Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule

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Trials are vanishing. At the same time, individuals, corporations, and other institutions have become wealthier, more powerful, and more influential than ever before. The stakes in litigation have reached unprecedented heights. With the expansion of the global economy, disputes between parties involve significant pre-trial strategy and cost considerations on both domestic and international levels. Complex cases are being increasingly resolved through settlement agreements based on massive discovery cost considerations and expected outcomes after pre-trial motion practice.

An unrealized consequence of the vanishing trial phenomenon is a corresponding lack of input from the federal appellate courts in some of the most important and cutting-edge cases. In response to this trend, this Article argues for increasing litigants' access to federal appellate courts through "manufactured finality." After exploring the historical origins, rationale, and cost considerations underlying the final judgment rule, the Article analyzes the concept of "manufactured finality," or the ability to appeal partial adjudications by dismissing non adjudicated claims without prejudice. The Article argues that a gradual shift toward acceptance of

manufactured finality is inevitable. As a result, the United States Supreme Court should endorse criteria for appellate courts to consider when deciding whether to review a partial adjudication as a final judgment. Such an effort would balance and smooth the transition to greater appellate court access, and provide much needed definition and clarity to a more workable and modernized final judgment rule.

INTRODUCTION

As the world embraces new technology, globalization, and increased concentrations of wealth in the hands of elite groups of individuals, corporations, and other institutions, the nature of litigation is changing.[1] Cases are bigger, more complex, and involve stakes larger than ever before.[2] At the same time, the explosively high costs of discovery and

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[1] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (1st ed. 2014) (discussing the increased wealth of the world's top 1, .1, and .01 percent of the population, and noting a return to a pre-World War I economic structure referred to as "patrimonial capitalism" where birth and inherited wealth will be a greater influence on an individual's socio-economic status in comparison to talent or hard work); Anup Shah, *Poverty Around the World: Inequality, Globalization, and a New Global Elite,* (Nov. 12. 2001), http://www.globalissues.org/article/4/poverty-around-the-world (noting an increased concentration of wealth in a new global elite); Robert Hunter Wade, *The Rising Inequality of World Income Distribution*, 38 FIN. & DEV.: A QUARTERLY MAGAZINE OF THE IMF 4, (2001) *available at* https://www.imf.org/external/pubs/ft/fandd/2001/12/wade.htm (discussing the "champagne glass" structure of the global economy, where over 80% of the world's wealth is in the hands of the richest 20% of the population).

[2] Most recently technology, tort, and financial litigation have involved multi-billion dollar amounts. For example, Apple recently recovered over $1B from Samsung in a patent dispute. The cases are Apple Inc. v. Samsung Elecs. Co., 2012 U.S. Dist. LEXIS 96302 (N.D. Cal. July 11, 12012) *and* Apple Inc. v. Samsung Elecs. *Co.*, 2013 U.S. Dist. LEXIS91450 (N.D. Cal. June 26, 2013), and selected case documents are *available at* http://cand.uscourts.gov/lhk/applevsamsung. The case received widespread media attention. *See* Jessica A. Vascalero, *Apple Wins Big in Patent Case: Jury Finds Samsung Mobile Devices Infringed Six Apple Patents, Awards $1.05 Billion in Damages*, WALL ST. J., Aug. 25, 2012, http://online.wsj.com/news/articles/SB10000872396390444358404577609810658082898. A South Dakota lean fine textured beef producer also recently sued for more than $1B in damages based on defamation and disparagement. *See* Beef Products Inc et al v. American Broadcasting Cos et al, Circuit Court of South Dakota, Union County, No. 12-292. A discussion of the case is *available at http://www.law360.com/articles /541151/abc-diane-sawyer-can-t-escape-1-2b-pink-slime-suit.* JP Morgan's $13B payout for mortgage lending practices also received widespread media attention. *See* Neil Irwin, *Everything You Need to Know About JP Morgan's $13 Billion Settlement*, WASH. POST, Nov. 19, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/21/everything-you-need-to-know-about-jpmorgans-13-billion-settlement/. *See also* Kevin LaCroix, *Substantiating the Explosive Growth in M&A Related Litigation,* The D&O Diary, (Posted on January 17, 2012) *available at* http://www.dandodiary.com /articles/securities-litigation/ (remarking that , "[r]eports corroborate the explosive growth in M&A-related litigation on deals worth $100M or more in recent years," but also noting that much of this litigation is in state courts – traditionally Delaware); Kevin LaCroix, *Are*

litigation have led to a preference for settlement in order to resolve disputes in place of trials.[3]

