

Michigan Supreme Court considers court rule amendments that could impact governmental immunity disputes

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The Michigan Supreme Court adopted key amendments to MCR 7.202 and MCR 7.209, effective Sept. 1, 2022, which allow **immediate appeals** of denials of motions for summary disposition based on governmental immunity and a concurrent stay of proceedings.

Notably, MCR 7.202 was amended to clarify that the terms “final judgement” or “final order” may be defined as: “[A]n order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.” See MCR 7.202(6)(a)(v).

On the other hand, MCR 7.209 was amended to include a provision for an automatic stay of proceedings during the pendency of the appeal. In full context, MCR 7.209(E)(7) presently reads: “If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the court of Appeals directs otherwise.”

Fast forward to Dec. 21, 2022, the Supreme Court published an order seeking public comment on proposed changes to MCR 7.202 and MCR 7.209 that seek to do away with the above-stated provisions. ADM File No. 2021-35.

More specifically, the proposed amendment to MCR 7.202 would remove subpart (6)(a)(v), which defines “final judgment” or “final order” as an order denying governmental immunity. Additionally, the proposed amendment to MCR 7.209 suggests removal of subpart (E)(7), which would effectively prevent appeals of right from denials of governmental immunity.

While the Supreme Court has offered no rationale for the 2022 proposed amendments, Justice Megan Cavanagh issued a concurrence that stated, “... the issue the Court need to consider whether, in practical application, these rules have struck the proper balance between protecting taxpayers from the expense of unnecessary litigation and ensure prompt and efficient resolution of claims against governmental entities that are not barred by governmental immunity.”

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Justice Cavanagh further raised several questions for consideration, which in part, include as follows:

- If the Supreme Court adopts the proposed amendments, would the ability to file an application for leave to appeal (and a motion to stay trial court proceedings) adequately protect a governmental entity's interest in the swift dismissal of claims barred by governmental immunity?
- How have MCR 7.202 and MCR 7.209 affected the resources expended by litigants in claims against governmental entities?
- How frequently have trial court decisions denying claims of governmental immunity been reversed on appeal? And, have governmental entities used these rules for gamesmanship?
- How do these rules apply in the context of an unmeritorious motion to dismiss on governmental immunity grounds?
- Are there amendments the Supreme Court could adopt, short of a complete elimination of these provisions, that would mitigate problems while continuing to advance the interests underlying these provisions?

At present, responses to these amendments appear largely split with defense attorneys representing governmental entities providing public comment against these amendments, and plaintiff's attorneys taking the opposite position.

Nevertheless, the biggest takeaway at this point is that the changes discussed ***remain a proposal only***. Thus, while discussions continue, there has been no definitive statement from the Supreme Court that the 2022 proposed amendments will be adopted.