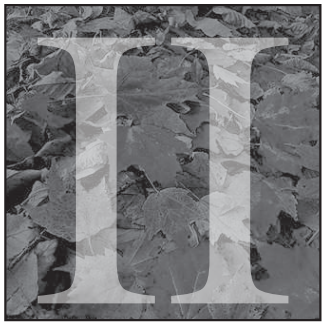
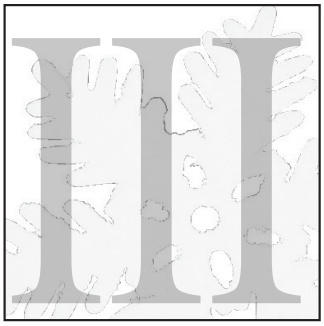
MICHIGAN DEFENSE
QUARTERLY

Volume 36, No. 4 - 2020





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Appellate Practice Report

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"Last Pending Claim" Language in Trial-Court Orders: It's a (Potential) Trap[1]

The Michigan Court Rules provide that every "judgment" must state whether it's the case's final order:

> Each judgment must state, immediately preceding the judge's signature, whether it resolves the last pending claim and closes the case. Such a statement must also appear on any order that disposes of the last pending claim and closes the case. [MCR 2.602(A)(3)]

Although this language can help advocates track a case's progress, it can be a trap, too. The inclusion or omission of this language is not relevant to whether the judgment is final for appellate purposes. Consequently, attorneys who rely on this language to determine what is and is not appealable by right may waive a client's appellate rights.

Generally, a party may file an appeal of right from the first order that resolves all claims. See MCR 7.202(6)(a)(i). Other orders can trigger appeals of right, but the final judgment is often the key order. The "last pending claim" language of MCR 2.602(A)(3) seems, at first blush, to mark when an order is final under this rule.

But finality for appellate purposes does not depend on the inclusion or omission of the "last pending claim" language. The Court of Appeals made this point in *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc,* 292 Mich App 51; 807 NW2d 354 (2011). There, the trial court's order stated that it was final, even though it left several claims open. The appellants filed a claim of appeal, treating the order as a final order for appellate purposes. Before addressing the merits, the Court of Appeals explained that an order's finality depends on the Michigan Court Rules, not the trial court's erroneous insertion of "last pending claims" language. *Id.* at 61. Consequently, the order did not give rise to an appeal of right. (Fortunately, the Court of Appeals exercised its discretion to treat the claim of appeal as an application and granted it.)

Why would the Michigan Court Rules require courts to insert "last pending claim" language if that language has no legal effect? Staff comments to the 1998 amendments to MCR 2.602 indicate that the Michigan Supreme Court added this requirement at the suggestion of the Michigan Judges Association "to facilitate docket management." MCR 2.602, Staff Comment to 1998 Amendment. So this language is not about determining finality for appellate purposes. It's about informing circuit-court clerks when to close a case.

Advocates who confuse "last pending claim" language with a determination of finality can lose appellate rights. For example, suppose you receive an order in the opposing party's favor on all counts. The opposing party's sanctions motion is still pending, which prompts the court to add language stating that the order is not final and does not close the case. Because that order "disposes of all the claims and adjudicates the rights and liabilities of all the parties[,]" it is a final order under MCL 7.202(6)(a)(i). Instead of filing a timely claim of appeal, however, you rely on the "last pending claim" language and wait for an order on the sanctions motion before filing a claim of appeal. Then you receive a sanctions order stating that it **is** a final order that **does** close the case. If this sanctions order arrives more than 21 days after entry of the judgment on the merits, then you have waited too long to file a claim of appeal on the merits.

You can still appeal the sanctions order under MCR 7.202(6)(a)(iv), but you've lost your right to file a claim of appeal from the **merits** judgment. Even if you still have time to file a delayed application, you're likely to have an unhappy client.

The lesson, therefore, is to assess finality based on MCR 7.202(6) and governing caselaw rather than the inclusion or omission of "final order" language.

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When is a Court's Decision Really "Final" for Purposes of Appeal?

As a general matter, appellate jurisdiction in both the Michigan Court of Appeals and the federal appellate courts stems from entry of a "final" decision. See MCR 7.203(A)(1) ("The court has jurisdiction of an appeal of right filed by an aggrieved party from . . . (1) A final judgment or final order . . . ."); 28 USC 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."). But determining whether a decision is actually "final" for purposes of appeal is not always an easy task.