This raises the question: on what basis are these massive block-buster cases being settled? Today, parties negotiate the terms of a settlement agreement in light of the success and failure of pre-trial motion practice, critical documents found in discovery, and calculations about the expected outcomes of a trial, even if one is never held.[4] With the stakes so high,

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Securities Class Action Opt-Out Actions Back?, THE D&O DIARY, (Aug. 1, 2011), http://www.dandodiary.com/articles/securities-litigation/ (noting the rise of opt-outs and the large settlements they obtain in securities class actions).

[3] *See* Lawyers for Civil Justice et. al., *Litigation Cost Survey of Major Companies,* May 10-11, 2010, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf. (noting that in aggregate, companies spend billions of dollars on litigation spend due to ballooning discovery costs and fees.).

[4] For a discussion of the settlement phenomenon *see* Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, J. L. ECON. & ORG. (forthcoming Oct. 2010), (Temple Univ. Legal Studies Research Paper No. 2011-8. *available at* SSRN: http://ssrn.com/abstract=1649643 or http://dx.doi.org/10.2139/ssrn.1649643) (noting the attention scholars have paid to, "settlement's propriety, timing, incidence, and causes . . . given that most filed civil cases settle."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STANFORD L. REV. 1339 (1994) (noting that "'[m]ost cases settle' has become commonplace in discussions of civil justice," while acknowledging this observation requires some qualification due to statistics representing cases that do not go to trial that may also include cases disposed of by authoritative decisions in ways other than trial.) The growing ADR movement, mediation, arbitration, and non-traditional dispute resolution mechanisms also play a large role on the decreasing frequency of trials. Robert J. Niemic, *Mediation Becoming More Appealing in Federal and State Courts*, 5 DISP. RESOL. 13 (Summer 1999) (noting that, "[i]n the trial courts, ADR diverts some disputes – expensive commercial transaction cases, for example – out of the court system that might otherwise generate difficult and complex appeals. The ADR movement also took root at the appellate level. Most appellate courts have established an in-court ADR track and more resources are being invested in settling appeals with the result of increasing the supply of appellate decisionmaking."); Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341, 342—350 (1999) ("95%] of all federal civil cases settle before trial.") (describing the 1990 passage of the Civil Justice Reform Act and the Alternative Dispute Resolution Act of 1998 solidifying a variety of ADR processes and settlement mechanisms the district courts might implement including mediation, arbitration, neutral case evaluation, summary jury trials, and other hybrids). The article also outlines the development of ADR at the appellate level beginning with the 2nd circuit's Civil Appeals Management Plan (CAMP) which has eventually led to, "nearly every United States court of appeals . . . establish[ing] a mediation program to assist parties in resolving their appeals . . . established under Federal Rule of Appellate Procedure (FRAP) 33." *Id*.; *see generally* Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998) (acknowledging and discussing the use of form contracts to bind consumers to arbitrate claims arising out of purchases of wireless phones, home computers, and televisions despite concerns about disparate bargaining power). Regardless of the cause, trials are vanishing. *See* Blake D. Morant, *The Declining Prevalence of Trials As A Dispute*

winning or losing a pre-trial motion can swing the settlement pendulum millions of dollars in one direction or the other.[5]

The new cost structure and trends towards settlement have not escaped the attention of the judiciary, or the Supreme Court.[6] Procedural rule changes from recent decisions have begun to fundamentally change the way federal court litigators practice.[7] Perhaps the most noteworthy of these changes have been modifications to the pleading requirements and the ability of claims to survive a motion to dismiss.[8] Specifically, the Supreme Court's adoption of heightened fact pleading requirements in *Iqbal* and *Twombly* have gained widespread attention, and generated vigorous debate about whether the new standards will stifle underdeveloped, yet ultimately meritorious claims.[9] Although speculation runs rampant about the exact reasoning behind the heightened pleading requirements, the changes are due, in part, to an effort to reduce the number of non-meritorious claims that survive motions to dismiss.[10] Recognizing that litigation can be just as much a resource war as it is a purely legal one, in the modern economy, a litigant's ability to survive a motion to dismiss, can create immense pressure on opposing parties to

