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Proposed Changes to FRAP 3 Face Rare Pushback From Judiciary

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Federal judges rarely defend their judicial actions outside of court. A recent kerfuffle over Federal Rule of Appellate Procedure ("FRAP") 3 is a high-stakes (at least for federal practitioners) exception.

The issue arises out of FRAP 3(c)(1)(B), which requires a notice of appeal to "designate the judgment, order, or part thereof being appealed." Typically, a "notice of appeal designating the final judgment necessarily confers jurisdiction over earlier interlocutory orders that merge into the final judgment." *AdvantEdge Business Grp. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236-37 (10th Cir. 2009); *Federal Practice & Procedure* § 3949.4 (4th ed.) ("A notice of appeal that names the final judgment suffices to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders . . . .").

A controversy arose, however, when a litigant in the eighth circuit designated the final judgment and only *the latter* of two orders dismissing claims against two different defendants, respectively. In an opinion by Judge Steven Colloton, the eighth circuit reasoned that "a notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice." *Stephens v. Jessup*, 793 F.3d 941, 943 (8th Cir. 2015) (quotation marks omitted). In other words, a statement that a litigant is appealing from only an articulated list of orders necessarily excludes from the appeal other orders that are not listed.

The potential consequences of the *Stephens* decision prompted two Hogan Lovells attorneys (including former acting U.S. Solicitor General Neal Katyal) to propose a change to FRAP 3 in an October 2016 letter to the Rules Committee.[1] According to the Hogan Lovells attorneys, the rule articulated in *Stephens* is "a trap for the unwary" that could cause appellate practitioners to forfeit issues on appeal simply because of their efforts to provide more specificity in the notice of appeal. They proposed a change to FRAP 3 to clarify that "[a] party does not forfeit any argument on appeal by failing to designate an order other than—or designating orders in addition to—the district court's judgment and any order disposing of a motion listed in Rule 4(a)(4)(A)."

On August 19, 2019, the Rules Committee did just that, proposing significant modifications to FRAP 3 "to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal."[2] In particular, the Rules Committee expressed concern that "there is substantial confusion both across and within circuits" regarding the requirements of a notice of appeal. To alleviate the confusion, the Rules Committee proposed the following changes.

First, Rule 3(c)(1)(B) now states that a notice of appeal must "designate the judgment, order, or part thereof being appealed." The proposed revision would instead require it to "designate the judgment,—or the appealable order—from which the appeal is taken." This language clarifies that there must be a single *final judgment* (or in uncommon cases, another appealable interlocutory order) that is the basis of appellate jurisdiction.

Second, the Rules Committee proposed adding specific language precluding any possible waiver by adding a new Rule 3(c)(4): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." This rule change in effect overrules the eighth circuit's *Stephens* decision and precludes inadvertent waiver of issues on appeal through the phrasing of the notice of appeal. Now, to appeal from fewer than all of the orders that merge into the final judgment or appealable order, a notice of appeal must, as a new Rule 3(c)(6) clarifies, "expressly stat[e] that the notice of appeal is

so limited."

Finally, the Rules Committee proposed a new Rule 3(c)(5), which would excuse errors by district court clerks who fail to set out the final judgment in a separate document under Federal Rule of Civil Procedure 58 (a rule often honored in the breach). In particular, the proposal provides that a notice of appeal will encompass the final judgment "whether or not that judgment is set out in a separate document . . . if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or "an order described in Rule 4(a)(4)(A)" (disposing of a motion for reconsideration).

As the "Committee Note" accompanying the proposal clarifies, these changes are all aimed at eliminating a "trap for the unwary" caused by a "misunderstanding or a misguided attempt at caution" by courts applying the current rule. This language can only be read to target decisions like the *Stephens* decision in the eighth circuit, which the Committee Note alleges "limit[] the scope of the notice of appeal to the particular order, and prevent[] the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment."

In a remarkable departure from judicial restraint, Judge Colloton submitted a comment sharply disputing the need for the proposed revisions.[3] According to Judge Colloton (and a string cite provided in his letter), *every circuit*, not just the Eighth, follows the rule that listing specific orders to be appealed necessarily indicates an intention not to appeal those that are not listed. This rule "properly appl[ies] the text of the rule and give[s] effect to the intent manifested by the appellant when a notice of appeal was filed." Moreover, the proposed change would incorrectly "presume that lawyers are incapable of" specifying the orders from which they want to appeal.

According to Judge Colloton, the proposed changes are really aimed at accommodating "appellate specialists, retained after a notice of appeal is filed," who "understandably may prefer a different rule that permits an appellant *to change its intent* after the time for filing a notice of appeal has expired." But facilitating the needs of such "latecoming appellate lawyers" is "not a sound reason to amend Rule 3(c)," according to Judge Colloton.

Moreover, Judge Colloton alleged that the proposed change would "skew the rule so that virtually every notice of appeal must be construed to allow the broadest possible scope of appellate litigation." Rather than encouraging needless litigation, Judge Colloton urged that it would be "wise to leave well enough alone."

Judge Colloton submitted his comment on February 19, 2020. It is not yet apparent whether the Rules Committee will change or abandon its proposal in the face of Judge Colloton's criticism. Other comments were positive, and the Rules Committee may well find its original rationale sound.

In any case, the earliest the new rule could go into effect is December 1, 2021, In the meantime, all appellate practitioners would be well advised to avoid the "trap for the unwary" in the current Rule 3, and to either specify in the notice of appeal *all* of the orders they intend to appeal from—without exception—or, if they intend to appeal from all possible orders, to specify *only* the final judgment. Any other course would risk waiving certain appellate rights. ■

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1.. https://www.uscourts.gov/sites/default/files/16-ap-d-suggestion_katyal_0.pdf
2. https://www.uscourts.gov/sites/default/files/preliminary_draft_proposed_amendments_to_the_federal_rules_of_appellate_bankruptcy_and_civil_procedure_0.pdf
3. https://www.regulations.gov/document?D=USC-RULES-AP-2019-0001-0013

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