle's inverse condemnation claim rather than deferring to the Harris County Civil Courts of law. In regards to the second cross-point, the Court held that if granted, it would have altered the ruling because the trial court would have then decided the issue. The Court stated that because both of these cross-points sought more favorable relief than granted by the trial court, and because Boyle had not perfected his own appeal on these issues, the Court of Appeals lacked jurisdiction to consider either cross-point.
- *Richardson v. State Farm Lloyds Ins.*, 2007 Tex. App. LEXIS 2631 (Tex. App. – Fort Worth 2007, pet filed). The trial court granted appellee’s plea to the jurisdiction and dismissed all claims against appellee for lack of subject matter jurisdiction. The trial court did not rule on the merits of appellee’s summary judgment motion but rather dismissed it as moot. On appeal, appellee requested in the alternative that the appellate court render summary judgment in favor of appellee on the ground that it does not have a duty to defend or indemnify appellant. The court of appeals affirmed the trial court’s judgment, but denied the appellee’s request to grant summary judgment under Rule 25.1(c).

- *City of Waco v. Kelley*, 226 S.W.3d 672 (Tex. App. – Waco 2007, pet granted). Trial court affirmed the decision of a hearing examiner that (1) reduced appellee assistant chief of police’s indefinite suspension, (2) reinstated the chief at rank of sergeant, and (3) awarded the chief fees. The chief/appellee argued on appeal that the trial court erred by denying his appeal of the hearing examiner’s refusal to dismiss the indefinite suspension. This complaint was waived by his failure to file a notice of appeal.
- *Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd.*, 225 S.W.3d 721, 733-34 (Tex. App. – Dallas 2007, pet dism’d w.o.j.) . Trial court rendered a take-nothing judgment in favor of appellee. Appellee asserted on appeal that the trial court erred in no imposing a \$10,000 sanction against appellants. The complaint was waived by appellee’s failure to file a notice of appeal.

There is, of course, an important exception to the general rule that a notice of cross appeal is required for an appellee to seek greater relief on appeal: jurisdictional challenges. Challenges to a court’s jurisdiction cannot be waived and may be raised at any time. *See Shaw v. Shaw*, 2008 Tex. App. LEXIS 3417 (Tex. App. – Fort Worth 2008, n.p.h.) (considering appellee’s “cross-points” that the appellant’s notice of appeal was untimely and failed to vest the appellate court with jurisdiction despite lack of notice of appeal).

2. An appellee need not file a notice of cross appeal to assert theories for affirmance that do not alter the trial court’s judgment and do not ask for greater relief than that granted by the trial court.

The following cases find that the appellee was not required to file a notice of cross appeal to assert alternative, independent grounds for affirmance:

- *First Gen. Realty Corp. v. Maryland Cas. Co.*, 981 S.W.2d 495 (Tex. App. -- Austin 1998, pet. denied), the court of appeals affirmed the judgment in favor of the appellees, who had raised two alternative, independent grounds for affirmance. Because the court had ruled against the appellants on all grounds they raised, it declined to address the appellees’ cross-points. However, in dicta, the court stated, “Appellees correctly note that because their arguments do not ask for greater relief than that granted by the trial court, they were not required to file a notice of appeal as a prerequisite to presenting these arguments.”
- *Dean v. Lafayette Place (Sec. 1) Council of Co-Owners, Inc.*, 999 S.W.2d 814 (Tex. App. -- Houston [1st Dist.] 1999, no pet.). In *Dean*, the issues centered around a dispute between the co-owners of condominiums and an amendment to the Condominium Declaration. The trial court ruled in favor

of the Council members that an amendment to the Declaration had been ratified by all parties, and that the individual owners take nothing. Dean and the other individuals appealed the ruling, and the Council offered as an alternative theory for affirming the ruling through a cross-point, that the Declaration and its amendments were binding, in and of themselves, and did not depend on the ratification of the Declaration. The Court held that because the Council was not asking for greater relief than it had been awarded, and was only offering another ground for affirming the judgment, the Council did not need to file a separate notice of appeal to have the Court consider their cross-point.

