

A P P E L L A T E

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THIRD CIRCUIT PROVIDES GUIDANCE ON TIME FOR FILING A NOTICE OF APPEAL

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Federal Rule of Appellate Procedure 4(a)(1)(A) states that a notice of appeal “must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.” In *Cumberland Mutual Fire Insurance Co. v. Express Products, Inc.*, Nos. 11-3919, 12-2155 (3d Cir. June 24, 2013) (unpublished opinion), the Third Circuit clarified that the 30 days commence when the district court enters judgment — not when it files a memorandum explaining the reasons for entering judgment.

The district court in *Cumberland* granted summary judgment to the plaintiffs on September 1, 2011, stating that “[t]he Court’s supporting memorandum is forthcoming.” The court issued the memorandum explaining its reasoning on September 22, 2011, under the title “Memorandum and Order.” The memorandum stated at its conclusion that “[a]n appropriate order follows.”

The defendant filed a notice of appeal on October 21, 2011 — less than 30 days after the district court issued its memorandum, but more than 30 days after the court entered its September 1, 2011, order granting summary judgment. The defendant did not move for an extension of time to file an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) or to reopen the time to file an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6).

The Third Circuit therefore had to decide whether the appeal period began upon entry of the September 1 order or the September 22 “Memorandum and Order.” The panel concluded that the only question was whether the September 1 order was a final judgment that commenced the 30-day time window for filing a notice of appeal. According to the Court of Appeals, a final order must meet three criteria: “first, the order must be self-contained and separate from the opinion; second, the order must note the relief granted; and third, the order must omit (or at least substantially omit) the District Court’s reasons for disposing of the parties’ claims.” The parenthetical is likely a reference to so-called “footnoted orders,” in which a district court enters an order without an accompanying opinion but adds a footnote in the order giving a bare-bones explanation of its reasoning.

Under this standard, the panel held that the September 1 order was a final judgment, making the defendant’s notice of appeal untimely and, therefore, depriving the court of jurisdiction. The September 1 order’s notation that a later explanation would be forthcoming and the court’s subsequent filing of the “Memorandum and Order” did not extend the time to appeal, even though the second document included the confusing statement that “[a]n appropriate order follows.”

The panel also offered guidance to appellate practitioners: “[w]hen parties are in doubt about whether the separate judgment rule has been met, they should file a notice of appeal. A too-late appeal is fatal, but a too-early appeal provides safety, as a premature appeal becomes effective on the entry of the judgment or order.” This is particularly so because courts lack discretion to excuse a late notice of appeal — even where the would-be appellant expressly receives an extension from the district court, or is never notified that a final judgment has issued. Though *Cumberland* is an unpublished opinion, its guidance is impeccable: if in doubt, file a notice of appeal. ♦

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