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Resolution Device: Implications of the Academy, 38 WM. MITCHELL L. REV. 1123, 1124-1130 (2012) ("The trend toward fewer trials is indispensable. From the middle of the twentieth century until the present, the number of disputes that are finally decided in judicial proceedings has declined exponentially . . . [t]he diminished use of trials may also be attributed to the increased employment of less costly procedures grouped within . . . Alternative Dispute Resolution (ADR) . . . [and] the judiciary's tendency to encourage settlement."); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 460 – 464 ("[t]he absolute number of trials has undergone a sharp decline . . . [t]he decline in the rate of civil trials in the post-World War II federal courts continues and accentuates a long historic trend away from trial as the mode of disposing of civil cases."); Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume,"* 8 J. APP. PRAC. & PROCESS 101, 107 (2006) ("According to recent studies, the classical trial is vanishing. There has been a long-term, gradual decline in the portion of cases that terminate in trials. There has been a pronounced, steep decline in the absolute number of trials in the past twenty years."); *cf.* Richard A. Posner, *Demand and Supply Trends in Federal and State Courts Over The Last Half Century*, 8 J. APP. PRAC. & PROCESS 133, 134 (2006) ("But this raises a question: Why the vanishing-trials phenomenon . . . that is, the sharp decline in the percentage of cases that are resolved by judgment after trial?").

[5] Pierre H. Bergeron & Bruce A. Khula, *The Future of Discretionary Appellate Review*, 31 APP. PRAC. 3 (2012) ("A single errant ruling swings the settlement pendulum millions of dollars in one direction or the other.").

[6] Ashcroft v. Iqbal, 556 U.S. 662 (2009) (building upon the plausibility standard in *Twombly*); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (adopting a heightened plausibility pleading standard).

[7] *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

[8] *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

[9] *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

[10] *See infra* note 11.

settle, purely because of the massive costs associated with commencing discovery.[11] The Court recognized that in today's world, when plaintiff's win motions to dismiss , it is not too different from winning period.[12]

At the same time, in many areas of the law, significant settlement activity is occurring without any input from the appellate judiciary.[13] In the earliest stages of the federal judiciary, organizing appellate review required a Supreme Court Justice to go circuit riding, and travel long distances to sit with district court judges in order to create appellate

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[11] *Twombly*, 550 U.S. at 559-60 (2007) ((("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . . And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less lucid instructions to juries; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.") (citations omitted)).

[12] *Id*.

[13] Settlement has "become the dominant trend in civil litigation over the past several decades . . . [but as] fewer cases go to trial or even reach an identifiable final judgment - - - [t]he ultimate results of these rends is that fewer and fewer district court decisions are scrutinized by the appellate courts. *See* Bergeron and Khula *supra* note 5. For example, "[m]ass tort trial judges are creating systematizing, and refining the genre alone, without the guidance of appellate courts. [B]ecause mass tort litigation almost exclusively emphasizes pretrial maneuvering and settlement, appellate courts never review many of the most controversial rulings and innovations of mass tort trial judges. *Id*. This is also happening in FCPA jurisprudence. Commenting on United States v. Kay, 359 F.3d 738 (5th Cir. 2004), FCPA litigators noted that, "[a]lthough technically binding only in the 5th circuit, the *Kay* decision is likely to be persuasive precedent throughout the United States, particularly because so few FCPA matters result in appellate rulings. *See* Philip Urofsky &Danforth Newcomb*, Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES OF FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (Shearman & Sterling LLP, Wash. D.C.), Mar. 1, 2009, at 1, 10, *available at* http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Cases-And-Review-Relating-to%20Bribes-to-Foreign-Officials-under-the-Foreign-Corrupt-Practices-Act.pdf (discussing United States v. Kay, 359 F.3d 738 (5th Cir. 2004) *cited in* Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisitions Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J. OF LAW & BUS. 247, 279 (2010). "[T]he SEC's enforcement strategy . . . forces settlement and leaves little judicial accountability. There are very few precedents for dealing with the FCPA so there is little judicial guidance to follow." *See e.g.* Jacquelyn Lumb, *SEC Historical Society Panel Discusses Developments in FCPA*, SEC TODAY (Wash. Servs. Bureau, Chi., Ill), Apr 21, 2010, at 1 (discussing comments by law professor Jeffrey Mann) *cited in* Grimm, at 279, n. 150. In FCPA jurisprudence,"[t]here aren't that many cases that go to trial," and "[t]he vast majority of cases have resulted in settlements." David Glovin, *Kozeny to Spend Investor's Oil Bribery Trial at Bahamas Estate*, BLOOMBERG, May 30, 2009 (quoting Danforth Newcomb of Shearman Sterling LLP on the FCPA trial of Frederic Bourke, calling it "a legal rarity," as "'[t]here aren't that many cases that go to trial in the FCPA area.'").