- *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 838 (Tex. App. – Houston [1st Dist.] 1999, no pet.) Defendant Pennzoil obtained a "no evidence" summary judgment on Flameout's breach of contract claims. Flameout appealed the grant of summary judgment and Pennzoil raised two cross-points: (1) the trial court should have sustained its objections to Flameout's summary judgment evidence and (2) the appellate court lacked jurisdiction to hear the case. The court held that because Pennzoil did not ask for greater relief than that granted by the trial court (a take-nothing summary judgment), it was not required to file a notice of appeal as prerequisite to presenting its points of error.
- *Bosque Asset Corp. v. Greenberg*, 19 S.W.3d 514 (Tex. App. -- Eastland 2000, pet denied). Appellant challenged an order granting a no-evidence summary judgment in favor of appellee. Appellee did not file his own notice of appeal, but asserted in his brief that the summary judgment should be affirmed on the no- evidence grounds, and argued alternatively in a cross-point that the summary judgment should have been granted on the basis of the applicable statute of limitations. The Court held that it could consider the appellee's cross-point, because it was not asking for more favorable relief than it received in the trial court. The trial court had granted a no-evidence summary judgment for the appellee, and the appellee was only offering another argument to affirm the trial court's grant of summary judgment, they were not seeking to alter its ruling.
- *Helton and Helton Prop. v. R.R. Commn of Texas and T-Union Dev. Corp.*, 126 S.W.3d 111, 119-20 (Tex. App. – Houston [1st Dist.] 2003, pet. denied). The First Court of Appeals held that the appellees were not required to file a separate notice of appeal to introduce alternative grounds for affirming the judgment of the trial court when the judgment did not specify the grounds on which it based its opinion, and appellees asked through cross-point that the ruling be affirmed due to insufficient service.

- *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 574 (Tex. App. -- Austin 2007, pet. denied) The Austin Court of Appeals held that it could consider appellee's cross- point asking for affirmance of the trial court's judgment based on the lack of evidence of actual malice, because appellees, who had received a take nothing judgment from the trial court, were not asking for greater relief than what was previously granted.

3. An appellate court may consider an appellee's request for more favorable relief, even in absence of notice of appeal, for "just cause."

Few Texas appellate courts have addressed the "just cause" exception to Rule 25.1(c). However, the Dallas Court of Appeals recently concluded that "just cause" existed to vacate an attorneys' fee award to the appellant, as the award as a sanction was without reference to any guiding rules and principles. *Darya, Inc. v. Christian*, 2008 WL 1838062 (Tex.App.-Dallas 2008, n.p.h.); *see also Byrd v. Estate of Nelms*, 154 S.W.3d 149 (Tex. App. – Waco 2004, pet. denied) (appellate court used its discretion to consider a cross-point where appellee filed a notice of appeal but raised the cross point in his appellee's brief rather than in a separate appellant's brief).

D. What is a "cross-point?"

Cross-points were used historically to request alternate, but inferior relief, in the event the trial court's judgment was set aside. Under Rule 38.2, the term "cross-point" has a specific meaning and a specific application. Rule 38.2(b) states:

- (1) Judgment Notwithstanding the Verdict. When the trial court renders judgment notwithstanding the verdict on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint. Included in this requirement is a point that:
 - (A) the verdict or one or more jury findings have insufficient evidentiary support or are against the overwhelming preponderance of the evidence as a matter of fact; or
 - (B) the verdict should be set aside because of improper argument of counsel.

- (2) When Evidentiary Hearing Needed. The appellate court must remand a case to the trial court to take evidence if:
 - (A) the appellate court has sustained a point raised by the appellant; and
 - (B) the appellee raised a cross-point that requires the taking of additional evidence.

Rule 38.2 clearly applies where the trial court's judgment notwithstanding the verdict is appealed. Beyond this rule, it is unclear whether cross-points continue to be viable in Texas appellate courts. *See Shaw v. Shaw*, 2008 Tex. App. LEXIS 3417 (Tex. App. – Fort Worth 2008, n.p.h.) (“We note that Frank attempts to raise this issue in a cross-appeal by means of cross-points, *which no longer exist* . . .”) (emphasis added).

E. Federal Law on Cross Appeals.

- 1. A notice of cross appeal is necessary only when a party seeks to alter the district court’s judgment or seek additional relief.**

“An appellee who does not desire a change in the decree appealed from is not required to cross-appeal in order to preserve his optional right to urge errors in a district court's ruling that would, if accepted by the appellate court, support an affirmance of the decree appealed from.” *See Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1101 (5th Cir. 1983); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156 n. 6, 25 L.Ed.2d 491 (1970); *Morley Construction Company v. Maryland Casualty Co.*, 300 U.S. 185, 191-92, 57 S.Ct. 325, 328, 81 L.Ed. 593 (1937); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36, 44 S.Ct. 560, 564, 68 L.Ed. 1087 (1924); *Subway Equip. Leasing Corp. v. Sims*, 994 F.2d 210,214 (5th Cir. 1993).). The Fifth Circuit has deemed a cross-appeal filed under such circumstances as being "worse than unnecessary." *Subway*, 994 F.2d at 214.

The Fifth Circuit has made clear when finding waiver of cross appeals that the appellee sought to alter the district court's judgment or sought additional relief. *See, e.g., Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996) ("Because Kelly did not file a notice of appeal or cross-appeal, however, we lack jurisdiction *to alter the district court's judgment* in her favor.") (emphasis added); *Richardson v. Byrd*, 709 F.2d 1016, 1024 (5th Cir. 1983) ("Absent a timely cross-appeal, [appellee] Gassner's *request for additional relief* is not before us.") (emphasis added).

2. The circuits are split as to whether the requirement of a notice of cross-appeal is a rule of practice, which can be waived at the court's discretion, or a jurisdictional requirement.

