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## Bergenfield v. BAC Home Loans Servicing, 131 Nev. Adv. Op. 68 (Sep. 10, 2015)

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## CIVIL PROCEDURE: APPEALABLE JUDGMENTS

### **Summary**

The Court held that when a district court dismisses a complaint but gives the plaintiff leave to amend the order it is not a final appealable judgment. In order for it to be a final appealable judgment, a plaintiff must give the district court written notice within 30 days that the plaintiff will not amend the complaint so the district court may enter a final, appealable order.

### **Background**

Plaintiffs, Marcia and Lawrence Bergenfield, filed a complaint against BAC Home Loans Servicing claiming fraud and consumer fraud. The district court granted BAC's motion to dismiss and gave the Plaintiffs leave to file an amended complaint. Plaintiffs filed an amended complaint asserting the same claims and the district court again granted BAC's motion to dismiss, but again left the Plaintiffs leave to amend. Instead of filing an amended complaint the Plaintiffs appealed. The Supreme Court issued an order requiring the Plaintiffs show cause as to why the Court had jurisdiction over the appeal.<sup>2</sup>

### **Discussion**

The Court relied on Ninth Circuit precedent that an order dismissing a complaint with leave to amend is not a final, appealable order.<sup>3</sup> In order for the Plaintiff to appeal they must file written notice that they will not file an amended complaint with the court.<sup>4</sup> The Court holds that this notice must be filed within 30 days of the courts order.<sup>5</sup>

### **Conclusion**

The Court dismissed the appeal for lack of jurisdiction because the district court's order gave the Plaintiffs leave to amend their complaint and the Plaintiff's did not notify the district court of their intent to stand on the first amended complaint.

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<sup>1</sup> By Chelsea Stacey.

<sup>2</sup> See *Landreth v. Malik*, 127 Nev. 175, 179 (2011) ("Whether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review...")

<sup>3</sup> *WMX Techs., Inc., v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

<sup>4</sup> *Id.* at 1135.

<sup>5</sup> *Relying on*, NEV. R. APP. P. 4(a)(1) (2009) (a notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment of order appealed from is served.").