panels.[14] In the seventeenth and eighteenth centuries this meant that appellate court proceedings required a far greater expenditure of time and resources in comparison to district court pre-trial and trial proceedings.[15] In today's world, the resource costs have flipped.[16] Appellate panels are easily convened, federal appellate review has transformed into a low cost, largely electronic and online based phenomenon, and pre-trial discovery is the cornerstone cost consideration for party's engaged in litigation.[17]

As a result, changes to the pleading standards should mark the beginning and not the end of modifications to the procedural rules. Future modifications should be based not only on growing discovery costs and the vanishing trial phenomenon, but also upon the decreased costs of appellate review in today's world in comparison to the past. One such needed yet overlooked modification to the procedural rules is increasing access to the appellate courts through relaxation and modernization of the final judgment rule. Specifically this article that argues the Supreme Court should take advantage of the new low cost structure of appellate review by encouraging resolution of legal questions before factual ones in large and complex cases.[18] The Supreme Court can accomplish this by permitting limited forms of manufactured finality.[19]

In this context, manufactured finality refers to appealing an adverse partial adjudication after dismissing any non-adjudicated claims without prejudice. For practitioners, relaxation of the final judgment rule may prevent hasty and unwise decisions about settlement based on significant,

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[14] *See* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS (Fed. Jud. Center, 2nd ed. 2009). Professor Baker provides a detailed analysis of the major historical stages of the federal court system from the creation of the Supreme Court in Article III of the Constitution and the historic Judiciary Act of 1789 to all versions leading up to the modern structure of the federal judiciary. Professor Baker outlines the fact that non-Supreme Court appeals originally required two Supreme Court justices to sit with a district judge as a panel. Later, Congress reconstituted the circuit courts to require that only one justice and one district judge sit on an appellate panel. By 1891, the country had become too large for circuit riding to be feasible for the justices.

[15] *Id*.; *see also* Paul D. Carrington, *U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future*, in C. Harrison & R. Wheeler, eds., THE FED. APP. JUDICIARY IN THE 21ST CENTURY (Federal Judicial Center 1989)(writing generally about the need for more appellate court involvement in district court decisions involving appeal. In particular, Professor Carrington argues the late Dean Roscoe Pound would agree with increased appellate involvement before traditional final judgment due to the reversed resource requirements of trials and appeals where appeals now require significantly less resources than trial proceedings).

[16] *Id*.

[17] *See* Lawyers for Civil Justice et. Al, *supra* note 3 (acknowledging the ballooning costs of massive discovery and pre-trial expenditures).

[18] *See supra* note 15.

[19] *See infra* Parts III B & III C.

yet potentially errant rulings without appellate court consideration.[20] For district court judges, permitting limited manufactured finality will significantly help control dockets, avoid the unnecessary expenditure of judicial resources, and lead to clearer rulings on complex issues due to added appellate court guidance.[21] For appellate courts, increasing access will lead to higher quality, much needed, and greater numbers of higher court legal precedent, critical to the proper development of emerging areas of the law.[22] For policy makers, a more uniform, clear, and balanced approach to finality will remove doctrinal inconsistency, and lead to better and fairer settlements.[23]

Part I provides the background and history of the final judgment rule. Part II addresses a three-rule circuit split on the issue of manufactured finality, and analyzes the issue based on seven different criteria. Part III A argues a relaxation and modernization of the final judgment rule and limited acceptance of manufactured finality is inevitable and already underway. Part III B argues the fairness, efficiency, and piecemeal litigation advantages of limited manufactured finality outweigh appellate resource cost disadvantages. Part III C argues Supreme Court action can harmonize the transition towards a modern and more relaxed view of the final judgment rule.

