COMMENT

AN EARLY ROLL OF THE DICE: APPEAL UNDER CONDITIONAL FINALITY IN FEDERAL COURT*

TABLE OF CONTENTS

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I. INTRODUCTION

Imagine that a plaintiff files a complex civil lawsuit in federal court with several distinct claims for relief involving closely related facts and legal issues. One of the claims is worth significantly more than the peripheral claims, so much so that trying the peripheral claims without the primary claim would not be worth it to the plaintiff. Early in the litigation process, the district court judge in a narrow decision issues an order adversely terminating the plaintiff's primary claim. At this point, the plaintiff faces a stark choice. The plaintiff may proceed to trial on its peripheral claims and hope to overturn the judge's order after trial on appeal or the plaintiff may dismiss its peripheral claims and immediately appeal the judge's order.

Under the traditional analysis, if a plaintiff chooses to dismiss its peripheral claims and immediately appeal, the dismissal of the peripheral claims must be with prejudice to produce a final judgment for appeal.[1] If the plaintiff dismisses the peripheral claims with prejudice, even if the plaintiff wins its appeal on the adversely terminated primary claim, the peripheral claims are lost forever.

In contrast, some courts of appeals allow parties to dismiss peripheral claims without prejudice to refiling in order to manufacture a final judgment for appeal.[2] Regardless of the outcome on appeal of the primary claim, a dismissal without prejudice does not prevent a party from refiling its peripheral claims in the future.

A majority of the courts of appeals that have considered the issue have concluded that allowing a plaintiff to manufacture finality by dismissing peripheral claims without prejudice violates the final judgment rule.[3] In practice both approaches, a dismissal with prejudice and dismissal without prejudice of peripheral claims, can produce harsh outcomes and judicial inefficiency.[4] Fortunately, the doctrine of conditional finality, or as it is sometimes referred to conditional manufactured finality or conditional prejudice dismissal, represents a novel solution to the problem.[5]

Under conditional finality, after the adverse termination of its primary claim, a plaintiff has the option to conditionally

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1. *See, e.g.*, Marshall v. Kansas City S. Ry., 378 F.3d 495, 500–01 (5th Cir. 2004) (holding that a dismissal without prejudice does not produce a final judgment and represents an attempt to circumvent the final judgment rule); State Treasurer of Mich. v. Barry, 168 F.3d 8, 11, 14–15 (11th Cir. 1999) (arguing that requiring a dismissal with prejudice of peripheral claims to secure appellate review protects the final judgment rule).

2. *See, e.g.*, Hope v. Klabal, 457 F.3d 784, 789–90 (8th Cir. 2006) (finding appellate jurisdiction based on dismissal without prejudice of peripheral claims); James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1070 (9th Cir. 2002) (finding jurisdiction based on dismissal without prejudice of peripheral claims).

3. The Federal Rules Advisory Committee on Appellate Rules also determined that manufacturing finality by dismissing peripheral claims without prejudice violates the final judgment rule. Minutes of Fall 2010 Meeting of Advisory Comm. on Appellate Rules 10–12 (Oct. 7–8, 2010) [hereinafter Fall 2010 Minutes], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP10-2010-min.pdf.

4. *See* Mark I. Levy, *Manufactured Finality*, NAT'L L.J., May 5, 2008, at 13 (arguing that requiring a dismissal with prejudice forces a plaintiff to abandon potentially meritorious claims while a dismissal without prejudice increases the likelihood of piecemeal appeals).

5. *See id.* (presenting the doctrine of conditional manufactured finality as a potential solution to the problem of obtaining early appellate review). The term conditional finality is synonymous with the term conditional manufactured finality or dismissal with conditional prejudice. *See* Fall 2010 Minutes, *supra* note 3, at 10–12.

dismiss its peripheral claims and immediately appeal.[6] A plaintiff is able to recapture the peripheral claims it conditionally dismissed, if and only if, the plaintiff wins a reversal on appeal of the order that terminated its primary claim.[7] Two federal courts of appeals currently permit appeal under the doctrine of conditional finality.[8]

This Comment argues that conditional finality produces cost savings for parties, improves judicial efficiency, and provides more accurate legal outcomes, and that a nationally uniform rule change should be adopted allowing for appeal under conditional finality. Part II of this Comment examines the functions and the limitations of the final judgment rule, Rule 54(b), and interlocutory appeals—the traditional methods of obtaining appellate review. Part III explains how a party may employ the rules of procedure to manufacture a final judgment to obtain early appellate review. Part IV explores the various approaches that courts of appeals take to the issue of manufactured finality. Part V analyzes the costs and benefits of allowing appeal under the doctrine of conditional finality. Finally, Part VI examines proposals for change to the rules governing appellate jurisdiction, including the recent consideration of conditional finality by the federal rules advisory committees. This Comment then concludes by suggesting a proposed amendment to the rules of procedure to allow for appeal under conditional finality.

II. TRADITIONAL METHODS OF OBTAINING APPELLATE REVIEW

A. 28 U.S.C. § 1291: The Final Judgment Rule

In most cases, the final judgment rule determines when a party may appeal.[9] The normal method of obtaining appellate review of a district court decision is to file for appeal after the entry of an order of judgment disposing of all claims.[10] The jurisdiction of federal courts of appeals over appeals from final

6. Levy, *supra* note 4, at 13.

7. Fall 2010 Minutes, *supra* note 3, at 10–12.

8. Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008); Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003).

9. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3907, at 270 & n.2, 273–74 (2d ed. 1991) (explaining the purpose of the final judgment rule).

10. *See* FED. R. CIV. P. 58 (describing the manner in which a judgment must be entered); FED. R. APP. P. 4(a)(1), (7) (explaining the procedure for filing for appellate review after judgment).

judgment is encapsulated in 28 U.S.C. § 1291,[11] commonly referred to as the final judgment rule.[12]

The purpose of the final judgment rule is to promote judicial efficiency and to protect parties from unnecessary appeals.[13] The final judgment rule obtains efficiency by delaying appeal until all possible legal issues and claims before the district court are concluded and consolidated into one appeal for consideration by the court of appeals.[14] Thus, the final judgment rule prevents parties from having to endure successive trips to a court of appeals to determine a series of piecemeal appeals.[15] In addition, the final judgment rule avoids unnecessary appeals because it provides a district court judge the opportunity to correct inaccurate rulings before final judgment.[16] Moreover, in some cases the need for an appeal from a decision by the district court judge made during the course of trial may be rendered unnecessary because the party that lost the interlocutory ruling may ultimately prevail on final judgment.[17]

A difficulty with the final judgment rule is that while it defines when an appeal is available,[18] it fails to define what constitutes a final judgment.[19] In most cases, it is not very difficult to determine when a judgment is final.[20] After disposing of all claims, the judge enters an order of judgment for a party and the judgment is final and appealable.[21]

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11. 28 U.S.C. § 1291 (2006).

12. *See* George C. Pratt, *Final Judgments*, *in* 19 MOORE'S FEDERAL PRACTICE § 202.02 (3d ed. Supp. 2012) (emphasizing the interplay between the final judgment rule and § 1291).

13. MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION & PRACTICE 39 (3d ed. 1999); *see also* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 998–99 (1997) (arguing that courts of appeals use the final judgment rule as a case management tool).

14. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3907, at 269 & n.2, 273–74 (explaining how the final judgment rule promotes judicial efficiency).

15. *See* Catlin v. United States, 324 U.S. 229, 233–34 (1945) (reasoning that the purpose of the final judgment rule is to prevent piecemeal appeals); 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3907, at 272 (illustrating how the final judgment rule prevents successive interlocutory appeals).

16. *See* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 481–82 (4th ed. 2009) (elaborating on how the final judgment rule prevents unnecessary appeals).

17. *See id.*

18. *Id.* at 481.

19. *See* TIGAR & TIGAR, *supra* note 13, at 48 (discussing the difficulty of applying the final judgment rule in practice).

20. *See* Pratt, *supra* note 12, § 202.02 (explaining that in most cases finality is an unambiguous issue).

21. FED. R. CIV. P. 58.

However, in some cases it is not clear whether or not a judgment is final.[22]

The commonly cited passage from *Catlin v. United States*, that a final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," does not address every difficult question of finality.[23] As a result, the Supreme Court has struggled to define with absolute clarity the outer bounds of what constitutes a final judgment.[24] This has led to the development of common law doctrines designed to provide access to appellate review in the rare case when it is uncertain or doubtful that a case meets the general definition of finality.[25] In the case of manufactured finality, the lack of clarity on finality has contributed to the circuit split over the issue of whether after the adverse termination of a plaintiff's primary claim, the dismissal without prejudice of peripheral claims creates an appealable final judgment.

While an appeal by right is normally available only after final judgment on all claims, under specific circumstances an interlocutory appeal may be available earlier in the litigation process.[26] Furthermore, in complex cases involving multiple claims or multiple parties a district court judge may certify a final decision on one claim as ready for immediate appellate review under Rule 54(b) while leaving other claims to be decided at the district court level.[27] Interlocutory appeals and Rule 54(b) appeals provide two methods by which a party may circumvent the strictures of the final judgment rule to obtain early appellate review.[28]

B. Rule 54(b) and Its Limitations

Rule 54(b) was designed to provide litigants in cases involving multiple parties or multiple claims an opportunity for prompt appellate review of a final judgment on an individual,

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22. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3909 (explaining the difficulties that courts have confronted in precisely defining finality).

23. Catlin v. United States, 324 U.S. 229, 233 (1945).

24. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3909.

25. *See generally* TIGAR & TIGAR, *supra* note 13, at 48–58 (discussing the various common law doctrines that have developed in an attempt to define finality).

