

Winter, 2021-2022 Update¹

**Significant Amendments to Federal Rule of Appellate Procedure 3(c),
“Contents of the Notice of Appeal,” Took Effect December 1, 2021**

Attorney Advertising Material

2021 Amendments to Fed. R. App. P. 3(c)
“Contents of the Notice of Appeal”

“The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals... It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.” Fed. R. App. P. 3, Committee Note – 2021 Amendment (“Committee Note”). “But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal.” House Document 117-30, p. 33 (Excerpt from the June 1, 2020 Report of the Advisory Committee on Appellate Rules).

To rectify this, a number of significant amendments to Rule 3(c) took effect on December 1, 2021 that are intended to simplify the notice of appeal, eliminate “trap[s] for the unwary” and prevent “the unintended loss of appellate rights.” Committee Note.

Set forth below are a) a description of the amendments, b) the text of the amendments and c) links to additional information about the amendments.

Description of the Amendments

The amendments are as follows:

1. Simply Designate “Judgment ... Or ... Appealable Order ... From Which The Appeal Is Taken”; Phrase “Or Part Thereof” Deleted. Subsection 3(c)(1)(B) formerly required that a notice of appeal “designate the judgment, order, or part thereof being appealed.” Fed. R. App. 3(c)(1)(B) (2020). In newly amended subsection 3(c)(1)(B), “the phrase ‘or part thereof’ is deleted” and a

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notice of appeal now must simply “designate the judgment – or the appealable order – from which the appeal is taken.” Fed. R. App. 3(c)(1)(B) (2021).

The reason for this amendment is that “some ... [had] ... interpreted ... [the former subsection 3(c)(1)(B)] ... as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal.” Committee Note. Such over inclusive drafting “overlook[ed]” the “merger principle” under which “[d]esignation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment.” *Id.* Worse, “[a] number of courts, using an *expressio unius* rationale, ... [had] ... held that ... a designation of [the final judgment and] a particular order [that the appellant wished to challenge on appeal] limit[ed] the scope of the notice of appeal to the particular order, and prevent[ed] the appellant from challenging other orders that would otherwise be reviewable ... under the merger principle ...” *Id.*

Thus, “[i]n an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of ‘the judgment – or the appealable order – from which the appeal is taken,’ and the phrase ‘or part thereof’ is deleted.” *Id.*

But note: “In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.” *Id.*

2. “Merger Principle” Stated Generally In Rule 3(c)(4). A new subsection (c)(4)² is added that provides: “The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” Fed. R. App. 3(c)(4).

The purpose of this amendment is to “alert readers to the merger principle ...” Committee Note.

Critically, however, note: (a) “[b]ecause this general rule is subject to some exceptions and complications, the amendment does *not attempt to codify the merger principle but instead leaves its details to case law*”³; and (b) “[t]he amendment does *not* change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that ‘a decision on the merits is a ‘final decision’ for purposes of § 1291 whether or not there remains for adjudication a request for attorney’s fees attributable to the case.’” *Id.* (emphasis added).

² As explained *infra*, the former subsection (c)(4) is now a new, amended subsection (c)(7).

³ With respect to the “exceptions and complications” to the general merger principle that newly amended Rule 3(c) “leaves ... to case law,” see, for example, *Bertha v. Hain*, 787 Fed. Appx. 334, 337-38 (7th Cir. 2019) (stating “we see no reason here to depart from the usual rule that all interlocutory decisions merge into the final judgment” but also noting that “[w]e would not apply the rule if it would encourage bad faith tactics,” citing *Sere v. Bd. of Trustees of Univ. of Ill.*, 852 F.2d 285, 288 (7th Cir. 1988)).

3. Notice Designating Order That Adjudicates All Remaining Claims, Rights, Liabilities Or Rule 4(a)(4)(A) Order Now Automatically Encompasses Final Judgment Too. A new subsection (c)(5)⁴ provides that “[i]n 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: (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A).”⁵ Fed. R. App. P. 3(c)(5).

This amendment has two purposes.