I. BACKGROUND

In its infant stages, the structure of the judiciary changed significantly from the initial creation of the U.S. federal court system in the late eighteenth century.[24] As the need for appellate review became more widespread due to "geographical expansion, population growth, commercial development and expansions of jurisdiction," Congress ultimately passed the 1891 Evarts Act,[25] which created the framework for the appellate judiciary that is in place today.[26]

Yet throughout that time, the final judgment rule has remained largely untouched.[27] While there have been plenty of exceptions and moves over, under, and around the final judgment rule that have

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[20] *See infra* note 229 and corresponding text.
[21] *See infra* note 237 and corresponding text.
[22] *See infra* note 229 and corresponding text.
[23] *See infra* note 229 and corresponding text.
[24] *See* BAKER, *supra* note 14.
[25] Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891); *see* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 1.03 History of the Courts of Appeals, (Fed. Jud. Center, 2nd ed. 2009).
[26] Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).
[27] *See infra* notes 28–29, 31.

marginally increased appellate rights, the final judgment rule remains the "primary gatekeeper" to the doors of the appellate courts.[28] With roots predating the founding of the country,[29] recitations of the final judgment rule can be found in the 1789 Judiciary Act,[30] in a form substantially similar to the rule's modern-day codification in Section 1291 of the United States Code.[31] Consistent with these firmly grounded historical roots, there have been few major changes to the application of the final judgment rule apart from the adoption of Rule 54(b) in 1939.

Rule 54(b) states that federal district courts "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . [w]hen an action presents more than one claim for relief" and "[t]here is no just reason for delay."[32] The purpose of Rule 54(b) was to modernize appellate procedural rules and balance the deep-rooted interest against piecemeal litigation with the recognition that there are situations where allowing an appeal before resolution of an entire action is beneficial.[33] The Supreme Court has acknowledged that Rule 54(b) was

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[28] John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence With Discretionary Review*, 44 DUKE L. J. 200, 204 (1994).

[29] *Id*. at 202 (citing 15A CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC. § 3906, at 264 (1992)) ("the final judgment rule can be traced to the write of error at English common law.").

[30] *Id*. at n. 13. Establishment of the Judicial Courts of the United States; Chapter XX, §§ 21, 22, 25, 1 Stat. 73, 83 – 87:

> [Section 21:] [F]rom final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court . . .
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> [Section 22] [F]inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . . And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court . . . .
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> [Section 25] [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . may be re-examined and reversed or affirmed in the Supreme Court of the United Stats upon a write of error . . . .

[31] 28 U.S.C. § 1291 (1988) ("The circuit courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

[32] *See* FED. R. CIV. P. 54(b).

[33] *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956) (discussing the promulgation of Rule 54(b) and its amendments in order to "meet[] the current needs of judicial administration."); *see also* Marianne Fogarty, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 FORDHAM L. REV. 637, 643-644 nn. 48-50 (1989) (recognizing that courts have also approached the final judgment rule pragmatically

in large part a response to the increasing complexity and size of litigation, and was intended to implement a newfound recognition that the smallest "judicial unit" for appellate review was no longer an entire case, but often times, rulings within a case.[34]

Despite the adoption of Rule 54(b) close to seventy-five years ago, academics, practitioners, and judges have questioned whether additional steps are necessary to change the civil practice rules yet again to adapt to the modern day realities of litigation. Specifically, "[i]s it time to revisit the rigidity of the final order doctrine?"[35] Others have simply commented, "[t]he final judgment rule is not working very well."[36] These calls to action should no longer be ignored. The Supreme Court should modernize the final judgment rule and permit limited forms of manufactured finality. This long overdue change will properly align the federal judiciary with the new cost structure of litigation in today's world, increase much needed access to the appellate courts, and lead to better-reasoned and more equitable settlements.

II. CIRCUIT SPLIT

Commentators, judges, academics, and policy makers have approached the issue of manufactured finality in different ways. Some have emphasized whether the circuits have overlooked the importance of whether dismissals of non-adjudicated claims are with or without prejudice.[37] Some have found the issue is best understood by focusing on

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and with considerations of "just, speedy, and inexpensive determination of every action.") (citing Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848)); Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962). The author also notes that *Forgay*, "provided the first secure basis for interpreting the final judgment requirement flexibly in order to alleviate the hardship that may result if orders . . . cannot be reviewed until entry of the clearly final order." Marianne Fogarty, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 FORDHAM L. REV. 637, 643-644 nn. 48-50 (1989) (citing 15 C. WRIGHT & A. MILLER, FED. PRAC. & PROC. § 3910, at 453).

