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New Amendments to Rule 3(c): Removing "Traps for the Unwary"

Some important takeaways from the recent amendments to Federal Rule of Appellate Procedure 3(c).

By Ahmad Huda

At first glance, the preparation of a notice of appeal is an easy task. Federal Rule of Appellate Procedure 3 (Rule 3) requires that the notice of appeal designate certain information—the underlying adverse order(s) or judgment(s) being appealed, the parties, and the case. If this sounds easy enough, remember that this requirement is jurisdictional in nature and cannot be waived. In other words, if the notice of appeal has certain defects, those defects bar an appellate court's review of the adverse ruling. So, practitioners must ensure that they comply with Rule 3's requirements to avoid waiver of any ruling or issue. As the Committee Notes recognize, the rule contained "trap[s] for the unwary," which new amendments, effective December 1, 2021, seek to eliminate. This article describes these new amendments to Rule 3(c) and explains some of the key takeaways.

Takeaway #1

You do not need to designate prior interlocutory orders that merge into the final judgment. As the Committee Notes indicate, it is well settled that "a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment." *See* 28 U.S.C. § 1291 (providing for appellate jurisdiction over "final decisions"); *see also* 28 U.S.C. § 1292 (providing appellate jurisdiction over a limited set of interlocutory orders). So, designation of the judgment in a notice of appeal "encompasses not only that judgment, but also all earlier interlocutory orders that *merge* in the judgment." *John's Insulation v. L. Addison & Assocs.*, 156 F.3d 101, 105 (1st Cir. 1998) (emphasis added) (collecting cases from other circuits for the same principle). This principle is known as the "merger doctrine." *See id.* Notwithstanding this well-settled doctrine, litigants have at times argued that an

appellate court lacks jurisdiction to review an interlocutory order where the notice of appeal simply designates the final judgment. *See, e.g.*, *id.*

Putting that argument to rest, one of the amendments to Rule 3 expressly provides that the notice of appeal "encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order"—and, importantly, "[i]t is not necessary to designate those orders in the notice of appeal." Fed. R. App. P. 3(c)(4). To further avoid any confusion, the phrase *or part thereof* is deleted in the subsection requiring that the notice of appeal "designate the judgment, order, or part thereof being appealed." Fed. R. App. 3(c)(1)(B). Put another way, these amendments confirm that if a notice of appeal designates the final judgment being appealed, an appellant can seek review of unidentified interlocutory orders that merged into that judgment by operation of law.

Conversely, if the notice of appeal designates an order that merges into the final judgment, another amendment provides that an appeal should not be dismissed "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment. . . ." Fed. R. App. 3(c)(7). "In this situation," the Committee Notes explain, "a court should act as if the notice had properly designated the judgment."

Taken together, these amendments ensure that litigants do not lose or waive their rights based on how they designate certain orders in the notice of appeal.

A word of warning, however, to practitioners: as the Committee Notes explain, the merger doctrine has its exceptions, and practitioners should consult case law to determine which prior interlocutory orders do not, in fact, "merge" into the judgment. For example, in the First Circuit, "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable." *John's Insulation*, 156 F.3d at 105. In other words, a judgment rendered because of a failure to prosecute does not encompass interlocutory orders; consequently, a notice of appeal designating such a judgment would not confer appellate jurisdiction to review those interlocutory orders. And to complicate matters, not all circuits agree on whether this exception applies. *See id.* (identifying circuit split); *see also Commonwealth Sch., Inc. v. Commonwealth Acad. Holdings LLC*, 994 F.3d 77, 82 (1st Cir. 2021). In sum, practitioners must not assume that all prior interlocutory orders "merge" into the judgment, and they should perform legal research—especially in the circuit court in which the notice of appeal is filed—where appropriate.

Takeaway #2

A notice of appeal designating a judgment and an interlocutory order does not necessarily exclude other, unidentified interlocutory orders. Out of an abundance of caution (and perhaps unaware of the merger doctrine), practitioners have sometimes designated a judgment and an interlocutory order in a notice of appeal. In adopting this belts-and-suspenders approach, however, litigants unwittingly risked waiving review of other unidentified interlocutory orders. *J.W. v. Roper*, 541 F. App'x 937, 942 (11th Cir. 2013) ("[W]hen a notice specifies a particular ruling or issue, we infer others are not part of the appeal."); *Denault v. Ahern*, 857 F.3d 76, 81–82 (1st Cir. 2017) ("[I]f we should find it clear that the object of that challenge was not . . . included in the itemized list of rulings appealed, we will have no jurisdiction to consider the challenge.").

To avoid this outcome, Rule 3(c) is now amended to include the following subsection:

> An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

Fed. R. App. P. 3(c)(6). Put differently, the default rule is that "specific designations do not limit the scope of the notice of appeal"—unless the appellant "expressly" says so in the notice itself.

Takeaway #3

The lack of designation of a separate document under Rule 58 in civil cases does not necessarily bar review of the final judgment (and prior interlocutory orders). Federal Rule of Civil Procedure 58 requires that judgments be set out in a "separate document." Before December 1, 2021, if the notice of appeal designated an order that disposed of all claims—say, an order granting summary judgment—there was a risk that a court would limit its review to specified rulings within that order but *not* extend its review to other rulings. *See, e.g.*, *Evance v. Trumann Health Servs., LLC*, 719 F.3d 673, 677 (8th Cir. 2013) (holding that notice of appeal designating "June 8, 2012 grant of summary judgment" did not encompass June 29, 2011, order of dismissal). Similarly, if a notice of appeal designated an order disposing of a motion identified under Fed. R. App. 4(a)(4)(A), there was a risk that some courts would limit review to that particular order and would not view the order as encompassing the final judgment.

To minimize the risk of waiver, the amendment resolves the issue as follows:

> In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates
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> (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties.
>
> (B) an order described in Rule 4(a)(4)(A).

Fed. R. App. P. 3(c)(5).

Litigants do not control when or if the trial court enters a "separate document" under Federal Rule of Civil Procedure 58, so this amendment ensures that a litigant is not penalized for not designating the "separate document" called for under that rule.

Conclusion

In sum, the amendments to Rule 3 are designed to remove "trap[s] for the unwary" and are more likely to ensure that parties do not unwittingly lose their rights based on how they prepare their notices of appeal. Even so, parties should pay attention to the local rules and the case law in their specific circuit to ascertain how courts handle questions related to the notice of appeal.

Ahmad Huda is a senior associate in Porter Wright's Columbus, Ohio, office.