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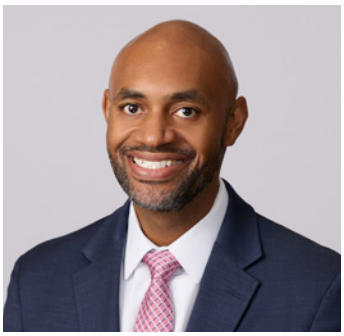




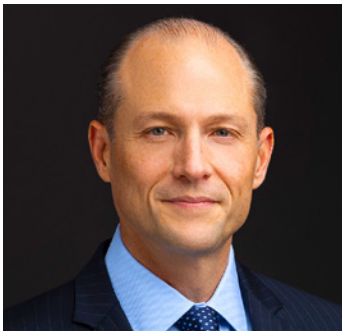

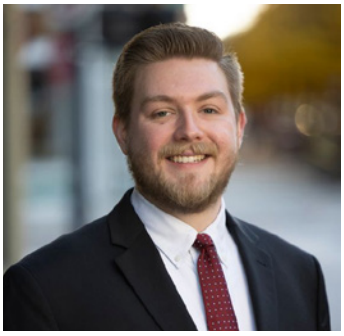
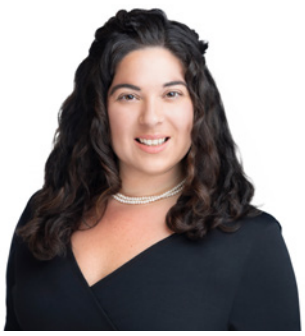

Promoting Excellence in **Civil Litigation**

Appellate Practice Report

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Orders Enforcing Agreements to Arbitrate—Final or Not?

Under the Michigan court rules, the Court of Appeals has jurisdiction over an appeal as of right from a "final judgment or final order." MCR 7.203(A)(1). In a civil case, that usually 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). A recent decision from the Court of Appeals serves as a reminder that orders dismissing a case in state court in favor of the parties' agreement to arbitrate are not necessarily "final" for purposes of appeal.

In *Nucast, LLC v Livonia Pre Cast LLC*, ___ Mich App ___; ___ NW3d ___; 2025 WL 3209432 (2025), the parties asserted various claims and a counterclaim against each other in a dispute arising out of the plaintiff's purchase of the defendants' concrete-business assets out of bankruptcy. After the trial court dismissed the defendants' counterclaim on summary disposition and denied their motion for summary disposition as to the plaintiff's complaint, the parties "entered into an arbitration agreement to resolve the now-narrowed-by-the-trial-court dispute." *Id.*, 2025 WL 3209432, *2. The trial court entered a stipulated order enforcing the parties' agreement. Although the order stated that it was "a final order resolving 'the last pending claim' and closing the case," it provided that the dismissal was "without prejudice" and that the parties could file a motion to reopen the case to enter any resulting arbitration award. *Id.*

The defendants appealed, but the Court of Appeals dismissed the appeal for lack of jurisdiction, explaining that because the trial court's order "dismissed all the remaining claims *without prejudice* . . . it did not 'resolve the merits' of those claims, such that they 'are not barred from being resurrected on that docket at some future date.'" *Id.* (citation omitted; emphasis in original). Indeed, the order "expressly allowed the parties to move to reopen the case for entry of an arbitration award, which is akin to the trial court retaining jurisdiction." *Id.* And while the order did state that it was "final," the Court of Appeals reiterated its longstanding caution that "such language is not dispositive and 'does not control this Court's jurisdiction.'" *Id.* at *3 (citation omitted).

So, is an order dismissing a case in favor of arbitration *ever* appealable? It appears the answer is "maybe." In *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), the Court of Appeals held that an order granting summary disposition and referring claims to arbitration *was* "final" because "there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction." *Id.* at 148 n.1. *Nucast* cited *Rooyaker* on the latter point, suggesting that the trial court's retention of jurisdiction to entertain an order reopen-

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ing the case was key to the order's lack of finality. Indeed, the Court of Appeals has even found jurisdiction to exist in a case in which the dismissal in favor of arbitration was "without prejudice," albeit in an unpublished opinion. *See Turner v AutoAlliance Int'l, Inc*, unpublished per curiam opinion of the Court of Appeals, issued Nov 19, 2002; 2002 WL 31934417, *1 (Docket No. 233185) (holding that although dismissals "without prejudice" are ordinarily not final, the trial court's order granting summary disposition and compelling arbitration of the plaintiff's worker's compensation retaliation claim pursuant to his collective bargaining agreement was a "final judgment" because under MCR 7.202, it was "'the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties'").

One way to distinguish *Nucast* from *Rooyaker* and *Turner* is the fact that the appeal in *Nucast* did not involve the actual compelling of arbitration. On the contrary, the parties *agreed* to arbitrate the remaining claims. What the defendants appealed was the trial court's dismissal of their counterclaim and denial of their motion for summary disposition as to the plaintiff's claims. *Nucast* took issue with that, noting that "[p]arties cannot create a final order by stipulating the dismissal of remaining claims without prejudice after a trial court enters an order denying a motion for summary disposition addressing only some of the parties' claims." *Nucast*, 2025 WL 3209432, *2 (citation modified).

By contrast, *Rooyaker* and *Turner* both involved challenges to the order compelling arbitration itself. In that situation, a better argument can be made for finality. Indeed, that is the same approach that federal courts in the Sixth Circuit follow, holding that orders of dismissal in deference to arbitration under Federal Rule of Civil Procedure 12(b)(6) and orders granting summary judgment and compelling arbitration under Rule 56 are immediately appealable because "[b]oth orders indicate a final decision on the arbitrability issue and leave nothing more for the court to do." *ATAC Corp v Arthur Treacher's Inc*, 280 F3d 1091, 1098 (6th Cir., 2002). The Sixth Circuit has found such dismissals to be final, appealable decisions even if they are entered "without prejudice." See *Howell v Rivergate Toyota, Inc*, 144 Fed Appx 475, 477 (6th Cir. 2005) ("The district court's order dismissed Mr. Howell's action, albeit without prejudice, and the order thus constitutes a final decision.")

So, what is the lesson in all of this? It is important to carefully evaluate any order (or proposed stipulated order) of dismissal in favor of arbitration and determine its effect. If the order dismisses the cases and leaves nothing else for the lower court to do, then it is arguably final for purposes of appeal. But if the order indicates that the trial court is retaining jurisdiction, then the order is most likely interlocutory and thus not immediately appealable—at least not as a matter of right. While the jurisdiction of federal appellate courts is narrowly circumscribed by statute, a party can always ask the Michigan Court of Appeals to exercise its discretion under MCR 7.203(B)(1) to grant leave to appeal from an order that is "not a final judgment appealable as of right."