APPELLATE PRACTICE
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Summer 2013, Vol. 32 No. 4

Determining Finality of a Judgment Awarding Damages

By Victoria Dorfman

There are a few truisms that every appellate practitioner knows: Federal courts of appeals have limited jurisdiction, reviewing (with some minor exceptions) final judgments only, and parties cannot agree to or create jurisdiction where it is otherwise absent. As usual, however, in the appellate-litigation world, how these principles play out in specific circumstances is complicated and subject to various considerations. Where a judgment entails an award of damages, it does not always have to contain the actual sum to be final. It is therefore essential for appellate practitioners to be aware of the rules applicable to damages awards and related procedural matters of entering a judgment on the docket and its effect on finality for purposes of appeal.

As courts of appeals have emphasized, "every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction" because "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Pause Tech. LLC v. Tivo Inc.*, 401 F.3d 1290, 1292 (Fed. Cir. 2005) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Thus, before turning to the merits, courts of appeals consider whether there is a final judgment of the district court under 28 U.S.C. § 1291 or 28 U.S.C. § 1295 (in the case of the Federal Circuit) or a basis for jurisdiction over an interlocutory order under 28 U.S.C. § 1292(c).

Under section 1291, "[t]he courts of appeals (other than the U.S. Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Under section 1295, the Federal Circuit has jurisdiction to review "a final decision of the United States Court of Federal Claims." 28 U.S.C. § 1295(a)(3). Per the Supreme Court's decision in *Catlin v. United States*, a final judgment is a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Quoting *Firestone Tire & Rubber Co. v. Risjord*, the Federal Circuit explained several functions of the final-judgment rule. First, it "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Pause Tech.*, 401 F.3d at 1293 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). Piecemeal appeals "undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." Second, "the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Finally, it "promot[es] efficient judicial administration." *See also Franklin v. District of Columbia*, 163 F.3d 625, 629 (D.C. Cir. 1999) (expressing preference for a single appeal rather

than piecemeal litigation, especially where it would force a court of appeal "to master the same record twice[] and render two opinions instead of one" and observing that a later decision may obviate a need for appeal or lead to a settlement).

Whether a Judgment That Does Not Award a Specific Sum for Damages Is Final

Whether a decision is final for purposes of appeal, even where damages are not fixed, is typically an ad hoc determination. That said, some common principles emerge.

As a threshold matter, however, and as it relates to determinations of the finality of judgments of all kinds, "[n]o form of words is necessary to evince the rendition of a judgment." *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1363 (Fed. Cir. 2003) (quoting *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232 (1958)). "Rather, whether an order constitutes a final judgment depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." *Id. Cf.* Moore's Federal Practice 3d § 58.06[2] ("When the intent of the court in making the order is unclear, an appellate court must dismiss any appeal for want of jurisdiction, remanding for clarification when appropriate.").

The Supreme Court has emphasized that "it is obvious that a final judgment for money must, at least, determine, or specify the means of determining the amount." *United States v. F. & M. Schaefer Brewing*, 356 U.S. 234. The Court further noted that there is no finality where "one must search the whole record to determine the amount[] or the facts necessary to compute the amount." Accordingly, courts of appeals have held that where there is no discretion in calculation damages—that is, the task is ministerial or employs a formula—there is finality.

For example, the Tenth Circuit explained that "the touchstone of a final order is a decision by the court that a party shall recover only a sum certain. . . . Accordingly, an order that determines liability but leaves damages to be calculated is not final." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1145 (10th Cir. 2004). The court noted, however, an exception that "an order is final even if it does not reduce the damages to a sum certain if the order sufficiently disposes of the factual and legal issues and any unresolved issues are sufficiently ministerial that there would be no likelihood of further appeal." In a Social Security disability case, an order is not final where "both determining the correct amount of monthly benefits and the proper deductions for other income benefits may prove to be complicated," and thus, calculations would be "disputed" and "not likely to be simply ministerial." *Id.* (quoting *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1093 (10th Cir. 1995)). Similarly, there was no final judgment in a backpay case where "[t]he various components of the damages award were not sufficiently fixed," as "the amount of Plaintiff's past and future earnings was not determined, and calculation of those amounts could have proven complicated and disputed." *Id.* In that case, the district court also ordered parties "to meet and confer within[ ] 20 days from the date hereof to determine the precise amounts to be set forth in the judgment in accordance with the above stated findings and conclusions" and noted that it would set a hearing if parties disagreed, thereby having "contemplated the possibility of a contentious process."

Likewise, the Seventh Circuit explained (albeit in dicta) that

> if the determination of damages will be *mechanical and uncontroversial*, so that the issues the defendant wants to appeal before that determination is made are very unlikely to be mooted or altered by it—in legal jargon, if only a "ministerial" task remains for the district court to perform—then immediate appeal is allowed.

