A PREVAILING PARTY CAN STILL BE A "SORE" WINNER ON APPEAL UNDER CPLR 5501(A)(1); RAISING ALTERNATIVE ARGUMENTS THAT NECESSARILY AFFECT THE FINAL JUDGMENT TO ENSURE WINNING ON APPEAL

*Joseph F. Castiglione**

There's an old sporting adage in competition that says, basically, don't be a "sore loser"; however, there is no such advice for winners. This appears to hold true in New York civil litigation. After a losing party has just expended a significant amount of time, effort, and money in litigating and losing before a lower court, the prevailing party can force its adversary to address not only the substantive arguments concerning the underlying judgment they just lost, but can further assail the losing party with a multitude of alternate issues that "necessarily affect" the final judgment; and matters that "necessarily affect" the judgment can be completely different grounds to affirm the final judgment on appeal.[1] Rather than making losing any less distressing, New York's Civil Practice Law and Rules ("CPLR") empower a winning party to relitigate any number of issues that were initially decided in favor of the losing party below, to ensure that its final victory stands on appeal.

There's a broad scope of issues that a prevailing party can raise on its adversary's appeal from final judgment in New York civil litigation. This article discusses the necessary "aggrievement" for a winning party to be entitled to raise issues on appeal generally, as well as the circumstances in which a prevailing party can assert alleged errors below that "necessarily affect" the final judgment—beyond the issues involved in the final judgment itself—as alternative grounds to prevail on appeal under CPLR 5501.

* The author, Joseph F. Castiglione, Esq. (jcastiglione@youngsommer.com), is a Senior Litigation Associate with the law firm Young, Sommer, Ward, Ritzenberg, Baker & Moore LLC, in Albany, New York (http://www.youngsommer.com), and is a graduate of Albany Law School. The author primarily practices in commercial, land use, environmental and municipal litigation, and appellate practice.

[1] N.Y. C.P.L.R. 5501(a)(1) (McKinney 1995).

I. "AGGRIEVED" UNDER CPLR 5511

A. The Requirement of Being "Aggrieved" to Appeal

CPLR 5501 addresses the scope of appellate review on appeals from final judgments in civil judicial proceedings for the Appellate Divisions of the Supreme Court, their Appellate Terms, and the New York State Court of Appeals.[2] The appellate authority in CPLR 5501 extends to a litany of issues on appeal from a final judgment, including, inter alia: remarks made by a "judge to which the appellant objected"; "any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken"; "any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant"; and, relevant here, "any non-final judgment or order which necessarily affects the final judgment."[3] However, before a party can generally invoke the review under CPLR 5501, the party must be considered properly "aggrieved."

The CPLR states that only "[a]n aggrieved party or a person substituted for him may appeal from any appealable judgment or order."[4] There is no definition provided for the word "aggrieved" in CPLR 5511. Rather, "[w]hen the revisers of the laws on civil practice were in the process of creating the CPLR, they were unable to formulate a definition for the word 'aggrievement' and they determined to leave that definition to case law."[5] The Court of Appeals helped fill that void in *Parochial Bus System, Inc. v. Board of Education of New York*.[6] The Court in *Parochial Bus* explained that, "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal."[7] This is because "the successful party has obtained the full relief sought," and therefore "he has no grounds for appeal or cross appeal."[8]

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[2] *See* N.Y. C.P.L.R. 5501 (McKinney 1995); *see also* N.Y. C.P.L.R. 5601 (McKinney 1995) (addressing "[a]ppeals to the court of appeals as of right"); N.Y. C.P.L.R. 5701 (McKinney 1995) (addressing "[a]ppeals to the appellate division from supreme and county courts").

[3] *See* N.Y. C.P.L.R. 5501(a)(1)–(4).

[4] N.Y. C.P.L.R. 5511 (McKinney 1995).

[5] Mixon v. TBV, Inc., 76 A.D.3d 144, 147, 904 N.Y.S.2d 132, 135, No. 00521, slip op. at 1 (App. Div. 2d Dep't June 22, 2010) (citing N.Y. C.P.L.R. 5511 (Legislative Studies and Reports)).

[6] Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y., 60 N.Y.2d 539, 458 N.E.2d 1241, 470 N.Y.S.2d 564 (1983).

[7] *Id.* at 544, 458 N.E.2d at 1243, 470 N.Y.S.2d at 566 (citations omitted).

[8] *Id.* at 545, 458 N.E.2d at 1243, 470 N.Y.S.2d at 566 (citing Bayswater Health Related

Although a party that has obtained its requested relief cannot generally appeal under CPLR 5511, "[t]his rule is not inflexible."[9]

A "successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief."[10] The courts have identified "prejudice" or incomplete relief as including: "situations in which the successful party received an award less favorable than he sought or a judgment which denied him some affirmative claim or substantial right";[11] and where "a specific finding at trial might prejudice a party in a future proceeding by way of collateral estoppel";[12] or when a party is not granted the primary relief requested, but is still granted relief requested in the alternative.[13] If "the successful party has obtained the full relief sought," that party is not considered aggrieved, even though the "party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor, or where he failed to prevail on all the issues that had been raised."[14]

Facility v. Karagheuzoff, 37 N.Y.2d 408, 413, 335 N.E.2d 282, 284, 373 N.Y.S.2d 49, 51 (1975)); *see also* Lincoln v. Austic, 60 A.D.2d 487, 490, 401 N.Y.S.2d 1020, 1021 (App. Div. 3d Dep't 1978) (stating "[g]enerally . . . a party who has been successful below may not appeal a judgment in his favor") (citation omitted); *see also* Vill. of Croton-on-Hudson v. Ne. Interchange Ry., LLC, 46 A.D.3d 546, 548, 846 N.Y.S.2d 606, 609 (App. Div. 2d Dep't 2007) (stating that "[a] party that has been granted the relief it sought on a motion is not aggrieved by the order granting relief, even if the order contains language that the party considers to be objectionable") (citations omitted).