26. *See* 28 U.S.C. § 1292(a)–(b) (2006) (elaborating on the circumstances under which an interlocutory appeal is available); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–47 (1949) (explaining when an interlocutory appeal is available under the collateral order doctrine); Forgay v. Conrad, 47 U.S. (6 How.) 201, 204–05 (1848) (explaining when an interlocutory appeal is available under the *Forgay* doctrine).

27. FED. R. CIV. P. 54(b).

28. *See* Maurice Rosenberg, *Solving the Federal Finality–Appealability Problem*, 47 LAW & CONTEMP. PROBS. 171, 172–74 (1984) (elaborating on the "crazy quilt" of exceptions to the final judgment rule).

severable claim.[29] Because the Federal Rules of Civil Procedure provide for liberal joinder of parties and claims in a single lawsuit, Rule 54(b) acts as a safety valve that allows a party to move for immediate appellate review of severable claims when there is "no just reason for delay."[30] Under Rule 54(b), the district court judge acts as the dispatcher and must determine that (1) a claim is final and severable from other claims in the lawsuit and that (2) there is "no just reason for delay" before certifying a claim for appeal.[31] A district court judge's determination of severability is reviewed for abuse of discretion by a court of appeals.[32]

In some cases when the facts and potential remedies are closely related, it can be difficult to distinguish a separate and severable claim for Rule 54(b) appeal from merely another legal theory of liability.[33] Rule 54(b) recognizes that a "claim, counterclaim, crossclaim, or third-party claim" may constitute a separate claim for relief.[34] Without specifying a precise definition of a severable claim, the U.S. Supreme Court indicated that a separate claim does not need to be so distinct as to arise out of a separate transaction or occurrence.[35] Consistent with this analysis, the Second Circuit developed a test for determining if a separate claim exists that asks if two claims could be separately enforced.[36] Under this test, "[a] single claimant presents multiple claims for relief . . . when the possible recoveries are more than one in number and not mutually exclusive or, stated another way, when the facts give rise to more than one legal right or cause of action."[37]

In determining close questions of severability under Rule 54(b), the U.S. Supreme Court has tended towards leniency and deference to the district court judge's decisionmaking.[38] As

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29. *See* FED. R. CIV. P. 54 advisory committee's note to 1946 amendment (explaining that the purpose of Rule 54(b) is to prevent litigants from having to wait for adjudication of an entire case before appeal).

30. FED. R. CIV. P. 54(b); *see* 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE, § 2654 (West Grp. 1998) (elaborating on the purpose and background of Rule 54(b)).

31. FED. R. CIV. P. 54(b).

32. 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7, at 567, 588.

33. *See* 10 WRIGHT, MILLER & COOPER, *supra* note 30, § 2657, 67–72 (elucidating the difficulties that can arise in determining the severability of claims).

34. FED. R. CIV. P. 54(b).

35. *See* 10 WRIGHT, MILLER & COOPER, *supra* note 30, § 2657, at 69–72 (analyzing U.S. Supreme Court precedent and determining that separate claims do not need to arise from separate transactions or occurrences).

36. *See id.* at 73–81 (elaborating on the Second Circuit's test for severability).

37. *Id.* at 76–77.

38. Curtis-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8–10 (1980); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956); *see also* FED. R. CIV. P. 54 advisory committee's note to 1961 amendment (discussing the lenient construction applied to the "no just

to how often Rule 54(b) should be used, the Court suggested that although Rule 54(b) appeals should be used sparingly, there is no need to limit its use to the "infrequent harsh case."[39]

Despite the Court's indication that Rule 54(b) should be used at the district court judge's discretion, courts of appeals take a stricter approach in reviewing a district court judge's Rule 54(b) certifications and have "frequently found that despite the clear presence of multiple claims, the matters resolved are not severable from the matters left open."[40] Moreover, the denial of a Rule 54(b) certification by a district court judge is not itself appealable.[41] Thus, while a Rule 54(b) appeal represents an important avenue of relief for litigants, its availability depends on the judicial certification of severability, which may not be readily granted in cases when claims involve closely related legal issues or interrelated facts.[42] Under circumstances when a Rule 54(b) appeal is unavailable or denied by a district court judge, a party may seek to manufacture a final judgment as an alternative means of obtaining early appellate review.

C. Interlocutory Appeals: 28 U.S.C. § 1292 and Judicially Created Methods

28 U.S.C. § 1292 provides access to appellate review for some interlocutory orders and represents a statutory exception to the final judgment rule.[43] In contrast to Rule 54(b), an appeal under § 1292 is not an appeal from a final judgment, but instead is an appeal from an interlocutory order issued during the course of trial.[44] The availability of interlocutory appeal under a provision of § 1292 represents the legislative

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reason for delay" provision of Rule 54(b)); 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7, at 541–43 (discussing Rule 54(b) and the broad discretion given to district court judges by the U.S. Supreme Court in defining severability under Rule 54(b)).

39. *See Curtis-Wright Corp.*, 446 U.S. at 9–10 (quoting FED. R. CIV. P. 54 advisory committee's note to 1946 amendment) (elaborating on the proper scope of judicial discretion allowable in the use of Rule 54(b)).

40. 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7, at 586; *see also* Cochran, *supra* note 13, at 992–94 (describing the strict standards applied by courts of appeals to Rule 54(b) certification).

41. 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7 at 544–45.

42. *Id.* at 592 & n.90; *see also* Minutes, Civil Rules Advisory Comm. 30 (Nov. 15–16, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2010-min.pdf (noting that use of 54(b) requires persuading a district court judge to enter a partial final judgment).

43. 28 U.S.C. § 1292 (2006).

44. 10 WRIGHT, MILLER & COOPER, *supra* note 30, § 2658.1–.2., at 83–84, 89–91.

determination that an issue is of such high importance that the potential benefit of immediate appellate review outweighs the potential harm of piecemeal appeals.[45]

Appeal under § 1292(a) covers a specific range of issues.[46] Section 1292(a) provides a party with the opportunity to receive appellate review of an interlocutory order of a district court judge granting or denying an injunction or the appointment of a receiver.[47] Interlocutory appeal under § 1292(b) is broader, and is not restricted by subject matter.[48] However, an appeal under § 1292(b) requires a determination by the district court judge and concurrence by the court of appeals that an "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and that immediate appellate review "may materially advance the ultimate termination of the litigation."[49]

In addition to § 1292, there are two judicially created doctrines that allow for interlocutory appeal.[50] The collateral order doctrine allows an interlocutory appeal when an issue is of such immediate concern that review delayed would amount to review denied.[51] Two important situations where the collateral order doctrine is applied are to orders denying qualified immunity and to orders denying Eleventh Amendment immunity.[52] In addition, the *Forgay* doctrine provides for interlocutory review when an order is issued requiring immediate delivery of physical property.[53]

Although there are a handful of statutory and judicially created avenues available to obtain interlocutory review, the use of interlocutory review is carefully scrutinized by courts of

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45. *Id.* § 2658.1, at 84–85.

46. *See* 28 U.S.C. § 1292(a)(1)–(3) (2006) (listing injunctions, receivers, and admiralty claims as appealable issues).

47. 28 U.S.C. § 1292(a)(1)–(2) (2006).

48. *See* 28 U.S.C. § 1292(b) (2006) (explaining that § 1292(b) covers issues not otherwise appealable under other provisions of § 1292).

49. *Id.*

50. *See* 10 WRIGHT, MILLER & COOPER, *supra* note 30, § 2658.4 (discussing the collateral order doctrine and the *Forgay* doctrine in relation to Rule 54(b)). In addition, the federal rules of procedure allow for interlocutory review of orders pertaining to class certification. FED. R. CIV. P. 23(f).

51. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–47 (1949); *see also* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3911, at 329–30 (elaborating on the functions of the collateral order doctrine).

52. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 142–44 (1993); Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985).

53. Forgay v. Conrad, 47 U.S. (6 How.) 201, 204–05 (1848); *see also* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3910 at 327–29 (elaborating on the use of the *Forgay* doctrine).

appeals to control caseload volume.[54] The types of appeals available under § 1292(a) are limited to issues pertaining to injunctions, receiverships, and some admiralty decrees.[55] Moreover, litigants rarely use the catchall § 1292(b) because courts have narrowly construed its provisions to restrict access to interlocutory appeal.[56] In situations where appeal from a district court judge's interlocutory ruling is unavailable, a party may seek to manufacture a final judgment as an alternative means of obtaining appellate review.

III. TECHNIQUES USED TO MANUFACTURE A FINAL JUDGMENT

When a Rule 54(b) or interlocutory appeal is unavailable, a party may still be able to access prompt appellate review by manufacturing finality through a voluntary dismissal.[57] In many cases, if a pretrial ruling has the effect of severely crippling a claim without actually terminating the claim, a district court judge will allow a party to dismiss that claim with prejudice in order to produce a final judgment for appeal.[58] Moreover, in a multiclaim case, when significant claims are terminated early in the litigation process, a party may wish to voluntarily dismiss any remaining peripheral claims to manufacture a final judgment for appeal.[59] A party might seek this option when a Rule 54(b) appeal is unavailable because the claims are either factually or legally interrelated and interlocutory appeal is inappropriate.[60]

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54. *See* Cochran, *supra* note 13, at 994–95 (arguing that courts of appeals have limited the use of interlocutory appeals to control caseload volume).

55. 28 U.S.C. § 1292(a) (2006).

56. *See* SHREVE & RAVEN-HANSEN, *supra* note 16, at 487–88 (discussing the process of judicial review under § 1292(b) and its narrow construction by federal courts); 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3929 (2d ed. 1996) (explaining that § 1292(b) is rarely used); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193–201 (1990) (analyzing the reasons for infrequent use of interlocutory appeals under § 1292(b)).

