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MEMORANDUM

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TO	Hon. Neil Gorsuch, Chair Prof. Gregory E. Maggs, Reporter	**ORGANIZATION**	Advisory Committee on Appellate Rules
FROM	Neal Kumar Katyal Sean Marotta	**TELEPHONE**	(202) 637-5528
DATE	October 15, 2016		
	By Electronic Mail		
SUBJECT	Appellate Rule 3(c)(1)(B) and the Merger Rule		

We want to bring to your attention a possible issue for the Rules Committee to take up. In particular, we may wish to consider changing the Rules to eliminate a trap for the unwary under the Eighth Circuit's interpretation of Appellate Rule 3(c)(1)(B), which requires a notice of appeal to "designate the judgment, order, or part thereof being appealed."

In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. In our view, such forfeiture is not justified by the policies underlying Appellate Rule 3(c)(1)(B).

Below, we lay out the general rule and the Eighth Circuit's exception, the problems with the Eighth Circuit's exception, and one proposed fix, should you think it worthwhile for the Committee to investigate the matter.

1. Appellate Rule 3(c)(1)(B) requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." Under the "merger rule," 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); *see also, e.g.*, *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) ("[I]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also earlier interlocutory orders that merge into the judgment."); *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 . . . ."). Absent unusual circumstances, then, a notice of appeal satisfies Appellate Rule 3(c)(1)(B) if it designates the final judgment and any order listed in Appellate Rule 4(a)(4)(A). *See* Appellate Rule 4(a)(4)(B)(ii) (requiring the appellant to file a new or amended notice of appeal if an Appellate Rule 4(a)(4)(A) motion is decided after the initial notice of appeal is filed).

The Eighth Circuit, however, has a rule that kicks in when a notice of appeal designates not just the final judgment, but also one or more interlocutory orders leading up to the final judgment. In those circumstances, "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). So, for instance, if the notice of appeal designates the final judgment and an order dismissing Count I of the complaint, the appellant would forfeit any challenge to a separate order dismissing Count II of the complaint.

2. With respect to the Eighth Circuit, its *exclusio unius* approach to Appellate Rule 3(c)(1)(B) creates an unjustifiable trap for the unwary.

First, the Eighth Circuit's exception appears to create a circuit split. The Federal Circuit, for instance, has held that the merger rule still applied where an appellant designated the district court's final judgment as well as "specifically that portion of the Order & Judgment relating to the entry of an Order for Permanent Injunction." *Cybersettle, Inc. v. National Arbitration Forum, Inc.*, 243 Fed. Appx. 603, 606 (Fed. Cir. 2007). The First Circuit, while not entirely clear, appears to have done the same. *See Markel Am. Ins. Co. v. Diaz-Santiago*, 674 F.3d 21, 26 (1st Cir. 2012) (appearing to reject the argument that designation of one order without another disclaims intention to appeal omitted order).

Second, the Eighth Circuit's exception to the merger rule creates a perverse incentive to appeal with less, rather than more, specificity. A notice of appeal that names only the final judgment allows the appellant to present in his opening brief essentially any error in the record below. But a notice of appeal that names the final judgment and, say, a major summary-judgment order but not a subsidiary discovery order, narrows the errors assignable by the appellant

Third, the Eighth Circuit's exception to the merger rule is inconsistent with the purpose behind Appellate Rule 3(c)(1)(B). The purpose of Appellate Rule 3(c)(1)(B) "is to provide sufficient notice to the appellees and the courts of the issues on appeal." *R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 808 (5th Cir. 2012). In truth, it is not clear the ordinary notice of appeal carries out this function well; a notice that appeals the bare final judgment does not give much insight on the particular issues the appellant will raise. And appellees have ample way to know what issues are on appeal: Reading the opening brief. We are not aware of many circumstances where appellees have been prejudiced by having to wait until the opening brief to know the particular issues to be argued. But in any event, Appellate Rule 3(c) is to be construed "liberally." *Smith v. Barry*, 502 U.S. 244, 248 (1992). The Eighth Circuit's forfeiture rule appears to be contrary to that liberal rule of construction.

3. We propose that the Committee consider adding to Appellate Rule 3(c)(4) or adding a new Appellate Rule 3(c)(5) to overturn the Eighth Circuit's exception. There is precedent for such an addition. Following *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that an appellant did not comply with Appellate Rule 3(c) by designating the first party appealing and adding "et al.," the Court relaxed Rule 3(c)(1)(A) to limit satellite litigation. *See* 1993 Committee Notes to Appellate Rule 3. A similar fix may be order here.

So, for example, the Committee could add a new Appellate Rule 3(c)(4) and renumber existing Rule 3(c)(4) and 3(c)(5) accordingly. A new Rule 3(c)(4) would thus read:

"(4) An notice of appeal that designates the district court's judgment and any order disposing of a motion listed in Rule 4(a)(4)(A) brings up for review any interlocutory order supporting the judgment or order listed in Rule 4(a)(4)(A). 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)."

The first sentence of the proposed new subsection merely restates and codifies the existing merger rule. The second sentence retains the core of existing Appellate Rule 3(c)(1)(B) and 4(a)(4)(B)(ii) by making clear that a notice of appeal should designate the district court's final judgment and the district court's order disposing of any motion listed in Rule 4(a)(4)(A). But the second sentence also overturns the Eighth Circuit's exception to the merger rule—and clears up any uncertainty in the other circuits—by making clear that an appellant's inartful attempt at greater specificity should not be held against him.

The new proposed Appellate Rule 3(c)(4) does not solve all issues surrounding Rule 3(c)(1)(B). There will be questions of whether a particular interlocutory order supports the judgment for merger-rule purposes and what to do when a notice of appeal fails to designate the final judgment or a Rule 4(a)(4)(A) order. Many of those circumstances are addressed by existing Rule 3(c)(4)'s admonition to not dismiss an appeal for informality of the notice. But the proposed addition makes clear that there should not be a "magic words" approach to the merger rule; a notice of appeal that designates the final judgment and any post-judgment motion should receive the benefits of the rule, regardless of the verbiage it uses in addition to that designation.