[34] *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. at 432 ("[w]ith the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction."); Cold Metal Process Co. v. United Co., 351 U.S. 455, 453 (1956) ("[t]he amended rule meets the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions, while retaining a right of judicial review over the discretion exercised by the District Court . . . .").

[35] *See* Bergeron and Khula*, supra* note 5.

[36] Howard B. Eisenberg and Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: Its Time to Change the Rules*, 13 J. APP. PRAC. & PROCESS 285 (1999).

[37] *See* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 981 (1997) ("In particular the, the trial and appellate courts' practice of overlooking or

whether there is "practical" prejudice, or whether the non-adjudicated claims can be disregarded for purposes of finality because they are lost due to some external consideration (i.e. lack of subject matter jurisdiction, expiration of the statute of limitations, etc . . .).[38] Yet others emphasize whether the non-adjudicated dismissals are for particular defendant(s), among a variety of other approaches and variations of the issue.[39]

This article categorizes the circuits into three categories: (1) circuits rejecting manufactured finality;[40] (2) circuits permitting manufactured finality;[41] and (3) circuits applying a discretionary and manipulation based standard that allows limited forms of manufactured finality.[42] These categories are referred to as the *Ryan*, the *Per Se*, and the Discretionary Standard rules respectively.

After a brief introduction of each of these rules, seven major criteria are used to compare the advantages and disadvantages of the approaches listed. The article ultimately argues in favor of a discretionary standard applied on a case-by-case basis.

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discounting language of dismissal with or without prejudice and examining instead the record to search for the litigants' and trial judges' intent is analyzed and found unwise, wasteful, and confusing.").

[38] *See* Arrow Gear Co. v. Downers Grove Sanitary Dist., 629 F.3d 633 (7th Cir. 2010) (statute of limitations expired) (citing Doss v. Clearwater Title Co., 551 F.3d 634, 639 (7th Cir. 2008)); Manez v. Bridgestone Firestone North American Tire, LLC, 533 F.3d 578, 583-84 (7th Cir. 2008) (recognizing without prejudice dismissal still created finality if the claims lack subject matter jurisdiction in that court or would be dismissed on *forum non conveniens* grounds); LNC Investments LLC v. Republic Nicaragua, 396 F.3d 342 (3d Cir. 2005) (statute of limitations expired); *see also* Bennett Evan Cooper, *"Manufacturing Finality" and the Right to Appeal in Federal Courts*, ABA Appellate Practice Committee Newsletter Vol. 32 No.1 (December 18, 2012) (recognizing that dismissals of claims without prejudice can create finality in certain circuits because they are practically with prejudice).

[39] *See* Cooper, *supra* note 38 (recognizing that certain jurisdictions have allowed dismissals without prejudice to manufacture finality where the dismissals are of all claims against a particular defendant or defendants). For example, there is a circuit split as to whether parties should be able to appeal a partial judgment in consolidated cases under Rule 42(a). Some circuits always allow parties to appeal a partial judgment of an action in a consolidated case by deeming the partial judgments – final under Section 1291. Other circuits require the parties to seek a Rule 54(b) certificate to appeal the partial judgment. And yet others have determined that after consolidation, the only appealable judicial unit is an entire case – effectively denying all partial appeals in consolidated cases. *See* Jacqueline Gerson, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. CHI. L. REV. 169, 170-71 (1990) (discussing "three different conclusions on the appealability of uncertified partial judgments in consolidated cases").

[40] *See infra* note 44.

[41] *See infra* note 48.

[42] *See infra* notes 51.

A. The Three Main Approaches to Manufactured Finality: the Ryan, Per Se, and Discretionary Standard Rules

1. *Ryan* Rule

Perhaps the oldest and most traditional approach to manufactured finality is an approach rejecting all forms of it, referred to as the *Ryan* rule. The *Ryan* rule provides that circuit courts deny the exercise of appellate jurisdiction in all instances involving any form of manufactured finality – no matter how well intentioned or innocuous. The name, the *Ryan* rule, is a reference to the rules origins in the 1978 Fifth Circuit case, *Ryan v. Occidental Petroleum Corp*.[43] The Second, Fifth, Tenth, and Eleventh Circuits have been the traditional and strongest followers of this approach.[44] In these circuits, if a party appeals a partial adjudication by

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[43] Ryan v. Occidental Petroleum, 577 F.2d 298 (5th Cir. 1978).