57. FED. R. CIV. P. 41.

58. *See* Concha v. London, 62 F.3d 1493, 1507–09 (9th Cir. 1995) (finding appellate jurisdiction when a plaintiff voluntarily dismissed a claim with prejudice following an adverse ruling by the district court judge); Dorse v. Armstrong World Indus., Inc., 798 F.2d 1372, 1376–77 (11th Cir. 1986) (finding appellate jurisdiction when the parties had consented to stipulated entry of a final judgment); 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.8, at 615 n.4 (discussing instances where courts of appeals have found jurisdiction over voluntary dismissals following adverse interlocutory rulings against a party).

59. *See, e.g.*, Hope v. Klabal, 457 F.3d 784, 789–90 (8th Cir. 2006) (finding appellate jurisdiction based on dismissal without prejudice of peripheral claims); Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 94 (2d Cir. 1987) (granting appellate review after a dismissal with prejudice of peripheral claims).

60. *See Hope*, 457 F.3d at 788–90 (finding jurisdiction based on dismissal without prejudice where the district court denied Rule 54(b) severance).

After an adverse ruling that occurs early in the litigation process, the technique of manufacturing finality becomes a practical option for a party. Rule 41 provides two techniques for voluntarily dismissing unwanted claims after service of an answer or the filing of a motion for summary judgment.[61] First, under Rule 41(a)(1)(A)(ii), all parties who have appeared can agree by stipulation to dismiss unwanted claims.[62] Second, under Rule 41(a)(2), a party can seek permission from the district court judge to voluntarily dismiss unwanted claims.[63] Unless otherwise indicated, a voluntary dismissal under either technique operates as a dismissal without prejudice.[64] Such a dismissal is generally not considered a final judgment,[65] because claims dismissed without prejudice may be refiled at anytime.[66] Therefore, to ensure that a final judgment is produced that will allow for appeal under 28 U.S.C § 1291, a party must ensure that all claims are terminated with prejudice.[67]

However, some parties may not wish to dismiss their peripheral claims with prejudice to refiling.[68] These parties may instead attempt to dismiss their claims without prejudice.[69] Manufacturing finality through this latter approach appears to be a clear attempt to circumvent the final judgment rule.[70] Even so, federal courts of appeals have taken divergent positions on the issue of whether manufactured

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61. FED. R. CIV. P. 41.

62. FED. R. CIV. P. 41(a)(1)(A)(ii).

63. FED. R. CIV. P. 41(a)(2).

64. *See* FED. R. CIV. P. 41(a)(1)(B), (a)(2) (stating that unless otherwise indicated a voluntary dismissal is without prejudice).

65. *See* Marshall v. Kansas City S. Ry., 378 F.3d 495, 500 (5th Cir. 2004); Fall 2010 Minutes, *supra* note 3, at 10–12.

66. *See, e.g.*, James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002) (acknowledging the potential that claims dismissed without prejudice may be refiled); State Treasurer of Mich. v. Barry, 168 F.3d 8, 11, 13 (11th Cir. 1999) (noting that a claim dismissed without prejudice could potentially be refiled).

67. 28 U.S.C. § 1291 (2006); *see, e.g.*, *Marshall*, 378 F.3d at 500 (distinguishing the effect of a dismissal with prejudice from a dismissal without prejudice); Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 93–94 (2d Cir. 1987) (granting appellate review after a dismissal with prejudice of peripheral claims).

68. *See, e.g.*, *James*, 283 F.3d at 1066, 1068; Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) (per curiam).

69. *See, e.g.*, *James*, 283 F.3d at 1066, 1068; *Hicks*, 825 F.2d at 120 (granting appellate jurisdiction on the basis of a dismissal without prejudice following an adverse ruling by the trial court).

70. *See, e.g.*, *Marshall*, 378 F.3d at 500 (recognizing that a dismissal without prejudice does not produce a final judgment and represents an attempt to circumvent the final judgment rule); *Barry*, 168 F.3d at 14–16 (arguing that requiring a dismissal with prejudice of peripheral claims to secure appellate review protects the final judgment rule).

finality through the dismissal of peripheral claims without prejudice constitutes an appealable final judgment.

IV. APPROACHES TO MANUFACTURED FINALITY BY COURTS OF APPEALS

Federal courts of appeals have reached different conclusions on the question of whether a manufactured dismissal without prejudice of peripheral claims after the adverse termination of a plaintiff's primary claim creates an appealable final judgment. The approaches that courts of appeals take to this question can be broken down into three categories: (1) the strict view that only a dismissal with prejudice of peripheral claims generates an appealable final judgment; (2) the liberal view that a dismissal of peripheral claims without prejudice creates a final judgment; and (3) the conditional finality approach under which voluntarily dismissed claims are conditionally dismissed and can only be recaptured with a reversal on appeal of the primary claim.[71]

71. *Compare Marshall*, 378 F.3d at 499–501 (denying appellate jurisdiction when the parties had manufactured finality by dismissing claims without prejudice), *with* Hope v. Klabal, 457 F.3d 784, 789–90 (8th Cir. 2006) (granting appellate review after the parties manufactured finality by stipulating to a voluntary dismissal without prejudice), *and* Purdy v. Zeldes, 337 F.3d 253, 257–58 (2d Cir. 2003) (granting appellate review on the condition that a conditional dismissal would solidify into a dismissal with prejudice barring a reversal on appeal).

Figure 1. Chart of Case Outcomes Under Different Approaches to Finality

Judicial Approach to Finality	**Type of Dismissal Required for Immediate Appeal of Primary Claim**	**Result of Affirmance on Appeal of Primary Claim**	**Result of Reversal on Appeal of Primary Claim**
Strict Finality	Dismissal with prejudice to refiling of peripheral claims	Case ends	Plaintiff recaptures only primary claim
Conditional Finality	Dismissal with conditional prejudice to refiling of peripheral claims	Case ends	Plaintiff recaptures both primary and peripheral claims
Manufactured Finality	Dismissal without prejudice to refiling of peripheral claims	Plaintiff may refile peripheral claims in district court	Plaintiff recaptures both primary and peripheral claims

The majority of courts of appeals to consider the question have held that a dismissal with prejudice of peripheral claims is the only way to create an appealable final judgment.[72] However, the Sixth, Eighth, and Ninth Circuits find appellate jurisdiction when a judgment is manufactured by the dismissal of peripheral claims without prejudice.[73] In contrast, the Second Circuit and Federal Circuit allow appeal on the basis of

72. Robinson-Reeder v. Am. Council on Educ., 571 F.3d 1333, 1339–40 (D.C. Cir. 2009); *Marshall*, 378 F.3d at 499–501; *Barry*, 168 F.3d at 16; Heimann v. Snead, 133 F.3d 767, 769–70 (10th Cir. 1998) (per curiam); Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435–37 (7th Cir. 1992); *see also* Berke v. Bloch, 242 F.3d 131, 135–36 (3d Cir. 2001) (finding appealable a dismissal without prejudice when it had the same effect as a dismissal with prejudice); Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990).

73. *Hope*, 457 F.3d at 789–90; *James*, 283 F.3d at 1070; *Hicks*, 825 F.2d at 120.

conditional finality.[74] To date, the U.S. Supreme Court has not issued a ruling to resolve the circuit split on the issue of manufactured finality.[75]

A. Examining the Reasons that Courts of Appeals Apply Strict Finality

The courts of appeals that do not allow appeal based on a manufactured dismissal without prejudice of peripheral claims ground their reasoning in the value of the final judgment rule to promote judicial efficiency and prevent piecemeal appeals.[76] In addition, these circuits view interlocutory appeals and Rule 54(b) severance as adequate safeguards to preserve fairness and provide controlled access to early appellate review.[77]

For example, in *State Treasurer of Michigan v. Barry*, the Eleventh Circuit examined multiple reasons for refusing to grant appellate jurisdiction when a party appealed an adverse partial summary judgment after stipulating to a dismissal without prejudice of the remaining claims.[78] In *Barry*, the court observed that the parties' stipulated dismissal without prejudice did not constitute a final judgment because the defendants' counterclaim could be refiled at anytime and raised the prospect of piecemeal appeals.[79] Thus, the court concluded that it did not have appellate jurisdiction under 28 U.S.C. § 1291.[80]

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74. Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008); *Purdy*, 337 F.3d at 258; *see also* SEC v. Gabelli, 653 F.3d 49, 56 (2d Cir. 2011) (citing *Purdy*, 337 F.3d at 258, for the authority that the Second Circuit authorizes appeal under conditional finality).

75. *See* Minutes of Spring 2009 Meeting of Advisory Committee on Appellate Rules 18 (Apr. 16–17, 2009) [hereinafter Spring 2009 Minutes], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP04-2009-min.pdf (noting that the U.S. Supreme Court has not directly addressed the issue of manufactured finality).

76. *See* Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210–11 (2d Cir. 2005) (basing decision not to grant appellate jurisdiction on adherence to the final judgment rule); *Marshall*, 378 F.3d at 499–501 (basing decision not to grant appellate jurisdiction on adherence to 28 U.S.C § 1291 and arguing that allowing a quasi-interlocutory appeal would erode the policy of only allowing interlocutory appeals in instances delineated by statute); *Barry*, 168 F.3d at 13, 16 (basing its decision not to grant appeal on goal of promoting of judicial efficiency and avoiding piecemeal appeals).

77. *See Marshall*, 378 F.3d at 500 (reasoning that prohibiting appeals from dismissals without prejudice furthers the policy of limiting interlocutory appeals to those circumstances delineated in federal statute); *Barry*, 168 F.3d at 14 (suggesting that Rule 54(b) represents the policy determination that a district court judge is in the best position to determine when early appeal is available); *Heimann*, 133 F.3d at 769 (stating that Rule 54(b) was precisely designed to provide grounds for appeal when fewer than all claims were adversely terminated).

78. *Barry*, 168 F.3d at 14–16.

79. *Id.* at 11, 13.