Michigan rules

With certain limited exceptions, the Michigan Court Rules define the "final" decision in a case as "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). Seems straightforward enough, but what does it mean to "dispose" of the claims in a case and "adjudicate" the parties' rights and liabilities? Do findings of fact and conclusions of law count? What if they contain the words "order" or "judgment" at the end? In short, it depends.

While a final judgment or order does not have to take any particular form, it has been said that "[t]o be final, that is, binding and determinative of litigation, a judgment must do more than indicate the judge's opinion as to the outcome of an action and must be 'rendered.'" 7A Michigan Pleading and Practice (2d ed), § 53:7. As explained in 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2602.2:

> [A] distinction exists between the court's decision or opinion and the judgment entered thereon. An opinion announces the court's decision and its reasons therefor, but the further entry of a judgment is required to carry the decision into legal effect.

So, for example, a written opinion using language that is "prospective only" is not sufficient—i.e., a "judgment . . . will enter." *LeTarte v Malotke*, 32 Mich App 289, 290, 292; 188 NW2d 673 (1971). See also *Heck v Bailey*, 204 Mich 54, 55; 169 NW 940 (1918) (finding statement that the defendant was "entitled to a divorce" was not sufficient to constitute a rendered judgment); *Hibbard v Hibbard*, 27 Mich App 112, 113; 183 NW2d 358 (1970) (no final judgment where the court's opinion stated, "[a] judgment may be entered in accordance with the foregoing opinion").

On the other hand, the Michigan Court of Appeals in *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212; 625 NW2d 93 (2000), found the following language to be sufficient to constitute the trial court's "judgment":

> Judgment **should** be entered for plaintiff against defendant, Don Jones, Inc. in the amount of $57,000.
>
> IT IS SO ORDERED. [*Id.* at 220 n 4 (emphasis added by the court).]

The dissent considered this language as indicating the trial court's *future* intent to enter a judgment, but the majority disagreed:

> While the document was not entitled a "judgment," it functioned, for all intents and purposes, as a judgment. Indeed, "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." See Black's Law Dictionary (7th ed), p 846. There is no requirement that this determination be contained in a document entitled a "judgment." Such a requirement would elevate form over substance. Here, the trial court did indeed intend the original "opinion and order" to function as the "final determination of the rights and obligations of the parties." [*Id.*]

What about the requirement under MCR 2.602(A)(3) that an order or judgment certify whether it resolves the last pending claim and closes the case? As we discuss more fully in our companion article, "'Last Pending Claim' Language in Trial-Court Orders: It's a (Potential) Trap," that can sometimes be helpful, but it isn't determinative. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (holding that an order leaving certain claims intact wasn't final, regardless of the trial court's statement to the contrary). Thus, the question in every case is whether the judgment, order, or opinion at issue intends to end the litigation, or whether it leaves open the possibility that some other action needs to be taken.

Federal rules

The federal rules make it easier to determine when a decision is final. With limited exceptions for orders disposing of certain post-judgment motions, Rule 58 provides that every judgment "must be set out in a separate document." FR Civ P 58(a). The purpose of this requirement is to help avoid uncertainty "'as to the date on which a judgment is entered,' and thus when the time for an appeal begins to run." *United States v $525,695.24, Seized from JPMorgan Chase Bank Investment Account #xxxxxxxx*, 869 F3d 429, 435 (CA 6, 2017) (citation omitted). Rule 54 provides additional guidance by stating that "[a] judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings." FR Civ P 54(a).

As a result, neither a court's findings of fact and conclusions of law after a bench trial (or evidentiary hearing) nor a written opinion granting a motion to dismiss or for summary judgment will start the time to appeal (or to file post-judgment motions). Instead, a separate document stating the court's "judgment" must be entered that is (1) "self-contained and separate from the opinion," (2) "note[s] the relief granted," and (3) "omit[s] (or at least substantially omit[s]) the trial court's reasons for disposing of the claims." *LeBoon v Lancaster Jewish Community Ctr Ass'n*, 503 F3d 217, 224 (CA 3, 2007). If a separate document is **not** entered as required by Rule 58(a), then judgment is automatically entered after 150 days. FR Civ P 4(a)(7)(A)(ii).

Conclusion

More often than not, the finality of a court's decision will not be difficult to assess. But care should be taken to ensure that it is, in fact, final.

Endnotes

1 Paraphrasing Ackbar, Gial, *Return of the Jedi* (1983).