[9] *Lincoln*, 60 A.D.2d at 490, 401 N.Y.S.2d at 1021.

[10] *Parochial Bus*, 60 N.Y.2d at 544–45, 458 N.E.2d at 1243, 407 N.Y.S.2d at 566.

[11] *Id.* at 545, 458 N.E. at 1243, 470 N.Y.S.2d at 566 (citing Norton & Siegel v. Nolan, 276 N.Y. 392, 12 N.E.2d 517 (1938); City of Rye v. Pub. Serv. Mut. Ins. Co., 34 N.Y.2d 470, 315 N.E.2d 458, 358 N.Y.S.2d 391 (1974)).

[12] *Lincoln*, 60 A.D.2d at 490, 401 N.Y.S.2d at 1021.

[13] Scharlack v. Richmond Mem'l Hosp., 127 A.D.2d 580, 581, 511 N.Y.S.2d 3080, 381 (App. Div. 2d Dep't 1987).

[14] *Parochial Bus*, 60 N.Y.2d at 545, 458 N.E.2d at 1243, 470 N.Y.S.2d at 566 (1983) (citing Bayswater Health Related Facility v. Karagheuzoff, 37 N.Y.2d 408, 413, 335 N.E.2d 282, 284, 373 N.Y.S.2d 49, 51 (1975); *In re* Zaiac's Will, 279 N.Y.2d 545, 554, 18 N.E.2d 848, 85 (1939); Kaplan v. Rohan, 7 N.Y.2d 884, 884, 165 N.E.2d 197, 197 (1959)); *see also* Mareno v. Univ. of the State of N.Y. Agric. & Tech. Coll. at Farmingdale, 101 A.D.2d 828, 829, 475 N.Y.S.2d 485, 487 (App. Div. 2d Dep't 1984) (holding defendants were not aggrieved "even though defendants disagree with particular findings made in decision supporting the order in its favor"); Vill. of Croton-on-Hudson v. Ne. Interchange Ry., LLC, 46 A.D.3d 546, 548, 846 N.Y.S.2d 606, 609 (App. Div. 2d Dep't 2007) (holding that the successful party was not aggrieved "even if the order contains language that the party considers to be objectionable"); *Parochial Bus*, 60 N.Y.2d at 545 n.1, 458 N.E.2d at 1243 n.1, 470 N.Y.S.2d at 566 n.1 (noting that a party is not aggrieved even by an "order of the Appellate Division [that] 'directs a modification in a substantial respect,' . . . unless it is actually 'aggrieved' by that modification") (quoting N.Y. C.P.L.R. 5601(a)(iii) (McKinney 1963) (current version at N.Y. C.P.L.R. 5601 (2010)); Mize v. State Div. of Human Rights, 31 N.Y.2d 1032, 1034, 294 N.E.2d 851, 851, 342 N.Y.S.2d 65, 65 (1973); 7 Weinstein, Korn & Miller, NEW YORK CIVIL PRACTICE:

B. Relief Granted to a Third Party, Not Involving the Remaining Parties, as Aggrievement Under CPLR 5501

The Appellate Division, Second Department, recently considered whether an order dismissing a complaint against some defendants, but not all defendants, constituted proper "aggrievement" to the remaining defendants for the purposes of appealing the order of dismissal, in *Mixon v. TBV, Inc.*[15] *Mixon* was a personal injury action to recover damages sustained in a rear-end automobile collision.[16] The plaintiffs commenced the action against two separate groups of defendants ("defendants V" and "defendants L") that had been involved in the chain of events allegedly contributing to the automobile accident.[17] The defendants V cross-moved for summary judgment to dismiss the complaint against them, as well as for summary judgment dismissing the cross-claims asserted against them by defendants L.[18] The lower court issued judgment granting the cross-motion, dismissing the complaint and cross-claims against the defendants V.[19] The plaintiffs did not appeal that portion of the final judgment; however, the defendants L filed an appeal, contending that their cross-claims and the complaint should each be reinstated against the defendants V.[20]

After reviewing *Parochial Bus System, Inc. v. Board of Education of New York* as the "leading case" on defining aggrievement, the Second Department posed the question, as relevant to the situation before the court, "what about a situation different from that in *Parochial Bus*, namely, one in which relief was requested in the trial court by someone other than the appellant, but the appellant is dissatisfied with the outcome of that request?"[21] The appellate court continued:

> The difficulty arises where someone seeks relief against a person other than the appellant, but on the appeal, the appellant challenges the outcome of that request for relief against the third person. Is aggrievement exclusively concerned with relief in that situation, or are we to consider

C.P.L.R. P 5601.05 (1964)).

[15] Mixon v. TBV, Inc., 76 A.D.3d 144, 146, 904 N.Y.S.2d 132, 135, No. 00521, slip op. at 2 (App. Div. 2d Dep't June 22, 2010).

[16] *Id.* at 146, 904 N.Y.S.2d at 134–35, slip op. at 1–2.

[17] *Id.* at 146, 904 N.Y.S.2d at 135, slip op. at 2.

[18] *Id.* at 147, 904 N.Y.S.2d at 135, slip op. at 2.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 149, 904 N.Y.S.2d at 136, slip op. at 2.