80. *Id.* at 16; *see also* 28 U.S.C. § 1291 (2006) (providing the courts of appeals jurisdiction to hear final judgments appealed from district courts).

Moreover, the *Barry* court reasoned that requesting a Rule 54(b) severance of the primary claim for immediate appeal was the proper avenue for appeal of a single claim in a multiclaim lawsuit,[81] and that it was within the district court's power to determine when exceptions from the final judgment rule were warranted under Rule 54(b).[82]

Furthermore, the *Barry* court posited that the final judgment rule forces litigants to make hard choices about the value of their claims before agreeing to a dismissal with prejudice of peripheral claims to produce finality for appellate review.[83] In the court's opinion, the parties were attempting to gain a tactical advantage by preserving a claim for future litigation without facing the daunting prospect of permanently losing a potentially winning claim by dismissing it with prejudice.[84] The court surmised that the parties could have validly sought appellate review by crafting a settlement agreement that dismissed the peripheral claims with prejudice and provided for a high or low settlement amount based on the outcome of the adversely terminated claim on appeal.[85]

Additionally, the *Barry* court pointed out that refusing to grant jurisdiction to an appeal from a dismissal without prejudice was not the equivalent to a complete denial of the right to appeal, but rather, only a delay of the right to appeal until the action was completely finalized.[86] In conclusion, the court argued that the long-standing precedent of requiring a final judgment or Rule 54(b) severance to secure an appeal fostered judicial efficiency, predictability, and clarity.[87]

Slightly in contrast to the courts of appeals that maintain an absolute rule of not taking appeals from dismissals without prejudice, several courts of appeals allow an appeal from an action when one claim is eliminated and the others are dismissed without prejudice, but only when the dismissal without prejudice has the same practical effect as a dismissal with prejudice.[88]

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81. *Barry*, 168 F.3d at 14; *see also* FED. R. CIV. P. 54(b) (allowing a district court judge to enter final judgment on one or more claims, but fewer than all, when the court expressly determines that there is no just reason for delay).

82. *Barry*, 168 F.3d at 14. The parties in this case did not request a 54(b) severance of the partial judgment for immediate appeal before stipulating to dismissal of the action. *Id.* at 14; *see also* FED. R. CIV. P. 54(b).

83. *Barry*, 168 F.3d at 15.

84. *Id.*

85. *Id.*

86. *Id.* at 15–16.

87. *Id.* at 16.

88. *See, e.g.*, Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006) (granting appellate jurisdiction from a dismissal without prejudice because, under the circumstances, it was the functional equivalent of a dismissal with prejudice);

B. Examining the Reasons that Courts of Appeals Allow Manufactured Finality

Currently, the Sixth, Eighth, and Ninth Circuits find appellate jurisdiction when there is an adverse termination of the primary claim and the remaining claims are dismissed without prejudice.[89] In most cases, the claims dismissed without prejudice to manufacture finality are peripheral claims and are of lesser importance than the primary claim that was adversely terminated.[90]

In these cases, whether or not the petitioner for appellate review sought and was denied a Rule 54(b) severance of the terminated claim is not a determinative factor in granting appellate review.[91] Rather, these courts of appeals base their determination of appellate jurisdiction on whether or not the district court judge was aware that the parties sought to terminate the case at the district court level through either a stipulated dismissal without prejudice or a judicially approved dismissal without prejudice.[92]

The policy rationale offered for this position is that the final judgment rule should be given a "practical rather than a technical construction."[93] Under this view, the disposition of all

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Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990) (holding that granting appellate review to a dismissal without prejudice does not violate the final judgment rule when the plaintiff cannot reassert the abandoned claim). These courts of appeals value adherence to the final judgment rule, but find that taking an appeal without requiring a prejudicial dismissal promotes judicial efficiency by disposing with the formality of requiring the district court to enter a dismissal with prejudice. *See Jackson*, 462 F.3d at 1238; *Trevino-Barton*, 919 F.2d at 878.

89. Hope v. Klabal, 457 F.3d 784, 789–90 (8th Cir. 2006); James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1070 (9th Cir. 2002); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) (per curiam).

90. *Hope*, 457 F.3d at 788; *James*, 283 F.3d at 1065.

91. *See Hope*, 457 F.3d at 788–90 (finding jurisdiction based on dismissal without prejudice when the district court denied Rule 54(b) severance); *James*, 283 F.3d at 1067–70 (finding appellate jurisdiction when the plaintiff did not seek Rule 54(b) severance before dismissing its remaining claims without prejudice); *Hicks*, 825 F.2d at 120 (granting appellate jurisdiction on the basis of a dismissal without prejudice following an adverse ruling by the trial court and ignoring the issue of whether the plaintiff had sought a Rule 54(b) severance).

92. *See Hope*, 457 F.3d at 789 (noting that two factors that weighed in favor of granting appellate jurisdiction were the district court judge's awareness of the stipulated dismissal without prejudice and the district court judge's entry of an order of dismissal); *James*, 283 F.3d at 1065–66, 1070 ("The court's approval of the motion [to dismiss without prejudice] is usually sufficient to ensure that everything is kosher."); *Hicks*, 825 F.2d at 120 (relying on the fact that the judge was aware and approved of the parties' stipulated dismissal without prejudice as a distinguishing factor in favor of granting appellate jurisdiction).

93. *Hope*, 457 F.3d at 789 (quoting Cohen v. Beneficial Indus. Loan Corp, 337 U.S. 541, 546 (1949)).

claims at the district court level is the equivalent of a final judgment, because "there [is] nothing left for the district court to resolve, and the suit [has] ended as far as [the district court is] concerned."[94] Although this may be technically true, it is still possible for a party to refile a claim that was dismissed without prejudice at any time, barring some other procedural obstacle.[95] Thus, allowing appeal after the dismissal without prejudice of peripheral claims arguably circumvents the final judgment rule.[96]

C. Examining the Reasons that Courts of Appeals Adopt Conditional Finality

While it is generally agreed that manufacturing finality through a dismissal without prejudice violates the final judgment rule, whether or not appellate jurisdiction exists when a claim is conditionally dismissed presents a more intriguing question. Under conditional finality, or as it is sometimes referred to, conditional manufactured finality, after a plaintiff's primary claim in a multiclaim lawsuit is adversely terminated, the parties may stipulate to or the plaintiff may receive judicial approval to conditionally dismiss its remaining claims to produce finality for appeal.[97] However, the voluntary dismissal is subject to the condition that the dismissed claims can only be refiled in district court if the court of appeals overturns the ruling that adversely terminated the plaintiff's primary claim.[98] Otherwise, the claims that were conditionally dismissed solidify into dismissals with prejudice and are lost forever.[99] Currently, the Second Circuit and the Federal Circuit have approved the use of conditional finality.[100]

In *Purdy v. Zeldes*, the Second Circuit concluded that the policies of the final judgment rule that counseled against taking an appeal in cases of manufactured finality were not similarly

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94. *Id.* at 790.

95. *See* Marshall v. Kansas City S. Ry., 378 F.3d 495, 500 (5th Cir. 2004) (finding that manufactured finality allows a plaintiff the option of refiling voluntarily dismissed claims); *James*, 283 F.3d at 1066 ("Admittedly, a dismissal of some claims without prejudice always presents a possibility that the dismissing party would attempt to resurrect them in the event of reversal.").

96. *See Marshall*, 378 F.3d at 500 (finding that a Rule 41(a) dismissal without prejudice is an unacceptable "end-run around the final judgment rule"); Fall 2010 Minutes, *supra* note 3, at 10–12.

97. Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008); Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003).

98. *Doe*, 513 F.3d at 1354; *Purdy*, 337 F.3d at 258.

99. *See Purdy*, 337 F.3d at 258 (suggesting that under conditional finality a failure to obtain a reversal on appeal results in termination of the entire lawsuit).

100. *Doe*, 513 F.3d at 1354; *Purdy*, 337 F.3d at 258.

implicated when conditional finality was employed.[101] After an adverse summary judgment ruling on its primary claims, the plaintiff decided not to pursue its peripheral claim alone and "moved to dismiss that claim without prejudice to refiling it if, but only if, the dismissal of his first two claims was reversed on appeal."[102] In distinguishing conditional finality from manufactured finality, the *Purdy* court concluded that unlike cases when some claims are dismissed without prejudice to refiling, under conditional finality the plaintiff "runs the risk that if his appeal is unsuccessful, his . . . case comes to an end."[103] Thus, the court concluded that conditional finality is in harmony with the final judgment rule.[104]

V. THE COSTS AND BENEFITS OF APPEAL UNDER CONDITIONAL FINALITY

A. Economic Theory, Methods of Analysis, and Basic Assumptions

At first glance, allowing for appeal under conditional finality may appear as a significant change to the established rules of procedure with uncertain benefits. However, upon closer examination, the potential benefits of cost savings for parties, increased judicial efficiency, and more accurate legal outcomes likely outweigh the costs of implementation and increased risk of piecemeal appeals. In addition, far from a drastic departure from established rules of procedure, the implementation of conditional finality would require only a slight modification to the rules of procedure.

Before proceeding with an examination of the potential costs and benefits of conditional finality, it is helpful to outline some basic assumptions involved in this Comment's cost–benefit analysis. First, this Comment utilizes a basic economic model that finds that an economic improvement is achieved when the monetary benefits accruing to private litigants and the government judiciary outweigh the costs.[105] Under this

101. *Purdy*, 337 F.3d at 258.

102. *Id.* at 257.

103. *Id.* at 258.