Prod. & Maint. Emps.' Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1401 (7th Cir. 1992) (quotations omitted) (emphases added). The court further held in the alternative that it had jurisdiction because "[t]he amount of benefit accruals is set by a formula in the plan [and d]etermining that amount is just a matter of plugging information into the formula."

Conversely, the Federal Circuit made clear in a number of cases that a judgment is not a final decision appealable under section 1295 where "it leaves pending an accounting [and proceedings on injunctive relief expressly stayed by the court]." *Johannsen v. Pay Less Drug Stores Nw., Inc.*, 918 F.2d 160, 162 (Fed. Cir. 1990). *See also Bayfield Constr. Co., Inc. v. United States*, 230 F.3d 1371 (Fed. Cir. 1999) (unpublished) (after granting summary judgment on liability, the court instructed the parties regarding further proceedings on damages issues; "[h]ere the issue of damages remains undecided," and therefore, there is no final decision for section 1295 purposes). In a bid-protest case, the Court of Federal Claims found liability, but the plaintiff had yet to submit a detailed breakdown of its bid-preparation and proposal costs. *CNA Corp. v. United States*, 83 Fed. Cl. 1, 6 (2008). The clerk of the court entered "judgment" under Rule 58 (see below). That court explained that, notwithstanding the issuance of this document, "finality was lacking" because the court "still need[ed] to set a dollar amount for bid preparation and proposal cost damages resulting from defendant's arbitrary and capricious behavior found [in the prior opinion]." The court further noted that "[i]t was always [its] intention, and it is the normal course of events, that a detailed cost breakdown would be submitted following the issuance of the court's opinion on the bid protest."

Notably, although the Federal Circuit has jurisdiction over an appeal in a patent-infringement case that is final but for accounting of damages, 28 U.S.C. § 1292(c)(2), the Federal Circuit has recently rejected attempts to use patent accounting as an analogy for expanding (pendent) jurisdiction. The court explained that there is a statutory basis for jurisdiction in cases where patent accounting remains but not in other contexts. *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356, 1361 (Fed. Cir. 2012).

Whether a Court Must Issue a Separate "Judgment"

If a judgment is final by virtue of making the damages calculation ministerial, the next question is whether a separate judgment was entered on the docket and, if not, whether its entry can be waived.

Federal Rule of Civil Procedure (FRCP) 54(a) and Rule 54(a) of the Rules of the U.S. Court of Federal Claims (RCFC) state: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings." *See also* Moore, § 58.05[4][a] ("A judgment should be a self-contained document, saying who has won and what relief has been awarded, but omitting the reasons for this disposition, which should appear in the court's opinion."). As *Moore's Federal*

Practice explains, "[c]ertain terms . . . are often used imprecisely, which can lead to confusion. For example, findings of fact and conclusions of law are often referred to as a 'decision' or an 'opinion.' Such a decision is not a 'judgment' but rather a statement of the reasons supporting the judgment." *Id*. § 58.02[2]. Rather, the judgment itself "is separate from the opinion or memorandum." But an opinion or a memorandum may clarify the judge's intent, such as whether the judge intended for the litigation to be terminated. A separate document provision is designed to simplify and make certain the matter of appealability. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978). Another relevant term is "entry" of a judgment that "occurs when the clerk makes the necessary notation of the judgment in the official court docket." Moore, § 58.02[2] (contrasting with the filing of a judgment, which is delivering the instrument to the custody of the clerk). *See also id*. § 58.04 ("'Entry' generally requires rendition of the judgment by the court with satisfaction of the separate-document requirement, if applicable, followed by the ministerial act of notation in the docket by the clerk.").

FRCP 58(a) and RCFC 58(a) state that "[e]very judgment and amended judgment must be set out in a separate document." As Moore emphasizes, "a final order or judgment must be self-contained and not refer, for purposes of completeness or explanation, to other proceedings or other documents." Moore § 58.05[4][a]. A court's written opinion does not satisfy the separate-document requirement of Rule 58. The exceptions to this requirement under FRCP 58(a) are for orders disposing of a motion: "(1) for judgment under Rule 50(b); (2) to amend or make additional findings under Rule 52(b); (3) for attorney's fees under Rule 54; (4) for a new trial, or to alter or amend the judgment, under Rule 59; or (5) for relief under Rule 60." *See also* RCFC 58(a) (exceptions are for motions "to amend or make additional findings under RCFC 52(b); for attorney's fees under RCFC 54; for a new trial, or to alter or amend the judgment, under RCFC 59; or for relief under RCFC 60").

Under FRCP 58(b) and RCFC 58(b), whether entering a judgment is a ministerial act depends on the kind of a judgment. If a judgment "awards . . . a sum certain or . . . denies all relief," the clerk enters the judgment without any further judicial involvement, but judicial approval is required otherwise.