> the rationale or reasoning as well in order to determine whether a person is aggrieved? Can a person be aggrieved where the relief granted was not sought against that person but was sought against a third person? Alternatively, can a person be aggrieved only by the rationale used in that same situation where the relief granted was not sought against that person but was sought against a third person?[22]

The court then engaged in a thorough discussion of the history of the substantive and procedural law involved with the personal injury claims, as well as relevant case law concerning aggrievement.[23] The Appellate Division ultimately determined that, to the extent that certain case law holdings conflicted with the Court of Appeals' holding in *Parochial Bus*, those prior cases on the issue had been overruled by the Court of Appeals' decision in *Parochial Bus*.[24]

In *Mixon*, the Second Department promulgated "a two-pronged definition of the concept of aggrievement which, although it might be subject to some rare exceptions, should cover the broad majority of cases."[25] The court explained that:

> *First, a person is aggrieved when he or she asks for relief but that relief is denied in whole or in part. Second, a person is aggrieved when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part*.[26]

Employing this definition, the Appellate Division determined that:

> Applying the second prong of that definition to the case at bar, it is apparent that both the plaintiffs and the [defendants L] were aggrieved by the order of the Supreme Court, the plaintiffs by the portion thereof that awarded summary judgment dismissing the complaint insofar as asserted against the [defendants V], and the [defendants L] by the portion thereof that awarded summary judgment dismissing their cross claim against the [defendants V]. The [defendants L] were not aggrieved, however, by the portion of the order that granted the branch of the [defendants V's] motion which was for summary judgment dismissing the

[22] *Id.* at 149, 904 N.Y.S.2d at 136–37, slip op. at 2.
[23] *Id.* at 147–56, 904 N.Y.S.2d at 135–42, slip op. at 2–6.
[24] *Id.* at 156, 904 N.Y.S.2d at 142, slip op. at 6.
[25] *Id.*
[26] *Id.* at 156–47, 904 N.Y.S.2d at 142, slip op. at 6 (footnotes omitted).

> complaint insofar as asserted against the [defendants V] because that branch of the motion sought relief against the plaintiffs and not against the [defendants L].[27]

Mixon has not been overruled by any case and apparently stands as valid case law. The *Mixon* decision serves to offer helpful insight about what does or does not constitute "aggrievement" under CPLR 5511.

C. Stipulation to Damages and Aggrievement

The Court of Appeals recently reexamined precedent regarding "aggrievement" when a party has stipulated to a reduction in damages in lieu of a new trial in *Adams v. Genie Industries, Inc.*[28] The Court explained in *Adams* that "[i]t has long been and remains the rule that parties who stipulate to a modification of damages as an alternative to a new trial are not aggrieved by that modification and may not appeal from it."[29] This rule had become known as the "Dudley Rule," based upon the Court of Appeals' decision in *Dudley v. Perkins*.[30]

The Court noted in *Adams* that the *Dudley* Rule on aggrieved-status had been more broadly applied over the years by the courts.[31] For example, the Court of Appeals had previously held in 1998, in *Batavia Turf Farms v. County of Genesee*, that:

> a party who, as a result of a conditional order, has stipulated at the trial or appellate court to a reduction in damages in lieu of a new trial on a cause of action, foregoes all further review of other issues raised by that order, including those pertaining to any other cause of action, and is therefore not a party aggrieved.[32]

"The rationale underlying this broader application of *Dudley* [in cases likes *Batavia*], by which a stipulation on one issue could foreclose an appeal on other, unrelated issues, was that the stipulation did not merely resolve an issue, but also fulfilled a

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[27] *Id.* at 157, 904 N.Y.S.2d at 142–43, slip op. at 6.

[28] Adams v. Genie Indus., Inc., 14 N.Y.3d 535, 540–41, 929 N.E.2d 380, 383–84, 903 N.Y.S.2d 318, 320–21 (2010).

[29] *Id.* at 540–41, 929 N.E.2d at 382–83, 903 N.Y.S.2d at 320–21 (citing Dudley v. Perkins, 235 N.Y. 448, 457, 139 N.E. 570, 573 (1923)).

[30] Dudley v. Perkins, 235 N.Y. 448, 457, 139 N.E. 570, 573 (1923).

[31] *Adams*, 14 N.Y.3d at 541, 929 N.E.2d at 383, 903 N.Y.S.2d at 321.

[32] Batavia Turf Farms v. Cnty. of Genesee, 91 N.Y.2d 906, 906, 691 N.E.2d 1025, 1025, 668 N.Y.S.2d 1001, 1001 (1998) (citing N.Y. C.P.L.R. 5511 (McKinney 1995)); Whitfield v. City of N.Y., 90 N.Y.2d 777, 780 n.*, 689 N.E.2d 515, 517 n.*, 666 N.Y.S.2d 545, 547 n.* (1997)); *see also Adams*, 14 N.Y.3d at 541, 929 N.E.2d at 383, 903 N.Y.S. at 321.

condition for the existence of the order in question."[33] The Court of Appeals further explained that "[i]t was thought that a party who had consented to the order's existence could not claim to be aggrieved by any part of it."[34]

The Court ultimately determined in *Adams* that any continuation of a broader application of the Dudley Rule, as evidenced by *Batavia* and similar cases, "is not justified."[35] Rather, continuing any expanded reading of *Dudley* in cases like *Batavia* was simply an impermissible "trap" for litigants.[36] In reversing *Batavia* and similar cases, the Court reasoned that "[i]t is unfair to bar a party from raising legitimate appellate issues simply because that party has made an unrelated agreement on the amount of damages."[37]

Ultimately, except in instances of "prejudice" or incomplete relief, a *successful non-aggrieved party* basically has no right to appeal adverse determinations or contest dissatisfied findings in civil judicial proceedings. However, "[t]he question remaining in such cases . . . is whether the successful non-aggrieved party, thus barred from bringing an appeal or cross appeal, may nonetheless seek review of an adverse holding rendered below, on the appeal from the final judgment or order brought by the losing party."[38] The answer to that question lies in CPLR 5501(a)(1).

II. A WINNING LITIGANT'S ABILITY TO RAISE ANY ALTERNATIVE ARGUMENT THAT "*NECESSARILY AFFECTS*" THE FINAL JUDGMENT ON APPEAL

A. The Origin and Meaning of "Necessarily Affects"

The CPLR empowers a non-aggrieved winning party to raise certain non-final judgments or orders as alternate grounds to affirm a final judgment being appealed by the losing party. Specifically, CPLR 5501(a) provides:

> An appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if

[33] *Adams*, 14 N.Y.3d at 541, 929 N.E.2d at 383, 903 N.Y.S. at 321.
[34] *Id.* at 541, 929 N.E.2d at 383, 903 N.Y.S. at 321.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y., 60 N.Y.2d 539, 545, 458 N.E.2d 1241, 1243–44, 470 N.Y.S.2d 564, 566–67 (1983).

> reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken.[39]

This provision "permit[s] a board scope of review"[40] of issues on appeal, and enables a

> successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal . . . to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor.[41]

CPLR 5501(a)(1) is a strong tool for prevailing parties because it "permits a respondent to obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground."[42] However, there are several statutory prerequisites for a non-aggrieved party to properly raise an alternate ground for affirming the final judgment or order under CPLR 5501(a)(1), most notably the requirement that determination "necessarily affects the final judgment."

The "necessarily affects" language from CPLR 5501(a)(1) is derived from section 580 of the Civil Practice Act ("CPA") (repealed September 1, 1963), the predecessor rules to the CPLR.[43] Section 580 of the CPA provided, in part:

> An appeal taken from a final judgment or from a final order in a special proceeding brings up for review an interlocutory judgment or an intermediate order, as the case may be, which is specified in the notice of appeal *and necessarily affects the final judgment or order*; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the division or term of the court to which the appeal from the final judgment or order is taken.[44]

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[39] N.Y. C.P.L.R. 5511(a)(1) (McKinney 1995).

[40] *Parochial Bus*, 60 N.Y.2d at 545, 458 N.E.2d at 1244, 470 N.Y.S.2d at 567.

[41] *Id.* at 546, 458 N.E. at 1244, 470 N.Y.S.2d at 567.

[42] *Id.*

[43] *Id.* at 545, 458 N.E. at 1244, 470 N.Y.S.2d at 567. *See also* N.Y. C.P.L.R. 5501 (McKinney 1995) (Legislative Studies and Reports).

[44] Ramsay v. Town Bd. of Hempstead, 241 A.D. 83, 87, 271 N.Y.S.2d 297, 302 (App. Div. 2d Dep't 1934) (emphasis added) (quoting Civil Practice Act § 580, L. 1920, ch. 925 (repealed Sept. 1, 1963)); *see also In Re* Nationwide Mut. Ins. Co., 39 Misc. 2d 782, 790, 241 N.Y.S.2d 589, 596 (Sup. Ct. Broome Cnty. 1963).

The wording of section 580 did not exactly mirror CPLR 5501(a)(1), but clearly contained similar "necessarily affects final judgment or order" language as its successor.[45] The *Legislative Studies and Reports* on CPLR 5501(a)(1) explained the Legislature's rationale for retaining the "necessarily affects" language from CPA section 580 in the new CPLR 5501(a)(1) as follows:

> The Revisers also retained the requirement that the non-final determination "necessarily affect" the final judgment or order "since it has proven to be an effective means of limiting the determinations which can be raised on an appeal from a final judgment or order to those which relate to possibly serious prejudicial errors." They further state that while any interlocutory judgment or order will "necessarily affect" a final determination, any other non-final order "necessarily affects" a final determination only if reversing the order would require a reversal or modification of the determination and there was no further opportunity during the trial to raise the issues decided by the order.[46]

The "necessarily affects" language from section 580 of the CPA had been interpreted by courts as contemplating an order or judgment "which, if reversed, would take away the foundation of the final order or make the hearing and order entered thereon invalid and without support."[47] That interpretation has seemingly been reincorporated into today's "necessarily affects the final judgment" language from CPLR 5501(a)(1). As explained by the Court of Appeals in *In re Aho*,[48] the words "necessarily affects" from CPLR 5501(a)(1) contemplate an order or judgment that "would strike at the foundation on which the final judgment was predicated."[49]

The Appellate Division, Second Department, in *Two Guys from*

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[45] N.Y. C.P.L.R. 5501(a)(1) (McKinney 1995) (stating "necessarily affects the final judgment").

[46] *See* N.Y. C.P.L.R. 5501 (Legislative Studies and Reports).

[47] *In re* Seltzer, 11 A.D.2d 805, 805, 205 N.Y.S.2d 218, 220 (App. Div. 2d Dep't 1960); *see also* Koziar v. Koziar, 281 A.D. 771, 771, 118 N.Y.S.2d 417, 417 (App. Div. 2d Dep't 1953).

[48] *In re* Aho, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651, 383 N.Y.S.2d 285, 289 (1976).

[49] *Id.* at 248, 347 N.E.2d at 651, 383 N.Y.S.2d at 289; s*ee also* Mars Assoc., Inc. v. N.Y.C. Educ. Constr. Fund, 126 A.D.2d 178, 191, 513 N.Y.S.2d 125, 133 (App. Div. 1st Dep't 1987); *but see* Raff v. Koster, Bial & Co., 38 A.D. 336, 338, 56 N.Y.S. 997, 998 (App. Div. 1st Dep't 1899) (interpreting Code of Civil Procedure § 1316, a predecessor to CPA § 580 that included similar "necessarily affects final judgment" language, as applying to "only orders which, if reversed, would take away the foundation of the judgment or make the trial or the judgment entered invalid or without support"). *See also* Buffalo Elec. Co. v. State, 14 N.Y.2d 453, 459–60, 201 N.E.2d 869, 872, 253 N.Y.S.2d 537, 542 (1964) (interpreting and contrasting CPA § 580 with the then recent C.P.L.R. 5501(a)(1), and noting that the former CPA § 580 "was broadly construed").