104. *Id.*

105. *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 441–42 (1973) [hereinafter Posner, *An Economic Approach to Legal Procedure and Judicial Administration*] (explaining how rules of civil procedure may be designed to achieve economic efficiency). *See generally* Richard A. Posner, *Cost–Benefit Analysis: Definition, Justification, and Comment on Conference Papers* 29 J. LEGAL STUD. 1153, 1153–56 (2000) (explaining the basic principles of cost–

model, an efficient rule of procedure is one that produces a net increase in economic benefits minus costs.[106] Second, the cost–benefit analysis is based on a head-to-head comparison of conditional finality and strict finality. Manufactured finality is not considered as a viable alternative in the cost–benefit comparison because it arguably contradicts the final judgment rule, and it is unlikely to be implemented given the federal rules advisory committee's hostility.[107]

As an aid to exposition, this Comment will assume a hypothetical scenario under which conditional finality is likely to occur. Under this hypothetical scenario, the use of conditional finality becomes a viable option when a plaintiff's primary claim is adversely terminated before trial, but its peripheral claims remain viable for trial. At this point, under a system that allowed conditional finality, a plaintiff would face a choice. The plaintiff may proceed to trial on its peripheral claims, obtain a final judgment, and then appeal its adversely terminated primary claim. Or in the alternative, the plaintiff may dismiss its remaining claims with conditional prejudice and appeal, with the potential to recapture both its primary claim and its conditionally dismissed peripheral claims contingent on a victory on appeal. In contrast, under a system that did not allow conditional finality, the plaintiff would face the same two choices. However, in order to obtain early appellate review for its adversely terminated primary claim, the plaintiff would be required to dismiss its remaining peripheral claims with prejudice without the possibility of reinstatement, regardless of the outcome on appeal.

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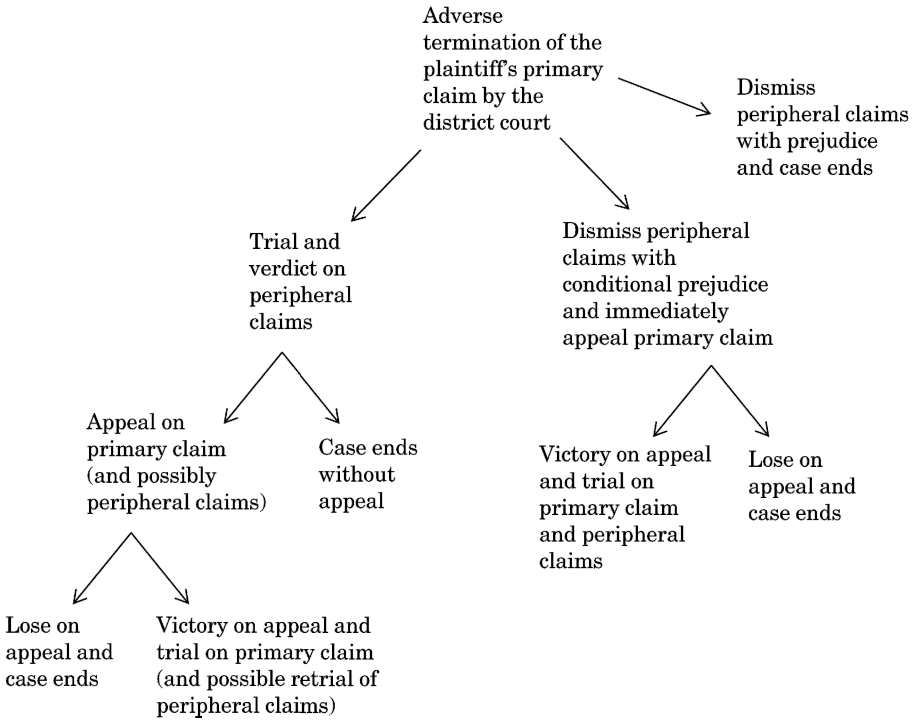
benefit analysis).

106. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, *supra* note 105, at 441–42 (explaining how rules of civil procedure may be designed to achieve economic efficiency).

107. *See* Fall 2010 Meeting, *supra* note 3, at 10–11.

Figure 2. Decision Tree Analysis Under Conditional Finality



B. Potential Benefits of Allowing Appeal under Conditional Finality

1. Cost Savings for Parties. Both plaintiffs and defendants are likely to benefit from having the option of conditional finality. Under conditional finality, the potential cost and risk of an early appeal are reduced because of the possibility of recapturing all claims based on a successful appeal. This alters the calculations that a plaintiff makes in deciding whether or not to proceed to trial or dismiss peripheral claims.[108] Variables that would impact the willingness of a plaintiff to take the option of appeal under conditional finality include the comparative value a plaintiff places on his primary and peripheral claims, the cost of trial and appeal, and the plaintiff's expected probability of victory on a conditional appeal.[109] Because the cost of dismissing peripheral claims is potentially lower under conditional finality, parties are

108. *See* State Treasurer of Mich. v. Barry, 168 F.3d 8, 15 (11th Cir. 1999) (explaining that requiring a dismissal with prejudice forces plaintiffs to make hard choices about the value of dismissing peripheral claims to obtain early appellate review).

109. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 805–06 (8th ed. 2011) (discussing the costs and benefits of immediate appeals).

forced to recalculate the costs and benefits of proceeding to trial on peripheral claims and delaying appeal on a primary claim.[110]

If a plaintiff opts for an early appeal under conditional finality, uncertainty about the final outcome of the case likely will be reduced earlier in the litigation process.[111] Decreased uncertainty of the ultimate outcome of a case is likely to result in an earlier disposition of the case.[112] Under conditional finality, uncertainty is decreased immediately after the early appeal.[113] If the plaintiff loses, then uncertainty is eliminated through the final disposition of all claims.[114] If the plaintiff wins, the parties will be able to more accurately predict the value of the case earlier in the litigation process, which will increase the likelihood of early settlement.[115]

Furthermore, appeal under conditional finality allows a plaintiff to decrease uncertainty early in a lawsuit before the input of significant trial expenditures.[116] This will make riskier lawsuits more attractive for plaintiffs, because plaintiffs will be able to more accurately predict a lawsuit's value after a conditional appeal and abandon lawsuits that are unlikely to be profitable before incurring significant losses.[117]

In addition, in some cases, the choice to opt for an early appeal under conditional finality would fall to the defendant.[118] For example, in a case when a plaintiff's claim is terminated and all that remains is the defendant's counterclaim, the defendant may determine that it is not worth the expense to proceed with a trial on the counterclaim and agree to conditionally dismiss its counterclaim in order to allow the plaintiff to immediately appeal.[119]

Moreover, in cases of clear judicial error, the option for an appeal based on conditional finality would be beneficial. A plaintiff who is able to recognize a judicial error that adversely

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110. *See id.* (explaining that one single appeal is less time-consuming than ten separate appeals).

111. *See* Solimine, *supra* note 56, at 1178 (linking a decrease in uncertainty to a corresponding increase in potential for settlement following an interlocutory appeal).

112. *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1279, 1315 (2006) (analyzing the effect of decreased uncertainty on the settlement value of a lawsuit).

113. *See id.*; Solimine, *supra* note 56, at 1178.

114. Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003).

115. *See* Grundfest & Huang, *supra* note 112, at 1279, 1315 (illustrating the effect of uncertainty on settlement value).

116. *See id.*

117. *See id.*

118. *See* State Treasurer of Mich. v. Barry, 168 F.3d 8, 10 (11th Cir. 1999) (explaining how the defendant agreed to dismiss its counterclaim without prejudice in an attempt to manufacture finality).

119. *See id.*

terminated a valid claim and who knows that the error will be reversed on appeal likely will select immediate appeal.[120] The resolution of clear error will save both parties the cost of proceeding with a first trial and appeal, with the overarching possibility of a second trial looming on the horizon.[121]

In addition, if both plaintiff and defendant recognize a clear error that will be reversed on appeal, the parties may opt to settle before any appeal takes place.[122] In such a case, the parties are spared the expense of trial and appeal.[123] Therefore, the option for an early appeal under conditional finality in cases of clear error is likely to benefit both plaintiff and defendant.

The cost and delay of proceeding with a trial before appeal can be significant for both plaintiff and defendant.[124] For a plaintiff who is doubtful about the value of proceeding to trial on peripheral claims and then appealing the adverse termination of the primary claim, taking the option of early appeal under conditional finality would be advantageous.[125] In addition, for the plaintiff who is more evenly divided in his analysis of the costs and risks of proceeding to trial versus immediately appealing, an appeal based on conditional finality would be a viable option. In contrast, a plaintiff who places a high value on proceeding to trial on peripheral claims is unlikely to select an immediate appeal under conditional finality.[126] Thus, in cases when the plaintiff is doubtful of the value of proceeding to trial on peripheral claims or is closely divided, having the option of an appeal based on conditional finality is beneficial to the plaintiff. Furthermore, allowing a plaintiff the option to appeal under conditional finality provides benefits to both parties by reducing trial costs and uncertainty early in the litigation process.

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120. *See* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 390 (1995) (elaborating on the influence of outcome prediction on the value of appealing a lawsuit).

121. *See id.* (discussing the benefit of error prediction for a party appealing a lawsuit).

122. *See id.* at 391–92 (recognizing the increased potential for settlement before appeal based on error recognition).

123. *See id.*

124. *See* POSNER, *supra* note 109, at 805–06 (discussing the costs and benefits of early appellate review).

125. *See* James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 (9th Cir. 2002) (suggesting that the plaintiff found the value of peripheral claims to be low and not worth pursuing alone).

126. *Cf. id.* (examining plaintiff's assertion that trial on peripheral claims alone would not be cost-efficient in an appeal based on manufactured finality).

