

## WHEN IS A FINAL ORDER REALLY 'FINAL'?

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Even experienced appellate practitioners are confounded by Michigan's court rule defining "final judgment" or "final order." That is MCR 7.202(7).

This rule defines a "final judgment" or "final order" in a civil case to mean the first judgment or order that disposes of all of the claims and adjudicates the rights and liabilities of all the parties. The rule is deceptively simple in form. Its application and interpretation have proven challenging.

For example, of late, the Michigan Court of Appeals' staff and appellate practitioners have been discussing the significance of a "final order" in the form of an order dismissing a case without prejudice. A typical scenario goes like this:

Plaintiff A sues defendants B, C and D. Defendant B prevails on a summary disposition motion, and the trial court enters a summary disposition order in favor of defendant B. The plaintiff settles with defendant C. An order reflecting the settlement is entered, and defendant C is dismissed from the lawsuit. For tactical reasons, mostly relating to the weakness of the plaintiff's case against defendant D, the plaintiff opts to enter into a "without prejudice" dismissal of his claims against defendant D. An order is entered reflecting the dismissal "without prejudice."

Presumably, the order dismissing the case without prejudice constitutes the "final order" within the meaning of MCR 7.202(7)(a)(1). It is the first order that disposes of all claims and adjudicates the rights and liabilities of all the parties. It gives plaintiff A an appeal of right in order to challenge the trial court's grant of summary disposition to defendant B. Or does it? The Michigan Court of Appeals' clerk's office may hold a different view of this situation. Experience shows that the clerk's office has disputed the fact that a "without prejudice" ruling disposes of or adjudicates anything and thus does not create a right of appeal.

The Court of Appeals' view has not been well received by appellate practitioners. Frequently, claims are dismissed on a "without prejudice" basis. For many reasons, not the least of which is that the person pursuing the claim may no longer have the interest in pursuing it, but does not want to abandon it without recourse, a "without prejudice" dismissal is extremely useful.

We will continue to update our clients on the ongoing debate. In the meanwhile, representatives of the Michigan Court Rules Practice Committee, a committee of the State Bar of Michigan Appellate Practice Section, look forward to the opportunity to sit down with members of the court of appeals' clerk's staff to discuss the situation.

Appellate practitioners seek to impress upon the court's staff the consequences of the court's adoption of the view that a "without prejudice" dismissal order cannot constitute a final order for appeal purposes. They oppose the court's approach which, makes a "without prejudice" order one falling outside the definition of a "final order" as found in MCR 7.202(7)(a)(i). A "without prejudice" order is a valuable tool in an attorney's arsenal.

Were the court of appeals' construction of MCR 7.202(7)(a)(i) to eliminate "without prejudice" orders, it should be done only after full discussion and input from those whose everyday practices will be impacted.