Harrison-NY v. S.F.R. Realty Associates, read the "necessarily affects" language from CPLR 5501(a)(1), as meaning it "excludes from review all incidental orders which do not have any impact on the final judgment."[50] The appellant in *Two Guys* raised the propriety of an earlier non-final order, which granted a preliminary injunction on certain matters while the case was pending, as purported grounds that "necessarily affect[ed] the final judgment."[51] The Second Department, in declining to review the injunction under CPLR 5501(a)(1), explained that the "injunction was a provisional remedy designed to retain the status quo while the action was pending, it does not 'necessarily affect' the final judgment, and thus the appeal does not bring it up for review."[52] The Second Department's holding that a status quo injunction did not necessarily affect a final judgment was clearly in line with the Court of Appeals' reading that the earlier order must "strike at the foundation on which the final judgment was predicated,"[53] or even the predecessor reading that the earlier order would "make the hearing and order entered thereon invalid and without support."[54]

In *In re the Acquisition of Real Property by Albany*, the Appellate Division, Third Department, reviewed a non-final order that "reasonably affect[ed]" the primary issue being tried by the lower court as an order that necessarily affected the final judgment.[55] The Third Department in that matter reviewed a lower court judgment issued in a proceeding to determine compensation due as a result of the City of Albany's acquisition of certain property under the Eminent Domain Procedure Law ("EDPL").[56] The City of Albany petitioners had apparently failed to timely file their appraisal report and moved for an extension to file the report. The landowner cross-moved to preclude the City from presenting any evidence on the value of the property at trial. The lower court subsequently issued an order denying the City petitioners' request, and granted the landowner's motion to preclude.[57]

On appeal from the final judgment determining damages after a

[50] Two Guys from Harrison-NY v. S.F.R. Realty Assocs., 186 A.D.2d 186, 189, 587 N.Y.S.2d 962, 965 (App. Div. 2d Dep't 1992).

[51] *Id.* at 187–89, 587 N.Y.S.2d at 964–65.

[52] *Id.* at 189, 587 N.Y.S.2d at 965.

[53] *Aho*, 39 N.Y.2d at 248, 347 N.E.2d at 652, 383 N.Y.S.2d at 289.

[54] *In re* Seltzer, 11 A.D.2d 805, 805, 205 N.Y.S.2d 218, 220 (App. Div. 2d Dep't 1960).

[55] *In re* Acquisition of Real Prop. by Albany, 199 A.D.2d 746, 747, 605 N.Y.S.2d 469, 470 (3d Dep't 1993).

[56] *Id.* at 746–47, 605 N.Y.S.2d at 470.

[57] *Id.* at 747, 605 N.Y.S.2d at 470.

trial, the City raised the lower court's earlier non-final order precluding them from presenting evidence of value at trial, as alternate grounds under CPLR 5501(a)(1). The Third Department allowed the argument on appeal because the court determined that "the admission into evidence of petitioners' appraisal report and the testimony of their expert on value would *reasonably affect* value and, thus, 'necessarily affects' the final judgment."[58]

The Third Department's holding in *In re Acquisition of Real Property by Albany* is notable because it could be read to expand the "necessarily affects" language in CPLR 5501(a)(1). The ultimate issue tried by the lower court in *Albany* was the compensation due the landowner as a result of the City's acquisition of real property under the EDPL.[59] The EDPL and Uniform Rules for New York State Trial Courts generally direct that compensation be primarily determined by valuing property through the use of appraisal reports.[60] However, simply because a party submits an appraisal doesn't mean the appraisal will be legally sufficient to determine the value of any given property.

New York property valuation law directs that an "appraisal [that is] no more than 'a conclusory ultimate valuation' lacking any demonstrated foundation or factual support . . . must be rejected as without probative force" by a court.[61] As such, in the *Albany* final valuation judgment, the City's appraisal that was precluded by the lower court may have been legally sufficient and accepted to establish value to help prove compensation; or, the proposed appraisal, after being reviewed by the lower court, may have been nothing more than "'a conclusory ultimate valuation' lacking any demonstrated foundation or factual support," that could be rejected by the lower court *and ultimately have no effect on the final judgment*.[62]

Realistically, the proposed appraisal would have likely been legally sufficient, and probably had some impact on the lower court's determination of compensation in the final judgment;

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[58] *Id.*, 605 N.Y.S.2d at 470 (emphasis added).

[59] *Id.* at 746, 605 N.Y.S.2d at 470.

[60] N.Y. EM. DOM. PROC. LAW §§ 302, 304, 508 (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.61 (2008).

[61] Fleetwood Maple Corp. v. State, 28 A.D.2d 1026, 1026, 283 N.Y.2d 682, 682 (App. Div. 3d Dep't 1967) (quoting Fredenburgh v. State, 26 A.D.2d 966, 967, 274 N.Y.S.2d 708, 708 (App. Div. 3d Dep't 1966)).

[62] *Id.* at 1026, 283 N.Y.2d at 682 (quoting *Fredenburgh*, 26 A.D.2d at 967, 274 N.Y.S.2d at 708).

however, it may have had no effect.[63] The Third Department's holding that the precluded testimony and report would "reasonably affect value and, thus, 'necessarily affects' the final judgment," seemingly expands the "necessarily affects" language under CPLR 5501(a)(1) to include issues that will likely impact any fundamental issue, law, or fact that supports the final judgment.[64] A non-final order that *would reasonably affect* a primary issue that is decided as part of the final judgment is a seemingly lower threshold than an order that would directly "strike at the foundation on which the final judgment was predicated,"[65] or even "make the hearing and order entered thereon invalid and without support."[66]

B. Examples of What "Necessarily Affects" and What Does Not

New York courts have identified a multitude of determinations that constitute non-final orders that necessarily affect a final judgment under CPLR 5501(a)(1). These orders involve issues that include, but are not limited to, the following: "an order denying a motion to dismiss a complaint";[67] an order concerning a determination of personal jurisdiction over a party;[68] denial of a "motion to amend a complaint to assert a claim for punitive damages" in a shareholder derivative action;[69] the issue of "failure to exhaust administrative remedies";[70] denying a motion to dismiss a "complaint for failure to join necessary parties";[71] an order "granting a defendant leave to move for summary judgment more than 120 days after the filing of the plaintiffs' note of issue";[72] the

[63] Additionally, the lower court may have deferred to the landowner's appraisal, determined that the proposed City appraisal was not persuasive regardless, and issued the same judgment using only the landowner's appraisal.

