

APPELLATE
HOW FEDERAL COURTS AND MICHIGAN COURTS VIEW PENDING MOTIONS FOR ATTORNEY FEES ON THE FINALITY OF A JUDGMENT
by Phillip J. DeRosier¹

A fundamental rule of appellate jurisdiction is the need for a "final" decision – whether it be a judgment or order. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). In federal court, a "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v United States*, 324 US 229, 233 (1945). But what if there is a pending motion for attorney fees at the time the underlying judgment or order is entered? Does that affect the time for filing an appeal?

In federal court, the answer is generally "no." Federal courts have long recognized that a post-trial motion for attorney fees does not prevent the judgment on the merits from being final. See *Budinich v Becton Dickinson & Co*, 486 US 196 (1988). And in *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'r's*, ___ US ___; 134 S Ct 773 (2014), the Supreme Court recently clarified that it makes no difference whether the attorney fees are being sought under a statute or contract (e.g., a contract provision awarding attorney fees to the "prevailing party").

So what about cases pending in Michigan courts? Does the same rule apply? Apparently not. While case law is sparse, it appears that the Michigan Court of Appeals has taken a different approach to finality when it comes to unresolved attorney fee issues. On the one hand, MCR 7.202(6)(a)(iv) provides that postjudgment orders "awarding or denying attorney fees or costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are considered "final orders" that are separately appealable. Thus, a party should not wait to appeal the judgment or order deciding the merits of the case until after a statutory or court rule-based attorney fee issue is resolved. See *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 WL 1278478, *3 (Docket No. 256144) (holding that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal; although they did timely appeal from the trial court's postjudgment order awarding attorney fees and costs, the Court of Appeals held that its jurisdiction was limited to the postjudgment order).

On the other hand, the Court of Appeals has held that there is no final judgment if there is an unresolved claim for contractual attorney fees. In *TGINN Jets, LLC v Hampton Ridge Props, LLC*, unpublished opinion per curiam of the Court of Appeals, issued Aug 29, 2013; 2013 WL 4609208 (Docket Nos. 294622, 297844), the plaintiffs filed a lawsuit claiming breach of contract. Following a bench trial, the trial court found in favor of the plaintiffs and awarded damages. The trial court entered a judgment to that effect on March 25, 2009, and also determined that the plaintiffs were entitled to contractual attorney fees, "in an amount to be determined in future proceedings." *Id.* at *2. A separate opinion and order awarding attorney fees was entered on September 29, 2009,

after which the defendants filed a claim of appeal.

On appeal, the plaintiffs argued that the Court of Appeals lacked jurisdiction "to consider any issues other than those relating to the award of attorney fees." *Id.* The Court of Appeals disagreed, finding that the March 25, 2009 judgment was not the final judgment because it "did not resolve the issue of contractual attorney fees, which was a distinct claim in plaintiffs' complaint." *Id.* Observing that "[a]ttorney fees awarded under contractual provisions are considered damages, not costs" under Michigan law, the Court held that the plaintiffs' claim for contractual attorney fees "was not resolved until the trial court issued its September 29, 2009, order establishing the amount of contractual attorney fees, making that order 'the first judgment or order that dispose[d] of all the claims' alleged in plaintiffs' complaint." *Id.* (citations omitted).

So what is the lesson here? In federal court, a postjudgment request for attorney fees is treated as a collateral "cost" issue that does not affect the finality of the decision on the merits, even if the attorney fees are being requested pursuant to a contract. But in Michigan, the Court of Appeals appears to distinguish between contractual attorney fees and those available under a statute or court rule. Thus, if a judgment on the merits has been entered in a case where a motion has been filed for contractual attorney fees, in all likelihood that judgment will not be considered final for purposes of appeal.

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Phillip J. DeRosier is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3866 or pderosier@dickinsonwright.com