2. Judicial Efficiency. Even though at first glance it may appear counterintuitive, conditional finality is likely to lead to increased judicial efficiency.[127] Because allowing appeal under conditional finality likely would result in more appeals,[128] any consideration of judicial efficiency must necessarily balance the competing value of district and appellate court time.[129] To achieve efficiency under conditional finality, increased appellate court costs must be offset by decreased costs at the district court level.[130]

Figure 3. Simplified Model for Achieving Judicial Efficiency under Conditional Finality

Cost of Increased Appeals	+	Cost of Increased Piecemeal Appeals	<	Cost of Trials Avoided

Because plaintiffs rarely succeed on appeal from nontrial civil district court judgments, more cases will be disposed of without the need for a trial under conditional finality.[131] Federal appeals from nontrial final judgments for defendants occur at a rate of about 29%.[132] When a plaintiff pursues a nontrial appeal to conclusion, a plaintiff obtains a reversal in about 17% of cases.[133] Assuming the nontrial reversal rate remained constant in appeals under conditional finality, in most cases a trial could be avoided at the expense of an early appeal.

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127. *See* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 102 (1975) (elaborating on the potential for a reduction in the caseload of federal courts through the disposition of cases through early appeal); Solimine, *supra* note 56, at 1178 (illustrating the potential for a resulting decrease in the overall federal caseload by allowing greater access to early appeal).

128. *See* POSNER, *supra* note 109, at 805 (discussing the relationship between the ease of access to appeal and demands on appellate courts); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 29–30 (2010) (elaborating on the relationship between access to appellate review and the resources allocated to appellate courts).

129. *See* POSNER, *supra* note 109, at 805–06 (comparing the costs and benefits of increasing trial versus appellate caseloads).

130. *See id.* at 805.

131. *See* Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 671 tbl.3, 681 (2004) (analyzing appellate reversal rates for plaintiffs and defendants in federal civil cases and determining that defendants fare better because of their higher trial win rate and not because of judicial bias).

132. *Id.* at 671 tbl.3 (analyzing appellate reversal rates for plaintiffs and defendants in tried and nontried federal civil cases).

133. *See id.* (finding that nontrial judgments in favor of defendants are appealed to conclusion in 15.7% of cases, with 13.0% affirmed and 2.7% reversed).

Furthermore, under conditional finality, judicial efficiency may improve either if a party succeeds or fails on its conditional appeal.[134] If a plaintiff conditionally dismisses its claims and fails on appeal, the case is terminated.[135] On the other hand, if a plaintiff wins on appeal, uncertainty is reduced early in the litigation process and the likelihood of settlement increases.[136]

Therefore, implementing conditional finality likely would result in an increase in the overall number of appeals from nontrial judgments and in turn dispose of a greater number of cases early in the litigation process without the need for a trial.[137] Thus, this would produce an overall improvement in judicial efficiency.

3. Increased Clarity in the Law. Because the implementation of conditional finality would lead to more appeals,[138] it would also produce more appellate law precedent.[139] An increase in appellate law precedent improves the clarity of the law,[140] and decreases uncertainty for litigants.[141] A decrease in uncertainty for litigants likely would lead to more settlements earlier in the legal process.[142]

Furthermore, the additional appeals generated under conditional finality would come earlier in the legal process than most post-trial appeals, producing a broader spectrum of legal issues for appellate court review.[143] This would arguably provide for the development of law in some areas that often otherwise

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134. *See* Solimine, *supra* note 56, at 1178 (noting the increased potential for settlement following an interlocutory appeal).

135. Purdy v. Zeldes, 337 F.3d 253, 257 (2d Cir. 2003).

136. *See* Grundfest & Huang, *supra* note 112, at 1279, 1315 (illustrating the effect of uncertainty on settlement value); Solimine, *supra* note 56, at 1180–81 (discussing the impact of certainty on settlement).

137. *See* Solimine, *supra* note 56, at 1178 (noting that a modest increase in the number of early appeals has the potential to decrease the overall federal caseload through the earlier disposition of cases).

138. *See* POSNER, *supra* note 109, at 805 (noting the relationship between the ease of access to appeal and demands on appellate courts); Rutledge, *supra* note 128, at 29–30 (elaborating on the relationship between access to appellate review and the resources allocated to appellate courts).

139. *See* Rutledge, *supra* note 128, at 30–31 (noting the development of law that occurs when access to appellate review is more readily available).

140. *See id.* at 31 (suggesting that improved accuracy of litigation outcomes is one benefit that accrues to future litigants when the law is clear).

141. *See* Solimine, *supra* note 56, at 1180–81 (linking an increase in clarity of the law with a corresponding decrease in uncertainty).

142. *See* Grundfest & Huang, *supra* note 112, at 1279, 1315 (elaborating on the impact of uncertainty on a lawsuit's settlement value); Solimine, *supra* note 56, at 1180–81 (positing that a decrease in uncertainty likely will lead to an increase in early settlement).

143. *See* Solimine, *supra* note 56, at 1181–83 (discussing the impact of easier access to early appellate review on the types of topics that appellate courts review).

escape appellate review, such as pleading standards and jurisdictional issues.[144]

4. Increased Accuracy of Final Outcomes. Access to early review through conditional finality likely would increase the accuracy of individual legal outcomes. As discussed previously, the potential factors that weigh on an individual plaintiff considering an early appeal are numerous. Under a system that does not allow conditional finality, a plaintiff must either dismiss its peripheral claims with prejudice or proceed to trial on the peripheral claims and obtain a final judgment before appeal. If a plaintiff dismisses peripheral claims with prejudice to obtain early review, then the party is sacrificing potentially meritorious legal claims for the benefit of early appellate review.[145] In contrast, under conditional finality, a plaintiff who succeeds on appeal will recapture its peripheral claims and will be able to prosecute its entire lawsuit.[146] The ability to preserve meritorious claims through a successful appeal under conditional finality likely will lead to an increase in the accuracy of outcomes for individual litigants.[147]

A secondary benefit to the development of clearer laws through increased appeals is a corresponding increase in the accuracy of legal outcomes for future litigants.[148] Moreover, if trial judges fear more frequent reversal through more frequent review under conditional finality, then it is possible that trial judges will devote increased resources to producing an accurate outcome in the first instance.[149]

Thus, a system that allowed appeal under conditional finality would benefit litigants and result in gains in judicial efficiency. Moreover, the ability to quickly and accurately correct erroneous, dispositive trial court actions appeals to basic notions

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144. *See id.* at 1182 (arguing that earlier access to review by appellate courts will lead to the development of law in new areas).

145. *See* State Treasurer of Mich. v. Barry, 168 F.3d 8, 15 (11th Cir. 1999) (explaining that requiring a dismissal with prejudice forces plaintiffs to make hard choices about the value of dismissing peripheral claims to obtain early appellate review).

146. Purdy v. Zeldes, 337 F.3d 253, 257 (2d Cir. 2003).

147. *See* Rutledge, *supra* note 128, at 31 (arguing that earlier access to appellate review will lead to more accurate outcomes for individual litigants).

148. *See id.* (arguing that increased legal precedent through earlier appellate review will lead to more accurate outcomes). This would help to offset the increased difficulty in predicting case outcomes that has followed the decrease in jury trials. *See* David J. Beck, *The Consequences of the Vanishing Trial: Does Anyone Really Care?*, 1 HLR*e* 29, 32–35, 40–41 (2010) (explaining that the decrease in jury trials has stunted the development of the law), *available at* http://www.houstonlawreview.org/archive/downloads/hlre/1_1/(3)Beck.pdf.

149. *See* Shavell, *supra* note 120, at 390–91 (suggesting that fear of reversal may result in increased accuracy in the first instance).

of fairness and precision that undergird the hierarchy of the judicial system.[150]

5. Harmony with the Final Judgment Rule. Unlike manufactured finality, conditional finality does not directly infringe upon the final judgment rule.[151] When conditional finality is used to generate an appealable judgment, the case is effectively closed unless reversed on appeal.[152] This is a striking difference between conditional finality and manufactured finality.

Under manufactured finality, a party can potentially refile its claims that were dismissed without prejudice at anytime.[153] In contrast, under conditional finality, a party is not free to refile its conditionally dismissed claims in federal court unless it obtains a reversal on its primary claim at the appellate level.[154] This critical distinction prevents conditional finality from running afoul of the final judgment rule.

Nonetheless, it may be argued that conditional finality weakens the final judgment rule without directly violating it by allowing access to appellate review without full development of the facts and legal issues.[155] One result of a weakened final judgment rule is a greater potential for frivolous and piecemeal appeals.[156] However, if an appeal from an adversely terminated primary claim is inevitable, the potential cost savings produced by allowing a conditional appeal likely outweigh the increased risk of piecemeal appeals.

C. Potential Costs of Allowing Appeal Under Conditional Finality

1. Increased Number of Appeals. Any modification of the rules of procedure that provides easier access to appellate

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150. *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 660–64, 667 (1994) (elaborating on the shift of legal power over decisions of law from appellate to district courts).

151. *Purdy*, 337 F.3d at 258.

152. *Id.* at 257.

153. *See* Marshall v. Kansas City S. Ry., 378 F.3d 495, 500 (5th Cir. 2004) (finding that manufactured finality allows a plaintiff the option of refiling voluntarily dismissed claims); James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002) ("Admittedly, a dismissal of some claims without prejudice always presents a possibility that the dismissing party would attempt to resurrect them in the event of reversal.").

154. *Purdy*, 337 F.3d at 258.

155. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3907, at 272, 283–84, § 3914.8, at 624 (explaining the consequences of relaxing the final judgment rule).

156. *See id.* § 3907, at 269 n.2, 273 n.5, § 3914, at 624 n.18.

review of district court decisions likely will increase the overall number of appeals.[157] Because conditional finality would provide easier access to appellate review, implementation of conditional finality would increase the overall number of appeals.[158]

The requirement of finality for appeal is used as a jurisdictional means of docket control by courts of appeals.[159] By adding another procedure to generate an appealable final judgment, conditional finality would reduce courts of appeals' ability to control their dockets.[160] Moreover, it has been contended that courts of appeals are less able to absorb increased appeals because of elasticity constraints.[161] In other words, it is more difficult to "maintain[ ] a reasonable uniformity and consistency of law" if the number of appellate judges is increased beyond a certain threshold.[162]

Furthermore, due to the increase in the number of lawsuits filed in federal courts over the last four decades, it has been frequently argued that federal courts are facing a "crisis of volume."[163] Moreover, it has been argued that courts of appeals are bearing the brunt of this crisis.[164] Therefore, any procedural rule that increases the number of appeals will add work to the already overburdened courts of appeals.