[64] *In re* Acquisition of Real Prop. by Albany, 199 A.D.2d 746, 747, 605 N.Y.S.2d 469, 470 (App. Div. 3d Dep't 1993) (citing David D. Siegel, Practice Commentaries, C.5501:4, *in* N.Y. C.P.L.R. 5501 (McKinney 1993); *In re* Aho, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651, 383 N.Y.S.2d 285, 289 (1976)).

[65] *Aho*, 39 N.Y.2d at 248, 347 N.E.2d at 651, 383 N.Y.S.2d at 289.

[66] *In re* Seltzer, 11 A.D.2d 805, 806, 205 N.Y.S.2d 218, 220 (App. Div. 2d Dep't 1960) (citing Koziar v. Koziar, 281 A.D. 771, 118 N.Y.S.2d 417 (App. Div. 2d Dep't 1953)).

[67] State v. Wolowitz, 96 A.D.2d 47, 55, 468 N.Y.S.2d 131, 137 (App. Div. 2d Dep't 1983).

[68] *See* N.Y. Higher Ed. Servs. Corp. v. King, 232 A.D.2d 842, 648 N.Y.S.2d 797 (App. Div. 3d Dep't 1996).

[69] Wolf v. Rand, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (App. Div. 1st Dep't 1999).

[70] Harnischfeger v. Moore, 56 A.D.3d 1131, 1131, 867 N.Y.S.2d 314, 315 (App. Div. 4th Dep't 2008).

[71] Schwimmer v. Welz, 56 A.D.3d 541, 544, 868 N.Y.S.2d 671, 673 (App. Div. 2d Dep't 2008).

[72] Fernandez v. Stepping Stone Day Sch., Inc., 291 A.D.2d 530, 531, 737 N.Y.S.2d, 864, 865 (App. Div. 2d Dep't 2002).

issue of laches, concerning "bringing [a] proceeding, prosecuting it to judgment and perfecting the . . . appeal";[73] an "order directing a traverse" hearing;[74] an order rejecting a defense asserted by a party;[75] a statute of limitations defense;[76] and, an order concerning the admissibility of certain testimony.[77] The issue of whether a non-final order denying a motion for change of venue "necessarily affected" the final judgment under CPLR 5501(a)(1) was addressed by the Court of Appeals in *In re Aho*.[78]

The *Aho* proceeding was instituted "by two nieces of Olga Aho to have their 85-year old aunt [Mrs. Aho] declared incompetent and a committee of her person and property appointed."[79] The nieces commenced the proceeding in Westchester County, however "the firm of attorneys who had been representing [Mrs. Aho] for the previous 15 months made a demand for change of venue to Schenectady County," and formally moved for that relief before the lower court.[80] The lower court denied the attorneys' motion to change venue, and subsequently issued final judgment declaring Mrs. Aho incompetent.[81]

The attorneys representing Mrs. Aho sought to raise the non-final order denying change of venue on appeal to the Appellate Division, asserting that it necessarily affected the final judgment under CPLR 5501(a)(1).[82] The Appellate Division disagreed and refused to review the earlier order on appeal from the final judgment. The Court of Appeals reversed, holding that "reversal of an order denying the motion for change of venue in any proceeding to determine competency would strike at the foundation on which the final judgment was predicated."[83] The Court reasoned that:

> In this case any such reversal would inescapably have led to a vacatur of the judgment declaring Mrs. Aho incompetent

[73] Save the Pine Bush, Inc. v. N.Y.S. Dep't Envtl. Conservation, 289 A.D.2d 636, 638, 734 N.Y.S.2d 267, 269 (3d Dep't 2001).

[74] Joosten v. Gale, 129 A.D.2d 531, 533, 514 N.Y.S.2d 729, 731 (1st Dep't 1987).

[75] *See In re* Estate of Hillowitz, 20 N.Y.2d 952, 953–54, 233 N.E.2d 719, 720–21, 286 N.Y.S.2d 677, 679 (1967).

[76] *See* Measom v. Greenwich & Perry St. Hous. Corp., 8 Misc. 3d 50, 52, 798 N.Y.S.2d 298, 300 (App. Term, 1st Dep't, 2005).

[77] *See In re* Estate of Clouse, 292 A.D.2d 675, 676, 739 N.Y.S.2d 470, 472 (App. Div. 3d Dep't 2002).

[78] *In re* Aho, 39 N.Y.2d 241, 347 N.E.2d 647, 383 N.Y.S.2d 285 (1976).

[79] *Id.* at 243, 347 N.E.2d at 648, 383 N.Y.S.2d at 286.

[80] *Id.*

[81] *Id.* at 244, 347 N.E.2d at 648, 383 N.Y.S.2d at 286.

[82] *Id.* at 248, 347 N.E.2d at 651–52, 383 N.Y.S.2d at 289.

[83] *Id.*

> and to the submission of the issue of incompetency to a court where venue might then properly be laid. Thus, in our view, it was error to conclude that such latter appeal did not bring up for review the order of August 3 denying the motion for change of venue.[84]

The *Aho* decision is notable because it can be read to extend the "strike at the foundation on which the final judgment was predicated" language to situations where an entire case is decided by a wrong-venue court.[85] In other words, denying a venue change could necessarily affect the final judgment because the case would have been decided by an entirely different judge if the earlier non-final order was annulled; or, possibly to situations where *any* earlier non-final order itself, apart from the entire case and final judgment, is decided by a wrong venue court. However, these hypothetical situations may not subvert the seemingly arduous "strike at the *foundation on which* the final judgment [is] *predicated*" standard. The mere possibility of a different judge deciding a case does not necessarily mean that the judge would decide the fundamental issues any differently than another court, so that the "foundation" supporting the final judgment would be substantially or meaningfully different.[86]

The foregoing analysis is conjectural because the Court of Appeals specifically limited its holding in *Aho* to only those situations involving "an order denying the motion for change of venue in any proceeding to determine competency."[87] The possibility of venue generally—outside of a competency hearing—constituting an issue that "necessarily affects" a final judgment under CPLR 5501(a)(1) appears to be open for debate.[88]

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[84] *Id.* at 248, 347 N.E.2d at 652, 383 N.Y.S.2d at 289.

