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Appellate Practice Report

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Final Order Pitfalls

Figuring out what counts as a "final order" for appellate purposes can cause headaches. But a lot may ride on getting this issue right. Misinterpret the rules governing finality and you might miss a jurisdictional deadline for filing a claim of appeal. So, painful as it is, the subject of finality deserves attention.

Finality varies from context to context and from court to court. (It's especially tricky in bankruptcy appeals.) We'll focus here only on civil cases in the Michigan Court of Appeals.

The significance of finality has to do with the Court of Appeals' jurisdiction. Michigan's constitution grants the Court of Appeals jurisdiction as "provided by law."[1] The Legislature granted the Court jurisdiction "over all final judgments from the circuit court, court of claims or probate court "as those terms are defined by law and Supreme Court rule."[2] The Court of Appeals also has jurisdiction to consider applications for leave to appeal.[3] A party can file an application from, among other things, a circuit court's final order in an appeal from a **district court's** final order.

Michigan Court Rule 7.202(6) defines "final judgment" and "final order" as used in these rules. In a civil action, "'final judgment' or 'final order' means

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order
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> (ii) an order designated as final under MCR 2.604(B) [which allows courts in "receivership and similar actions" to designate certain orders as final],
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> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,
>
> (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,
>
> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.…

Often, a single case includes more than one order that fits this definition. You might have an order resolving all claims, such as an order granting summary disposition, followed by an order granting case-evaluation sanctions. Both are "final orders." The losing party has a claim of appeal from both. (A prevailing party isn't "aggrieved" in a legal sense and therefore lacks standing to appeal."[4]). So you may have more than one "final order."

Wait, you might say. Courts must specify in each order whether it "disposes of the last pending claim and closes the case." Can't I just go by the circuit court's finality designation? In a word: no.

Michigan Court Rule 2.602(A)(3) requires a judgment to state whether it resolves the last pending claim and closes the case.[5] The Staff Comments to the 1998 Amendment indicate that the Supreme Court added this language at the suggestion of the Michigan Judges Association "to **facilitate docket management**."[6] In other words, this language isn't about determining finality for appellate purposes; it's about informing circuit court

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clerks when to close a case. The Court of Appeals has therefore held that the "disposes of the last claim" certification "does not end the inquiry into whether an order is final."[7] Finality is a question for appellate review just like any other.[8] That means a litigant relies on this designation at its peril.

A last warning: not all final orders are created equal. Some final judgments include all previous orders for appellate purposes.[9] But this rule of incorporation doesn't apply to certain final judgments and orders. Michigan Court Rule 7.203 states: "An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right."[10] So a claim of appeal from a final judgment under Michigan Court Rule 7.202(6)(a)(i)—say, an order granting summary disposition—includes all previous orders. An appeal from an order granting case-evaluation sanctions does not.

If there's a single lesson here, it's this: don't take "final order" literally. Sometimes a final order for appellate purposes is the last order in a case. Often, it's not. To avoid game-changing errors, consult the Michigan Court Rules, consult governing caselaw, and consult an appellate specialist.

Misinterpret the rules governing finality and you might miss a jurisdictional deadline for filing a claim of appeal.

A Word of Caution Against Stipulating to a Judgment or Order Reserving Issues for Potential Future Appeals

With certain limited exceptions, only "final" decisions are appealable as a matter of right. In Michigan, that typically means "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 the federal system, a decision is final if it "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). A recent decision from the Sixth Circuit illustrates the danger of parties stipulating to a "final" judgment or order that purports to "reserve" certain issues for further proceedings, including potential future appeals.

Wait, you might say. Courts must specify in each order whether it "disposes of the last pending claim and closes the case." Can't I just go by the circuit court's finality designation? In a word: no.

In *Bd of Trustees of Plumbers, Pipe Fitters & Mech Equip Serv, Local Union No 392 v Humbert*, 884 F3d 624 (CA 6, 2018), the plaintiff union sued an employer claiming that it had failed to pay the union certain monies under the terms of the parties' collective bargaining agreement. The district court granted summary judgment to the union as to liability, but did not determine the amount of damages to which the union was entitled. *Id.* at 625.

Wanting to proceed immediately with an appeal on the liability issue, the parties agreed to the entry of a "Stipulated Judgment Order" providing that the employer would pay an agreed-upon amount of damages to the union if the district court's liability determination was upheld on appeal. The judgment specifically recited, however, that "none of the parties are waiving any rights or arguments in any subsequent proceedings, appeals, and/or further proceedings before the District Court and/or the United States Court of Appeals for the Sixth Circuit with respect to any issues, including but not limited to the amount of the damages to which the Plaintiffs are entitled to recover." *Id.*

The Sixth Circuit dismissed the appeal, finding that the "Stipulated Judgment Order" wasn't final because it "[left] open the possibility of 'piecemeal appeals.'" *Id.* at 626, quoting *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658, 660 (CA 6, 2013). The Court observed that "[t]he point of the finality requirement . . . is to make the parties bring all of their issues—liability, damages, and whatever else they choose to litigate—in a single appeal." *Id.* The parties' "Stipulated Judgment Order" violated that fundamental principle because it would "'let the parties pause the litigation, appeal, then resume the litigation' on whatever issues they like" in the event that the court were to reverse the district court's liability determination. *Id.* (citation omitted).

The Sixth Circuit further explained that it didn't make a difference whether the litigation "potentially **would** come to a close" if the court affirmed the district court's decision on liability. *Id.* What mattered was that "the 'potential for piecemeal litigation'" remained if the Court did "anything but affirm." *Id.* (citation omitted).

It doesn't appear that either the Michigan Supreme Court or Court of Appeals has addressed this particular procedural issue, but there is little doubt that the result would be the same under the Michigan Court Rules. By definition, an order or judgment that reserves certain issues for further proceedings doesn't "dispos[e] of all the claims and adjudicate[e] the rights and liabilities of all the parties." MCR 7.202(6)(a)(i).

So while it may seem efficient to craft a judgment or order that decides the core issue in a case (such as liability) and leaves other issues potentially subject to being revisited in the event of a remand, the appellate courts don't see it that way. They see it as giving rise to the potential of piecemeal appeals, which are highly disfavored. If parties wish to preserve appellate rights, they need to ensure that a judgment or order is truly "final."

Endnotes

1 See Const 1963, art 6, § 10.
2 MCL 600.308(1).
3 MCL 600.308(2).
4 *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).
5 MCR 2.602(A)(3).
6 MCR 2.602, Staff Comment to 1998 Amendment (emphasis added).
7 *McCarthy & Assocs, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992).
8 *Id.*
9 *See, e.g., Washington v Starke*, 173 Mich App 230, 241-42; 433 NW2d 834 (1988).
10 MCR 7.203.