Nonetheless, there is some evidence that suggests that the crisis of volume may have passed or been alleviated through improved case management techniques.[165] The overall number of

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157. *See* POSNER, *supra* note 109, at 805 (recognizing the relationship between the ease of access to appeal and demands on appellate courts); *see also* Rutledge, *supra* note 128, at 29–30 (elaborating on the relationship between access to appellate review and the resources allocated to appellate courts).

158. *See* POSNER, *supra* note 109, at 805; *see also* Rutledge, *supra* note 128, at 29–30.

159. Cochran, *supra* note 13, at 996–1001 (explaining how the final judgment rule is employed as a case management tool for appellate dockets).

160. *See id.* (discussing the use of finality as a means of appellate docket control).

161. POSNER, *supra* note 109, at 805.

162. *Id.*

163. *See* Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume"*, 8 J. APP. PRAC. & PROCESS 101, 102–13 (2006); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 761–63 (1989) (arguing that the increase in federal court cases from the 1960s to the late 1980s threatened the functioning of the judicial system); Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 474–77 (2009) (arguing that the crisis in caseload volume has worsened over time).

164. *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 320–25 (2011) (elaborating on the increase in appellate volume in federal courts of appeals and various case management responses to the problem).

165. *See* Baker, *supra* note 163, at 102–13 (providing numerous possible

federal appeals peaked in 2006 and has since decreased.[166] Moreover, from 2007 to 2011, data indicates that appellate caseloads are decreasing while federal district court caseloads are increasing.[167] This recent trend calls into question whether courts of appeals face a crisis of volume more dire than that of district courts.[168]

An unanswered question is how much would conditional finality increase the overall number of federal appeals? An informal survey of Assistant U.S. Attorneys in the jurisdiction of the Second Circuit found that the issue "does not come up frequently."[169] In addition, the paucity of published opinions discussing the use of conditional finality suggests that it is not widely used by litigants.[170] Furthermore, a portion of the cases appealed under conditional finality would be appealed after a trial regardless of whether conditional finality is available. Therefore, it seems unlikely that the implementation of conditional finality would result in a large increase in the number of federal appeals or significant burden shifting from trial to appellate courts.

2. Diminished Power of the District Court Judge. Under the current system, a district court judge controls access to early appeal from a final judgment that disposes with some but not all of the claims through Rule 54(b).[171] The granting of a Rule 54(b) motion for appeal by a district court judge is reviewed for abuse of discretion by a court of appeals.[172]

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explanations for the easing of the "crisis of volume" in courts of appeals).

166. Levy, *supra* note 164, at 324.

167. *See* ADMIN. OFFICE OF THE U.S COURTS, FED. JUDICIAL CASELOAD INDICATORS: MARCH 31, 2011, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/front/IndicatorsMar11.pdf (indicating that the number of federal appeals filed has decreased since 2007 while the number of federal district court cases filed has increased).

168. *See id.*

169. Draft Minutes of Spring 2011 Meeting of Advisory Committee on Appellate Rules 12–13 (Apr. 6–7, 2011), *in* Agenda Book of Fall 2011 Meeting of the Advisory Committee on Appellate Rules 31 (Oct. 13–14, 2011) [hereinafter Draft Minutes of Spring 2011 Meeting], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/AP2011-10.pdf.

170. To date, the doctrine has only been applied in a few cases. Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008); Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003); *see also* SEC v. Gabelli, 653 F.3d 49, 56 (2d Cir. 2011) (citing *Purdy*, 337 F.3d at 258, for authority that the Second Circuit authorizes appeal under conditional finality).

171. FED. R. CIV. P. 54(b).

172. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7, at 541–44 (explaining the criteria used by appellate courts when reviewing Rule 54(b) certifications by a district court judge).

One way to implement conditional finality would be to allow for conditional dismissal and appeal through stipulation of the parties or through certification at the district court judge's discretion. If the stipulation method were used to generate an appeal this would take the gatekeeping power out of the hands of the district court judge and place it in the hands of the parties. Moreover, because an additional avenue for obtaining appellate review of the district court judge's orders would open up, a district court judge's decisions would be subjected to earlier scrutiny with greater frequency.[173] Increased opportunities for early appellate review would arguably diminish the district court judge's authority, and result in diminished respect by the parties for the district court judge.[174]

Nevertheless, it is not axiomatic that increased appellate scrutiny leads to diminished authority and less respect for district court judges.[175] Rather, it seems likely that if a district court judge's orders are frequently affirmed on appeal, the overall level of authority and respect for that judge would increase.[176] Furthermore, if a district court judge's rulings are frequently reversed, then the initial authority and respect accorded to the judge were probably misplaced to begin with.[177] In all likelihood, the positive and negative effects of increased early appellate review "probably wash out . . . [and] neither increase nor decrease the authority or independence of district judges."[178]

3. Risk of Delay and Piecemeal Appeals. A risk of allowing any appeal before final judgment is that it creates the possibility for repeated or piecemeal appeals that may involve the same legal issues and result in undue delay.[179] Although conditional finality does not per se violate the final judgment rule, the possibility remains that if a conditional appeal succeeds, later in

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173. *See* POSNER, *supra* note 109, at 805 (illustrating the relationship between the ease of access to appeal and demands on appellate courts); Rutledge, *supra* note 128, at 29–30 (elaborating on the relationship between access to appellate review and the resources allocated to appellate courts).

174. *See* Solimine, *supra* note 56, at 1178–79 (explaining the potential result of increased appellate review on the authority of district court judges).

175. *See* Redish, *supra* note 127, at 106 (explaining the possibility of increased authority for a district court judge when that judge's orders are frequently affirmed on appeal).

176. *See id.*

177. *See id.* (suggesting that frequent reversal of a district court judge could reveal misplaced respect).

178. Solimine, *supra* note 56, at 1179.

179. JUDICIAL ADMIN. DIV., AM. BAR ASS'N., 3 STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.12 cmt. at 31 (1994) [hereinafter STANDARDS RELATING TO APPELLATE COURTS].

the trial an interlocutory or Rule 54(b) appeal could follow.[180] And then after trial, an appeal on the final judgment could occur. Thus, if conditional finality is implemented, the risk of increased costs and delay from piecemeal appeals is a burden that the parties and courts would be forced to bear.[181]

Moreover, allowing appeals under conditional finality could result in unnecessary appellate proceedings.[182] If a plaintiff is forced to proceed to trial on its peripheral claims after its primary claim is adversely terminated, it is possible that the issue resulting in the adverse termination of the primary claim will be rendered moot before final judgment is issued on the peripheral claims.[183] Forcing a plaintiff to proceed to trial on the peripheral claims or dismiss them with prejudice before taking an appeal reduces the number of unnecessary appeals and forces a plaintiff to make hard choices about the value of peripheral claims.[184]

However, it is important to weigh the costs of proceeding through trial against the risk of unnecessary appeals.[185] It is unknown whether or not the issues that resulted in adverse termination of the primary claim will even arise during a trial on peripheral claims. Therefore, while appeal under conditional finality increases the risk of producing unnecessary appeals, it also increases the possibility that the entire case will be terminated earlier in the legal process.

4. Reallocation of Judicial Resources. Implementing a rule allowing for appeal under conditional finality would produce costs.[186] The reallocation of judicial resources required to handle

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180. *See* POSNER, *supra* note 109, at 805 (illustrating the possibility for multiple interlocutory appeals in a single trial proceeding); *see also supra* Part II.B (discussing the application and limitations of Rule 54(b)).

181. *See* POSNER, *supra* note 109, at 805 (explaining the delay costs that result from frequent interlocutory appeals). *But see* Redish, *supra* note 127, at 104–05 (arguing that the benefits of properly managed interlocutory appeals outweigh the costs).

182. *See* POSNER, *supra* note 109, at 805 (noting that the basis for an interlocutory appeal may be rendered moot by the final judgment).

183. *See* STANDARDS RELATING TO APPELLATE COURTS, *supra* note 179 § 3.12 cmt. at 31 (elaborating on the merits of the final judgment rule in preventing unnecessary appellate proceedings).

184. *See* State Treasurer of Mich. v. Barry, 168 F.3d 8, 15 (11th Cir. 1999) (explaining that requiring a dismissal with prejudice forces plaintiffs to make hard choices about the value of dismissing peripheral claims to obtain early appellate review); POSNER, *supra* note 109, at 805 (elaborating on how the strict final judgment rule reduces unnecessary appeals).

185. *See* Redish, *supra* note 127, at 104–05.

186. *See* Rutledge, *supra* note 128, at 29–30 (elaborating on the resource investment policy choices that go into a determination of when appeal is available).

appeals produced under conditional finality would require a shift in resources from federal district courts to courts of appeals.[187] The cost of shifting resources and institutional change may outweigh the benefits gained from implementing appeal under conditional finality.

Determining the costs and benefits of implementing a rule allowing for appeal under conditional finality is in essence a question of policy.[188] The alternatives to implementing conditional finality include allowing the circuit split over manufactured finality to continue or implementing a rule that explicitly bans all forms of manufactured finality, including conditional finality. An outright ban on appeals based on any form of conditional finality would have harsh consequences for parties and could result in increased costs to courts if more cases are carried through trial to produce an appealable final judgment. Because the potential benefits of allowing appeal under conditional finality likely outweigh the costs, amending the rules of procedure to allow for appeal under conditional finality warrants serious consideration.