[85] *Id.*

[86] Relative to the New York State Supreme Court, there is only one Supreme Court, but with terms held throughout the State in each County. *See* N.Y. CONST. art. VI, § 6; *see also* N.Y. JUD. LAW § 147 (McKinney 2005). Each Supreme Court Justice, although located in a different "venue," is still a Judge of the Supreme Court, and able to decide Supreme Court cases: a Supreme Court Judge in New York City is still a Supreme Court Judge in Albany County. As such, a final judgment issued by an "incorrect" venue judge is still a final judgment being issued by the Supreme Court.

[87] *In re* Aho, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 652–53, 383 N.Y.S.2d 285, 289 (1976) (stating specifically, before holding that the earlier order necessarily affected the final judgment determining competency, that "[w]hatever may be the rule in other cases (to which we do not now speak)").

[88] *But see id.* at 252, 347 N.E.2d at 654, 383 N.Y.S.2d at 291 (Gabrielli, J., dissenting) (noting that "the majority merely states that the reversal of an order denying a motion for change of venue in a proceeding to determine competency . . . 'would strike at the foundation on which the final judgment was predicated.' I am unable to agree with that conclusion.

As opposed to orders that have been considered to necessarily affect a final judgment, orders that have been determined to not necessarily affect a final judgment include, but are not limited to, the following: an order granting a *Yellowstone* injunction to maintain the status quo;[89] an order requiring a party to submit a further bill of particulars;[90] an order denying the defendant's motion to examine the plaintiff before trial in a matrimonial action;[91] and an "order denying [a] motion striking out the defense of *res adjudicata*," because the party "might still urge upon the trial that the proofs did not establish a defense."[92]

In *Grullon v. Servair, Inc.*, the Appellate Division, Second Department, addressed whether an earlier order "which dismissed [a party's] fifth cause of action and severed and continued the remainder of the action," constituted a non-final order that necessarily affected the final judgment under CPLR 5501(a)(1).[93] The appellate court determined that the earlier order did not qualify as a non-final order, which necessarily affected the final judgment under CPLR 5501(a)(1), because "[u]pon severance, the severed causes of action became a separate action which may be terminated in a separate judgment."[94] Therefore, "[r]eview of the prior order may only be had by direct appeal therefrom or by appeal from a judgment entered thereon."[95]

The above cases, while only a limited sampling, show that a broad spectrum of issues have been considered under the "necessarily affects" language of CPLR 5501(a)(1). Practitioners must be cautious when seeking to follow any individual case holding that a particular order was considered to have necessarily affected, or conversely, not have necessarily affected, a final judgment. The facts in any given case will likely be different than any cited

Venue, basically, is of no jurisdictional consequence (cf. CPLR 509, 510, 511); and this waivable claim may not, therefore, be somehow elevated to postjudgment jurisdictional status. I conclude, as did an unanimous Appellate Division, that the venue objection was not reviewable.").

[89] Two Guys from Harrison-NY v. S.F.R. Realty Assocs., 186 A.D.2d 186, 189, 587 N.Y.S.2d 962, 965 (App. Div. 2d Dep't 1992).

[90] Raff v. Koster, Bial & Co., 38 A.D. 336, 338, 56 N.Y.S. 997, 999 (App. Div. 1st Dep't 1899).

[91] *See* Dulber v. Dulber, 37 A.D.2d 566, 566, 322 N.Y.S.2d 862, 862–83 (App. Div. 2d Dep't 1971).

[92] Dickinson v. Springer, 246 N.Y. 203, 208, 158 N.E. 74, 75 (1927).

[93] Grullon v. Servair, Inc., 121 A.D.2d 502, 502, 504 N.Y.S.2d 14, 15 (App. Div. 2d Dep't 1986) (citing N.Y. C.P.L.R. 5501(a)(1) (McKinney 1986)).

[94] *Id.* at 503, 504 N.Y.S.2d at 15 (citing Stokes v. Stokes, 30 N.Y.S. 153 (Sup. Ct. N.Y. Cnty. 1894); 3 Carmody-Wait 2d, NEW YORK PRACTICE § 18:6 (1986)).

[95] *Grullon*, 121 A.D.2d at 503, 504 N.Y.S.2d at 15.

precedent, and a finding of what "necessarily affects" a final judgment in one case does not guarantee the same finding on different facts in another case.

C. Where and How to Raise "Necessarily Affects"

The CPLR was enacted to "govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[96] The provisions in CPLR 5501(a)(1) therefore apply to appeals in any "civil judicial proceeding," which includes appeals in those civil prosecutions identified as "actions," and those identified as "special proceedings."[97] The right conferred upon non-aggrieved parties by CPLR 5501(a)(1) can be especially important in a CPLR Article 78 special proceeding.

A party in Article 78 litigation is allowed to "raise an objection in point of law . . . by a motion to dismiss the petition" under CPLR 3211.[98] "An objection in point of law is not any legal issue raised in the proceeding, but is limited to threshold objections of the kind listed in CPLR 3211(a) which are capable of disposing of the case without reaching the merits."[99] The grounds listed in CPLR 3211(a), while generally procedural or technical in nature, serve as a valid means to dismiss an entire Article 78 proceeding.[100] However, if a motion to dismiss is denied, the losing party has no right to appeal that order until the final judgment. CPLR article 57 dictates that a party has no right to appeal orders to the appellate division that are "made in a proceeding against a body or officer pursuant to Article 78."[101] If the losing movant ultimately prevails in the final judgment, that party is not considered aggrieved and has no ability to appeal the earlier order denying its motion under CPLR 5511. Through CPLR 5501(a)(1), a non-aggrieved party can

[96] N.Y. C.P.L.R. 101 (McKinney 2003).