The Supreme Court has held that a separate-document requirement is generally deemed waivable, and waiver is determined on the basis of a consideration of all relevant circumstances. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 388 (1978). *See also* Moore, § 58.05[6] (noting that the parties have waived the separate-document requirement where it is clear that the court intended its action to be final; no party objects to treating the judgment as if it had been properly entered (e.g, when the appellee does not object to the filing of a notice of appeal); and no party will be prejudiced by treating the judgment as final despite the lack a separate document and formal entry in the docket). The Court in *Bankers Trust* explained that the separate-document requirement was added "to clarify when the time for appeal . . . begins to run," and so this requirement ought to be construed in the manner that will best preserve the right to appeal. Because failure to comply with Rule 58 is not a jurisdictional defect, courts hold that waiver has not occurred when finding waiver would defeat jurisdiction. *Bankers Trust*. 435 U.S. at 387. *See also* Moore, § 58.05–06 (citing and discussing *Bankers Trust*). Applying *Bankers Trust*, the Federal Circuit held that it had jurisdiction over a judgment that had inadvertently not been

entered on a separate document, when both parties waived the issue of the separate document, and the district court "clearly evinced its intent that its opinion and accompanying order would function as the final judgment." *Enzo Biochem, Inc. v. Celgene, Inc.*, 188 F.3d 1362, 1378 (Fed. Cir. 1999). Quoting *Bankers Trust*, the Court observed that sending the case back to have a district court remedy the problem would only cause delay and would be "in direct contravention to the rationale of *Bankers Trust*." *Id.* ("If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would be taken. Wheels would spin for no practical purpose."). Quoting the same passage from *Bankers Trust*, the First Circuit held that it had jurisdiction where the district court "evidenced a finality to its order," and a party waived Rule 58 requirements. *DeJesus-Mangual v. Rodriguez*, 383 F.3d 1, 5 (1st Cir. 2004).

Whether Entering a Separate Document Entitled "Judgment" Confers Finality

A related issue is whether entering a separate judgment confers finality where it is otherwise absent. Courts have repeatedly held that just because a judgment has been entered by a clerk under Rule 58, it does not confer finality. "Merely entering the judgment, however, does not confer jurisdiction on circuit court." Moore, § 201.10. *Cf. Bankers Trust Co.*, 435 U.S. at 385 n.6 ("Even if a separate judgment is filed, the courts of appeals must still determine whether the district court intended the judgment to represent the final decision in the case."). For example, in *SafeTCare Manufacturing, Inc. v. Tele-Made, Inc.*, the Federal Circuit concluded that

> unless the district court enters an express Rule 54(b) judgment or unless the case falls into a "specific, and narrowly circumscribed, exception[ ] to th[e] general rule" of finality, *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 573 (1963), a statement by the district court that the judgment is final is by itself insufficient to establish this court's appellate jurisdiction under § 1295(a)(1).

SafeTCare Mfg., Inc. v. Tele-Made, Inc., 497 F.3d 1262 (Fed. Cir. 2007). In that case, "because litigation on the merits remained pending in the district court, the parties' reliance on the district court's order labeled 'Final Judgment' was misplaced. The judgment, as it was issued by the district court, "was insufficient to establish dismissal of the entire action, and therefore it could not be the basis for providing this court with subject matter jurisdiction." *See also CNA Corp. v. United States*, 83 Fed. Cl. 1, 5–6 (2008) (because there was still a determination of damages remaining, the entry of a "judgment" did not render an otherwise non-final judgment final. "The separate document required by Rule 58 can, but does not always, constitute a 'final judgment' of the court.") (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 414 F.3d 1376, 1379–80 (Fed. Cir. 2005), *order recalled and vacated by Enzo Biochem, Inc. v. Gen-Probe Inc.*, 143 Fed. App'x 350 (Fed. Cir. 2005)).

Similarly, other courts of appeals have held (albeit in contexts other than finalizing damages) that a designation of a judgment as "final" at the district-court level does not necessarily render it so. "A district court may designate its order as final only if the order 'meets the standard of finality governing independent litigation.'" *In re Air Crash at Belle Harbor, New York on Nov. 12, 2001*, 490 F.3d 99 (2d Cir. 2007) (quoting *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 594

(7th Cir. 1990)) (an order to produce documents and appear for a deposition was not final). The D.C. Circuit emphasized the same point.

> When appellate jurisdiction is at stake, what matters is the appellate court's assessment of finality, not the district court's or the clerk's. A non-final order cannot be appealed even if the district court designates it a 'final judgment' and the clerk of the court enters it as such on the civil docket.

Franklin v. District of Columbia, 163 F.3d 625, 630 (D.C. Cir. 1998).

Thus, if a clerk of the court, with the court's approval, entered a "judgment" prior to the finalization of damages, it is unlikely to make a judgment final for the purposes of appeal because the damages calculations are still pending.

In sum, especially in damages actions, practitioners should be mindful as to whether a ruling is final and what steps litigants and courts can and should take to ensure that the court of appeals has jurisdiction over a case.

Keywords: litigation, appellate practice, damages, damage award, final judgment

Victoria Dorfman is a partner at Jones Day in New York, New York.