VI. EXAMINING PROPOSALS FOR THE MODIFICATION OF APPELLATE JURISDICTION

Because implementing conditional finality likely would result in cost savings for parties and improved judicial efficiency, it is useful to explore how a rule would work in practice. National implementation of a court rule allowing for appeal under conditional finality can be accomplished through modification of the rules of procedure used in federal courts.[189] This Part briefly reviews academic proposals for changes to appellate jurisdiction and recent discussions by federal rules advisory committees concerning manufactured finality. This Comment then concludes by proposing a draft rule for conditional finality designed to work within the existing framework of federal court rules.

A. Academic Proposals for Modifying Appellate Jurisdiction

Over the years, academic commentators have suggested various changes to expand or contract appellate jurisdiction over

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187. *See* POSNER, *supra* note 109, at 805 (discussing the economics of resource allocation based on the availability of interlocutory appeal).

188. *See* Rutledge, *supra* note 128, at 29–30 (explaining that the allocation of judicial resources involves policy choices); *see also* Fall 2010 Minutes, *supra* note 3, at 10–12 (explaining some of the policy choices involved in drafting a rule concerning conditional finality).

189. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101–650, § 315, 104 Stat. 5089, 5115 (codified as amended at 28 U.S.C. § 2072(c) (2006)).

interlocutory appeals and final judgments. One type of proposal argues for providing complete discretion to an intermediate appellate court over which interlocutory appeals to hear and for strictly limiting appeal by right to final judgments.[190] In 1994, the American Bar Association (ABA) endorsed this standard.[191] Other proposals take a different track and argue for greater flexibility in the interpretation of interlocutory appellate devices, such as § 1292(b) and Rule 54(b), to allow for quicker access to appellate review of trial court decisions early in the litigation process.[192] In contrast, a recent proposal argues that parties should be permitted to agree to a stipulated interlocutory appeal of a district court order that an appellate court would then be required to rule on.[193] Alternatively, another competing proposal closely tracks the position taken by the courts of appeals that take a hard line on manufactured finality and encourages the adoption of a strict interpretation of the final judgment rule to do away with any uncertainty regarding finality.[194] Although none of these proposals directly addresses the issue of conditional finality, each one seeks to strike a balance between the competing needs for finality to prevent piecemeal appeals and the occasional need for early appellate review to prevent unduly harsh outcomes.

B. Consideration of Manufactured Finality by the Federal Rules Advisory Committees

In November 2008, after receiving information about the circuit split and potential benefits of national uniformity, the Advisory Committee on Rules of Appellate Procedure began to

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190. Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 776–77 (1993). An alternative variation would be to keep the current statutory provisions allowing for interlocutory appeal by right through § 1292(a), but to allow all other interlocutory appeals to be discretionary. *See* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1277–90 (2007) (arguing that courts should allow appeal by right under § 1292(a) and recognize that the All Writs Act authorizes discretionary jurisdiction over all other interlocutory appeals).

191. STANDARDS RELATING TO APPELLATE COURTS, *supra* note 179 § 3.12.

192. *See* Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353 356–59, 394–96 (2010) (arguing for a broader interpretation of the collateral order doctrine); Redish, *supra* note 127, at 97–116 (arguing for a pragmatic approach to finality to prevent harsh outcomes); Solimine, *supra* note 56, at 1175–83 (arguing for greater use of interlocutory appeals through a more flexible interpretation of § 1292(b)).

193. *See* James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1058–65 (2011).

194. Cochran, *supra* note 13, at 1017–20 (proposing eliminating manufactured finality and maintaining interlocutory appeals under Rule 54(b) and § 1292).

study the issue of manufactured finality.[195] The topic of manufactured finality was then assigned to a newly created Civil-Appellate Subcommittee, comprised of members from both the Advisory Committee on Rules of Appellate Procedure and the Advisory Committee on Rules of Civil Procedure, for further study.[196]

Consideration of manufactured finality by a rules advisory committee is significant because a committee has the power to recommend changes to the federal rules governing what constitutes an appealable final judgment.[197] A recommendation for a rule change by a rules advisory committee thus constitutes a preliminary step in the process of modifying the rules of practice and procedure in federal courts.[198]

After considering the costs and benefits of clarifying the circuit split on manufactured finality, the Civil-Appellate Subcommittee devised three possible courses of action: (1) to do nothing and allow the courts of appeals to continue to develop divergent policies regarding finality; (2) to modify the rules of procedure to clarify that only a dismissal with prejudice can produce a final judgment for appeal; or (3) to develop a rule that allows for the option of appeal under conditional finality.[199] After exploring the issue, the subcommittee reached agreement that appeal under manufactured finality through the dismissal of peripheral claims without prejudice was contrary to the final judgment rule and should not be allowed.[200] However, the subcommittee was unable to agree on whether or not the costs and benefits of conditional finality were clear enough to justify a rule change to formally permit its use.[201] In November 2011, after failing

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195. Minutes of Fall 2008 Meeting of Advisory Committee on Appellate Rules 18–20 (Nov. 13–14, 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP11-2008-min.pdf.

196. Spring 2009 Minutes, *supra* note 75, at 3.

197. *See* 28 U.S.C. §§ 2072(c), 2073(a)–(b) (2006) (allocating rulemaking power over the definition of final judgment to the Judicial Conference and U.S. Supreme Court); J. Thomas F. Hogan, *A Summary for the Bench and Bar*, U.S. CTS. (Jan. 6, 2012), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (explaining the rulemaking process for procedural changes in rules governing litigation in federal courts).

198. *See* 28 U.S.C. § 2073 (2006) (granting the Judicial Conference the power to formulate proposed rules and amendments for consideration and approval by the U.S. Supreme Court); Hogan, *supra* note 197.

199. Draft Minutes (June 8 Version), Civil Rules Advisory Committee 28–29 (Apr. 4–5, 2011), *in* Agenda Book of November 2011 Meeting of the Civil Rules Advisory Committee 19 (Nov. 7–8, 2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf.

200. Fall 2010 Minutes, *supra* note 3, at 10–12.

201. Minutes of Fall 2011 Meeting of the Civil Rules Advisory Committee 33 (Nov. 7–

to reach an agreement on the need to act, the Civil–Appellate Subcommittee tabled the issue of manufactured finality without any recommendation for a rule change, opting to do nothing "[b]arring renewed enthusiasm from an advisory committee."[202] It now remains to be seen how the Appellate Rules Advisory Committee or the Civil Rules Advisory Committee will react and whether they will again take up the issue of conditional finality.

C. Developing a Proposed Rule to Allow for Appeal under Conditional Finality

A new rule of procedure could borrow features from several current rules to allow for appeal under conditional finality. A new rule on conditional finality could combine the dismissal provisions of Rule 41 with the appeals provisions of Rule 54(b).[203] Under Rule 41, a party may voluntarily dismiss a claim without prejudice by stipulation of the parties or by certification by the district court judge.[204] Under Rule 54(b), in cases with multiple parties or multiple claims, a district court judge may certify a final judgment on a single claim for immediate appeal.[205]

A new rule could allow for appeal based on a conditional dismissal by stipulation of the parties like Rule 41(a)(1)(A)(ii). In addition, a rule could also allow for judicial certification of conditional dismissal like Rule 41(a)(2). Moreover, like Rule 54(b), a judicial certification of appeal under conditional finality could be reviewed for abuse of discretion by a court of appeals.[206]

Any new rule on conditional finality should explicitly state that a dismissal without prejudice does not produce an appealable final

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8, 2011) [hereinafter Minutes of Fall 2011 Meeting], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf. Some of the complicated issues that the subcommittee confronted were the difficulty of devising a rule to accommodate complex lawsuits involving multiple parties and multiple claims, the degree of control that a district court judge should have over when an appeal is authorized, and whether there was adequate demand to justify a rule change to allow for appeal under conditional finality. Draft Minutes of Spring 2011 Meeting, *supra* note 169, at 12–14; Fall 2010 Minutes, *supra* note 3, at 10–11.

202. Minutes of Fall 2011 Meeting, *supra* note 201, at 32–33.

203. *See* Memorandum from Honorable Mark. R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Practice and Procedure, to Honorable Lee Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 64 (May 2, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf (suggesting that a rule allowing for conditional finality could be addressed through modification of Rules 41 and 54(b)).

204. FED. R. CIV. P. 41(a)(1)(A)(ii), (a)(2).

205. FED. R. CIV. P. 54(b).

206. 15A WRIGHT, MILLER & COOPER, *supra* note 9, § 3914.7, at 541–42.

judgment, and that appellate jurisdiction will only exist if peripheral claims are conditionally dismissed. A new rule developed in this fashion would provide an additional procedure to obtain early appellate review and eliminate the circuit split on manufactured finality.

VII. CONCLUSION

If properly implemented by amending the Federal Rules of Civil Procedure, the doctrine of conditional finality would provide an additional avenue by which to expedite appellate review, promote judicial efficiency, and reduce the costs of litigation. Unlike manufactured finality, conditional finality does not run afoul of the final judgment rule by providing a plaintiff with an opportunity to refile dismissed claims after an adverse decision at the appellate court level. Because, under conditional finality, the consequence of losing on appeal is the termination of the case, a plaintiff is forced to weigh the risks versus the potential benefits of an expedited appeal.

Furthermore, the adoption of a new rule allowing for appeal under conditional finality would bring clarity and consistency to federal courts by explicitly detailing the conditions under which an appeal from a voluntary dismissal is available. The ability to quickly and accurately correct erroneous district court orders that adversely terminate a valid claim appeals to basic notions of fairness and precision. Allowing for appeal under conditional finality likely would increase judicial efficiency, result in cost savings for parties, and provide an additional measure of fairness to litigants who seek appellate review when a Rule 54(b) or interlocutory appeal is otherwise unavailable.

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