[97] N.Y. C.P.L.R. 105(d), 103(b) (McKinney 2003, Supp. 2010). The Appellate Division, First Department, previously determined that CPLR 5501(a)(1) applied in an appeal from Family Court involving penal changes. *See In re* Dora P., 68 A.D.2d 719, 728, 418 N.Y.S.2d 597, 602 (App. Div. 1st Dep't 1979).

[98] N.Y. C.P.L.R. 7804(f) (McKinney 2008); *see also* Long Island Citizens Campaign, Inc. v. Cnty. of Nassau, 165 A.D.2d 52, 54, 565 N.Y.S.2d 852, 854 (App. Div. 2d Dep't 1991); *see also* N.Y. C.P.L.R. 103(b) (McKinney 2003).

[99] *See* Hull-Hazard, Inc. v. Roberts, 129 A.D.2d 348, 350, 517 N.Y.S.2d 824, 825 (App. Div. 3d Dep't 1987); *see also* Women's Voices for the Earth, Inc. v. Proctor & Gamble Co., 906 N.Y.S.2d 721, No. 20302, slip op. at 1 (Sup. Ct. N.Y. Cnty. July 30, 2010).

[100] *See* N.Y. C.P.L.R. 3211(a) (McKinney 2005).

[101] *See* N.Y. C.P.L.R. 5701(b)(1) (McKinney 1995).

still raise previously denied arguments as alternative grounds to affirm the final judgment in Article 78 litigation.

Relative to raising any alternate grounds that necessarily affect the final judgment under CPLR 5501(a)(1), the statute provides that, "[a]ny such error is reviewable once the final judgment or order has been properly appealed from by the losing party."[102] A party can only assert an alternative ground under CPLR 5501(a)(1) if there was a "non-final judgment or order," and the issue had not been previously appealed and reviewed by an appellate court.[103] Additionally, the issue sought to be raised by a party on appeal must have been contested, or alternatively requested as affirmative relief, by the non-aggrieved party before the lower court.[104] Also, a non-aggrieved party on appeal cannot raise an argument asserted by a different litigant before the lower court, but not joined by the non-aggrieved party below, as alternative grounds under CPLR 5501(a)(1).[105]

A non-aggrieved party cannot raise an issue from the lower court proceeding that "necessarily affects" the final judgment under CPLR 5501 if the issue is being raised for the first time on appeal.[106] Additionally, a party that fails to brief an alternative ground under CPLR 5501(a)(1) will be deemed to have abandoned the argument on appeal.[107]

A party must generally be "aggrieved" to appeal any determination or order from a lower court proceeding; however, a party that improperly seeks to cross-appeal a non-appealable issue, because they are not properly "aggrieved," can still have its arguments raised on the improper cross-appeal, and considered by the appellate court as alternate grounds that necessarily affect the final judgment under CPLR 5501(a)(1).[108] Also, even though "after

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[102] Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y., 60 N.Y.2d 539, 546, 458 N.E.2d 1241, 1244, 470 N.Y.S.2d 564, 567 (1983).

[103] *See* N.Y. C.P.L.R. 5501(a)(1) (McKinney 1995).

[104] *See* Katz v. Katz, 68 A.D.2d 536, 540–41, 418 N.Y.S.2d 99, 102 (App. Div. 2d Dep't 1979); *see also* Shapiro v. Good Samaritan Reg'l Hosp. Med. Ctr., 55 A.D.3d 821, 824, 865 N.Y.S.2d 680, 682 (App. Div. 2d Dep't 2008).

[105] *See* Dischiavi v. Calli, 68 A.D.3d 1691, 1693, 892 N.Y.S.2d 700, 702 (App. Div. 4th Dep't 2009).

[106] *See* Mainline Elec. Corp. v. E. Quogue Union Free Sch. Dist., 46 A.D.3d 859, 862, 849 N.Y.S.2d 92, 94 (App. Div. 2d Dep't 2007); *see also* Davis v. N.Y.C. Transit Auth., 63 A.D.3d 990, 992, 882 N.Y.S.2d 207, 209 (App. Div. 2d Dep't 2009).

[107] *See* Huen N.Y. Inc. v. Bd. of Ed. Clinton Cent. Sch. Dist., 67 A.D.3d 1337, 1337–38, 890 N.Y.S.2d 748, 748–49 (App. Div. 4th Dep't 2009).

[108] *See* Cataract Metal Finishing, Inc. v. City of Niagara Falls, 31 A.D.3d 1129, 1130, 818 N.Y.S.2d 409, 410 (4th Dep't 2006); *see also* Noghrey v. Town of Brookhaven, 48 A.D.3d 529, 530, 852 N.Y.S.2d 220, 220 (App. Div. 2d Dep't 2008).

entry of a final judgment, an appeal from that judgment is the only method of reviewing an intermediate order," and any pending appeal from the intermediate order will be dismissed, arguments raised on appeal of the intermediate order can still be reviewed by the appellate court on appeal from the final judgment.[109]

III. CONCLUSION

The drafters of CPLR 5501(a)(1) were rightfully not concerned with winning parties being sensitive to their losing opponents. Rather, when it comes to winning in the competition that is civil litigation, a prevailing party can and should be a "sore" winner on appeal.

[109] *See* Champion Int'l Corp. v. Dependable Indus. Corp., 47 A.D.2d 473, 475, 367 N.Y.S.2d 273, 274 (App. Div. 1st Dep't 1975); *see also* Schoenlank v. Yonkers YMCA, 44 A.D.3d 927, 927, 845 N.Y.S.2d 69, 70 (App. Div. 2d Dep't 2007).