The Second, Fourth, Ninth and D.C. Circuit have held that a notice of cross-appeal is non-jurisdictional, based on the notion that the filing of the initial notice of appeal invokes the court's jurisdiction over the parties and the case and that, once this jurisdiction has been invoked, the court has the authority to fully adjudicate the appeal before it. The Ninth Circuit has stated:

Although an initial notice of appeal is mandatory and jurisdictional, a protective or cross-appeal is only the “proper procedure,” not a jurisdictional prerequisite once an initial appeal has been filed.... It has long been recognized that an appellate court has broad power to make such dispositions as justice requires.

Bryant v. Technical Research Co., 654 F.2d 1337, 1341-42 (9th Cir. 1981) (citations omitted). See also *Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 596 (9th Cir. 1993) (reaffirming and relying on *Bryant*'s rule). See *Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 33 (D.C.Cir.1990); *LaFaut v. Smith*, 834 F.2d 389, 394 n. 9 (4th Cir. 1987).

The First, Third, Sixth, Seventh, and Tenth Circuits have reached the opposite conclusion, holding that a notice of cross appeal is a jurisdictional prerequisite. See *Johnson v. Teamsters Local 559*, 102 F.3d 21, 29 (1st Cir. 1996); *E.F. Operating Corp.*, 993 F.2d at 1049 n. 1; *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993); *Rollins v. Metro. Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir. 1990); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887 (10th Cir.1984).

The Fifth Circuit Court of Appeals addressed this split of authority in detail in *Marte v. Hines*, 117 F.3d 1504 (5th Cir. 1997) (J. Garwood dissenting). The Fifth Circuit itself is divided as to whether a cross appeal is a jurisdictional requirement or a rule of practice that can be waived under certain circumstances. The dissent in *Marte* provides an extensive list of Fifth Circuit opinions on both sides of the issue. 117 F.3d at 1508-09. The Third and Eighth also split among themselves as to whether the requirement is jurisdictional or a rule of practice. See, *E.F. Operating Corp. v. American Buildings*, 993 F.2d 1046, 1049 & n. 1 (3rd Cir.), cert. denied, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed. 151 (1993) and *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985)(cross appeal jurisdiction); Compare, *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3rd Cir. 1991) and *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977) (cross appeal non-jurisdictional).

The Supreme Court granted certiorari to resolve the circuit split over whether the 14-day deadline is "mandatory and jurisdictional" or a discretionary rule of practice. *Zapata Indus. v. W.R. Grace & Co.-Conn.*, 34 Fed. Appx. 688 (Fed. Cir. 2002), *cert. granted.*, 123 S.Ct. 31, 536 U.S. 990, 153 L.Ed.2d 893 (2002). However, the parties settled, and the case was dismissed before the Court could issue an opinion.

F. Safest Course – File a Notice of Appeal.

Consider a Notice of Cross-Appeal with the following language:

Plaintiff filed a Notice of Appeal on May 29, 2008, giving notice of his intent to appeal the Final Judgment signed by the 124th Judicial District Court of Dallas County to the Dallas Court of Appeals. Defendant hereby states his intent to challenge on appeal any ruling adverse to Defendant that is contained in or subsumed by the Final Judgment or that is material to any issue raised or relief sought by Plaintiffs on appeal.

It seems likely, particularly given the Texas Supreme Court's recent in opinion in *Warwick Towers Council of Co-Owners ex rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P.*, 244 S.W.3d 838 (Tex. 2008), that such language would be considered a bona fide attempt to invoke appellate court jurisdiction. In *Warwick*, the Texas Supreme Court stated:

When perfecting the appeal, we have repeatedly said “that the factor which determines whether jurisdiction has been conferred on the appellate court is not the form or substance of the bond, certificate or affidavit, but whether the instrument ‘was filed in a bona fide attempt to invoke appellate court jurisdiction.’ ” *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 581 (Tex. 1989) (quoting *United Ass'n of Journeymen & Apprentices v. Borden*, 160 Tex. 203, 328 S.W.2d 739, 741 (Tex. 1959)); *see also Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994) (per curiam) (court of appeals has jurisdiction over appeal if party files instrument in bona fide attempt to invoke appellate court's jurisdiction); *Grand Prairie Indep. Sch. Dist. v. S. Parts Imp., Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) (per curiam) (same); *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570 (Tex. 1975) (same). We have further said that, “[i]f the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument required by law or our Rules to perfect the appeal.” *Grand Prairie Indep. Sch. Dist.*, 813 S.W.2d at 500. Our consistent policy has been to apply rules of procedure liberally to reach the merits of the appeal whenever possible. *See, e.g., Verburgt v. Dorner*, 959 S.W.2d 615, 616-17 (Tex. 1997); *Jamar*

v. Patterson, 868 S.W.2d 318, 319 (Tex. 1993) (per curiam); *Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 121-22 (Tex. 1991) (per curiam).

Warwick, 244 S.W.3d 838.