

## Sanctions Order of \$8.7M Was Voidable, But Not Void, and So Was Reinstated on Appeal

*Tim Kowal* November 30, 2023



A lot of savvy litigants search the web for ways to vacate an order after the time to appeal has expired. I know because many of these litigants have found my writings

on this subject. Challenges made after the appeal deadline has expired is fruitless, you say? Well, sometimes it can work: section 473 of the Code of Civil Procedure authorizes a trial court to set aside a “voidable” judgment or order up to six months after entry—by which time a 60-day appeal deadline would be long gone. And section 437 goes even further than that: a judgment or order may be set aside *an any time*, provided it was “void.”

So what makes a judgment or order “voidable” or “void” becomes an important question, given the six-month period to challenge a “voidable” judgment, and a limitless period to challenge a “void” judgment.

The distinction came up in *In re the Marriage of Jensen* (D2d2 Sep. 5, 2023) No. B320565 (nonpub. opn.). Following their divorce, David and Lynette Jensen continued litigating for some 14 years over assets surrounding David’s medical practice. The key event occurred in 2014 when the trial court, without notice or a hearing, imposed two daily sanctions against David—\$1,000 a day until David paid a retainer to administer a qualified domestic relations order (QDRO); and \$1,000 a day until he paid for a court-appointed expert to determine cash flow. The court later imposed another \$1,000 a day until David performed a “roll-over” into Lynette’s Ameritrade account.

David promptly petitioned the Court of Appeal for a writ of mandate, but was summarily denied.

But then David did nothing concerning the sanctions. He raised no challenges to the sanction orders (judging from the opinion), and did not comply with them, either. Not, that is, until late 2021—seven years after the orders—when he filed a motion to vacate challenging the orders as void. David argued they were void because he was given no notice or opportunity to address any grounds for sanctions before they were imposed.

A pretty good argument. Or so the trial court thought, because the court granted the motion and vacated the sanctions—sanctions which, by that time, had grown to \$8.7 million.

**Entering an \$8.7M order without notice was merely voidable, not void, and thus had to be challenged within section 473’s six-month deadline.**

Lynette appealed from the order granting the motion to vacate. And the Court of Appeal reversed, holding that David's motion to vacate was untimely: while he could challenge a "void" judgment at any time, he could only challenge a "voidable" judgment within six months. And here, the sanctions orders were merely voidable, not void.

There is obviously a big difference between a "void" and "voidable" judgment, so what is the difference? The court, not contributing any original thought, offered the same explanation from prior cases: "A judgment is 'void' only when the court entering that judgment 'lack[ed] jurisdiction in a fundamental sense' due to the "'entire absence of power to hear or determine the case'" resulting from the "'absence of authority over the subject matter or the parties.'" [Citations.]" (*People v. The North River Ins. Co.* (2020) 48 Cal.App.5th 226, 233-234; see also *In re Jesusa V.* (2004) 32 Cal.4th 588, 624 ["A court acts in excess of jurisdiction 'where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites"'].)

In other words, mere procedural irregularities amount to a mere "excess of jurisdiction," which is error but not a lack of "fundamental" jurisdiction that would make the judgment void. So as long as the court has power over a litigant to do a thing—even if doing that thing is conditioned on compliance with nice legal and constitutional protections—tossing aside those protections merely makes the judgment voidable, not void.

"[M]ost procedural errors are not jurisdictional." (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) For example, terminating sanctions without prior notice is a mere excess of jurisdiction, not a lack of it, meaning the judgment is merely voidable, not void. (*Lee v. An* (2008) 168 Cal.App.4th 558, 565; *Johnson v. E-Z Ins. Brokerage, Inc.* (2009) 175 Cal.App.4th 86, 99.)

But consider this: while a terminating a pleading without notice is not a failure of "fundamental jurisdiction" and thus is not void, awarding damages in excess of the demand is void. (*Dhawan v. Biring* (2015) 241 Cal.App.4th 963, 973 (*Dhawan*).) Figure that one out.

So the sanctions order, issued without notice, was merely voidable, and the trial court erred when it ruled it was void.

**A judgment may be set aside, apparently at any time, on due process grounds, but only if the trial court exercises its equitable powers.**

Finally, the appellate court said that the trial court still could have set aside the sanctions order—even seven years later—on the grounds that imposing \$8.7 million in sanctions without notice was “inequitable.” For this proposition, the court cited *Adoption of B.C.* (2011) 195 Cal.App.4th 913, 919, which in turn quotes *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215: “[E]ven where relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a default judgment or order on equitable grounds where a party establishes that the judgment or order was void for lack of due process [citation] or resulted from extrinsic fraud or mistake [citation].”

Back to *Jensen*: “But there is no indication or argument here,” the court noted, “that the trial court resorted to its equitable powers when it granted David's motion.”

## Comment

There is a serious difference between a “voidable” judgment and a “void” one. But the courts’ efforts to articulate that distinction, and their application of it, have been, at best, subtle.

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