The first purpose is to prevent an inadvertent limitation of appellate review where a notice of appeal designates only an order that adjudicated all remaining claims, rights and liabilities, such as an order granting summary judgment on all remaining claims. Committee Note. Under such circumstances, appellate rights inadvertently may be lost in multiple ways. Where a notice of appeal designates only an order that adjudicated all remaining claims, rights and liabilities and does not describe that order as a final judgment, which such an order is, “some courts would limit appellate review” to the designated order, thus leaving unreviewable an undesignated, prior order that adjudicated other claims at an earlier time, such as an order granting a motion to dismiss. *Id.* “Similarly, if the district court complie[d] with the separate document requirement of Fed. R. Civ. P. 58, and enter[ed] both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designate[d] the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier Fed. R. Civ. P. 12(b)(6) dismissal.” *Id.*

“To remove this trap,” new Rule 3(c)(5)(A) is added: “[i]n 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 ... an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties ...” *Id.*; Fed. R. Civ. P. 3(c)(5)(A).

The second purpose of this amendment is “[t]o reduce the unintended loss of appellate rights” that can occur because “some courts treat a notice of appeal that designates” an order disposing of a motion specified in Rule 4(a)(4)(A) “as limited to that order, rather than bringing the final judgment before the court of appeals for review.” *Id.* To address this, new Rule 3(c)(5)(B) is added: “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set

⁴ As explained *infra*, the former subsection (c)(5) is now a new, amended subsection (c)(8).

⁵ Rule 4(a)(4)(A) provides that “[i]f a party files in the district court any of the following motions under the Federal Rules of Civil Procedure — and does so within the time allowed by those rules — the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.” Fed. R. App. 4(a)(4)(A).

out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates ... an order described in Rule 4(a)(4)(A)." Committee Note; Fed. R. Civ. P. 3(c)(5)(B).

But note: "This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions.)" *Id.*⁶

And further note: Newly amended "Rule 3(c)(5) is limited to civil cases." Committee Note. While "[s]imilar issues may arise in a small number of criminal cases" and "similar treatment may be appropriate" in such cases, "no inference should be drawn about how such issues should be handled in criminal cases." *Id.*

4. May Limit Scope Of Notice Of Appeal Only By Express Statement; Otherwise, "Specific Designations Do Not Limit ... Notice Of Appeal." A newly added subsection (c)(6) provides: "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. 3(c)(6).

The purpose of this amendment is to continue to allow "deliberate limitation... of the notice of appeal ..." even as other amendments "remove trap[s] for the unwary..." by prohibiting limitations of appellate review previously imposed as a result of specific designations. Committee Note.

5. No Dismissal For Failure To Designate Judgment Where Notice Of Appeal Filed After Judgment Entered And Designates Order Merged Into Judgment. Newly added subsection (c)(7), an amended version of former subsection (c)(4), provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment." Fed. R. App. 3(c)(7).

The final phrase – "or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment" – was added as one of the current amendments to address cases where "a party ... file[s] a notice of appeal after a judgment but designate[s] only a prior nonappealable decision that merged into that judgment." Committee Note. "In this situation, a court should act as if the notice had properly designated the judgment." *Id.*

⁶ Rule 4(a)(4)(B)(ii) provides "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." Fed. R. App. 4(a)(4)(B)(ii).

Note: “In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2)⁷ and 4(b)(2)⁸ apply.” *Id.*

6. Corresponding Changes To Forms. Newly added subsection (c)(8), an amended version of former subsection (c)(5), provides: “Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.” Fed. R. App. 3(c)(8). Thus, “Form 1 is replaced by Forms 1A and 1B ...” Committee Note. Further, “Form 2” also “is amended.” *Id.*

Text of Amendments

The text of the amendments to Rule 3(c) are as follows, with added language underlined and in bold text and deleted language in brackets and bold text:

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment[,]
– or the appealable order[,]
– from which the appeal is taken [or part thereof being appealed]; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

⁷ Rule 4(a)(2), which applies to appeals in civil cases, provides: “A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.” Fed. R. App. P. 4(a)(2)

⁸ Rule 4(b)(2), which applies to appeals in criminal cases, provides: “A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.” Fed. R. App. P. 4(b)(2).

(5) 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:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) 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.

[(4)] (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

[(5)] (8) Forms 1A and 1B in the Appendix of Forms are [is a] suggested forms of [a] notices of appeal.

See House Document 117-30, pp. 14-17.

More Information

For more information, see in particular House Document 117-30, which may be found at <https://www.govinfo.gov/content/pkg/CDOC-117hdoc30/pdf/CDOC-117hdoc30.pdf> And see generally the Current Rules of Practice & Procedure page of the website of the United States Courts, which may be found at <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>

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