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2008RECENT THIRD CIRCUIT DECISION CONTRIBUTES TO
CONFUSION REGARDING PREMATURE NOTICES OF APPEAL

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A recent decision by the Third Circuit adds to the confusion involving an already muddled area of the law: premature notices of appeal. It is a fundamental principle of federal appellate practice that, with certain narrow exceptions, appeals only lie from final judgments. Thus, a notice of appeal filed *before* a final judgment is entered generally is considered premature and ineffective to confer appellate jurisdiction on a court of appeals. Yet, this seemingly straightforward rule is complicated by exceptions outlined in the federal rules and contradictory rulings by the federal courts of appeals. And the Third Circuit's recent decision in the case of *DeJohn v. Temple University* only adds to the confusion.

Rule 4 of the Federal Rules of Appellate Procedure governs the timeliness of notices of appeal in federal court. Rule 4(a) provides that notices of appeal must be filed within 30 days *after* entry of judgment, but then sets forth two exceptions. First, under Rule 4(a)(2), when a notice of appeal is filed after a trial court *announces* a decision, but before the court actually enters judgment, the notice is treated as if it were filed on the date that the court subsequently enters judgment. Second, under Rule 4(a)(4), where a party files a notice of appeal before a trial court disposes of any post-trial motions, the notice of appeal becomes effective upon the trial court's disposition of the last post-trial motion — in the words of the committee notes to the rule, the notice of appeal “ripens” at that time.

The presence of these two exceptions might appear to foreclose other exceptions to Rule 4(a)'s requirement that all notices of appeal be filed within 30 days after

entry of final judgment. But 25 years ago, the Third Circuit created a broader exception in *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983). In *Cape May Greene*, the plaintiff filed a notice of appeal after summary judgment was entered against it but before a cross-claim filed by one of the defendants was resolved. *Id.* at 184. Two months *after* the plaintiff filed its premature notice of appeal, the parties stipulated to dismissal of the remaining cross-claim. *Id.* The Third Circuit held that, absent prejudice to the appellee, the premature notice of appeal could ripen upon entry of final judgment and confer jurisdiction on the court over an appeal from that final judgment. *Id.* at 185.

Eight years later, in *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991), the Supreme Court was called upon to interpret the exception in Rule 4(a)(2) and held that, “Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment.” *Id.* at 276. Some courts of appeals have interpreted this language from *FirsTier* as limiting the scope of the exceptions to Rule 4(a)'s requirement that notices of appeal be filed after final judgment has been entered. *See, e.g., United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998). Under these courts' decisions, a notice of appeal filed from a decision that does not dispose of all claims by all parties (such as the one in *Cape May Greene* granting summary judgment on some but not all claims) does not ripen upon the subsequent entry of a final judgment.

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The Third Circuit, however, reaffirmed its *Cape May Greene* exception eight years after *FirsTier* was decided, in *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999). In *Lazy Oil*, objectors to a class action settlement filed a notice of appeal 29 days after the district court entered an order approving the settlement, but more than two months before the district court approved an allocation plan for the settlement and entered final judgment in the case. *Id.* at 585. The Third Circuit raised *sua sponte* the issue of its appellate jurisdiction, but concluded that the Supreme Court's decision in *FirsTier* had not altered the *Cape May Greene* doctrine. *Id.* at 585-87. Finding the premature notice of appeal ripened upon entry of final judgment two months later, the court held that the two exceptions in Rule 4 were not the only situations in which "a premature notice of appeal will become effective at a later date." *Id.* at 587.

The expansive view of the premature notice of appeal doctrine set forth in *Cape May Greene* and *Lazy Oil* has been adhered to in numerous subsequent Third Circuit cases. As recently as last October, a panel of the Third Circuit invoked these cases and, while expressing some skepticism about the expansive view, noted that the court was "bound by our prior interpretation regarding the scope and effect of Rule 4 unless and until we revisit that determination en banc." *DL Resources, Inc. v. FirstEnergy Solutions Corp.*, 506 F.3d 209, 215 (3d Cir. 2007). In *DL Resources*, the court held that it had jurisdiction over a final judgment when the notice of appeal was filed after the trial court fixed liability but before it determined the amount of damages and entered final judgment. *Id.* at 213-15.

Despite this continued adherence to the *Cape May Greene* doctrine, a panel of the Third Circuit issued a decision last month that took a much more limited view of the premature notice of appeal doctrine. In *DeJohn v. Temple University*, No. 07-2220, 2008 U.S. App. LEXIS 16463 (3d Cir. Aug. 4, 2008), the court held that a notice of appeal filed after disposition of a particular claim but before determination of damages for that claim was premature and did not ripen upon the award of damages and entry of final judgment. *Id.* at *9-*12 & n.3. Thus, the premature notice of appeal was ineffective to confer appellate jurisdiction on the court over an appeal from the award of damages. The court failed to mention either *Cape May Greene* or *Lazy Oil*, or to distinguish the cases such as *DL Resources* that specifically held that a notice of appeal filed after a determination of liability but before an award of damages ripened upon entry of the damages award and final judgment. Instead, the court cited Rule 4(a)(2) and *FirsTier*, and implied (contrary to the holding in *Lazy Oil*) that Rule 4(a)(2) sets forth the only situation in which a premature notice of appeal will ripen upon entry of final judgment. *Id.* at *12 n.3.

The Third Circuit's recent decision in *DeJohn* only adds to the uncertainty regarding premature notices of appeal that arose from the Supreme Court's decision in *FirsTier* and the Third Circuit's adherence to the *Cape May Greene* doctrine in *Lazy Oil*. This confusion is unlikely to abate until the Third Circuit addresses the premature notice of appeal issue en banc or the Supreme Court resolves the Circuit split that has followed its decision in *FirsTier*. ♦

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