[44] *See* Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992) (denying an opportunity for plaintiff to appeal her third claim for relief dismissed with prejudice after being denied Rule 54(b) certification, and voluntarily dismissing her first two claims for relief without prejudice because the 10th Circuit, "agree[s] with the reasoning of the Fifth Circuit."). The 10th Circuit explained that, "A plaintiff cannot be allowed to . . . voluntarily dismiss[] . . . her remaining claims and then appeal[] the claim that was dismissed with prejudice." *Id*.; Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005) ("[t]he court observed that "it is well settled in this Circuit that, in general, a plaintiff cannot appeal an adverse decision on some claims by simply voluntarily dismissing the remaining claims without prejudice.") ((citing Chappelle v. Beacon Commc'ns Corp., 84 F.3d 652 (2d Cir. 1996) (acknowledging multiple views on permitting appeal in the context of this article but ultimately stating that the court, "agree[d] with those courts that have precluded an appeal from a dismissal of some of a plaintiffs claims when the balance of his claims have been dismissed without prejudice pursuant to Rule 41(a) dismissal of the action. A plaintiffs attempt to appeal a prior adverse determination following the dismissal of his remaining claims without prejudice necessarily implicates the policies of the final judgment rule.")); *see also Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499-500 (5th Cir. 2004) ("[t]he [p]laintiffs' problem with the strategy they employed is that it runs headlong into the 'settled rule in the Fifth Circuit that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims *without prejudice*.' And, a Rule 41(a) dismissal without prejudice is not deemed to be a 'final decision' for the purposes of § 1291. This rule can be traced back to our decision in *Ryan v. Occidental Petroleum Corp*."); Purdy v. Zeldes, 337 F.3d 253 (2d Cir. 2003); Swope v. Columbian Chemicals Co., 281 F.3d 185, 192-193 (5th Cir. 2002) ("It is settled rule in the Fifth Circuit that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice. This rule originated in *Ryan v. Occidental Petroleum Corp* . . . . hence, the *Ryan* rule requiring Rule 54(b) certification to create finality will not prevent an appeal where one is warranted."); State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 27-28 (11th Cir. 1999) (citing Mesa v. United States, 61 F.3d 20 (11th Cir. 1995) ("The Court in *Mesa* agreed with the Fifth Circuit in *Ryan* that voluntary dismissal of the plaintiff's remaining claim could not be considered a "final decision" under § 1291 because a voluntarily dismissal is without prejudice to the moving party filing those claims again . . . because plaintiffs never sought or received a Federal Rule of Civil Procedure 54(b) certification and, thus, never received

dismissing non-adjudicated claims without prejudice, appellate courts will deny the exercise of appellate jurisdiction in every instance.[45]

2. *Per Se* Rule

The next, and virtually opposite approach to finality is the *Per Se* rule. A *per se* right to appeal provides that circuit courts exercise their appellate jurisdiction notwithstanding the presence of virtually any form of manufactured finality.[46] This approach has been dubbed a *per se* right to appeal based on Judge Emmitt Cox's concurring opinion in the case *State Treasurer of the State of Mich. v. Barry*.[47] The First, Sixth, Eighth, and D.C. Circuits have traditionally and to varying extents followed this approach.[48] In these circuits, if a party appeals a partial adjudication and

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a final decision, plaintiffs had nothing to appeal . . . The *Mesa* court also emphasized *Ryan's* conclusion that '[i]n the absence of a rule 54(b) certification, the earlier decisions were not appealable.'"); Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998) ("The plain language of Rule 54(b) . . . [controls where] the court disposed of "fewer than all claims" on the merits . . . Thus Rule 54(b), not § 1291, provides Plaintiffs' with the means for appeal in [that] case."); *cf.* Robinson-Reeder v. American Council on Educ., 571 F.3d 1333, 1339 (D.C. Cir. 2009) (citing Murray v. Gilmore, 406 F.3d 708, 712-713(D.C. Circuit 2005) (district court order granting summary judgment on some claims but dismissing the remaining claim without prejudice subject to reconsideration was not a dismissal of the action and was not final and appealable))(recognizing precedent which both accepts and rejects manufactured finality, but denying jurisdiction in that case solely because the parties dismissed the remaining claims by stipulation but without district court approval).

[45] *See supra* note 44.

[46] *See infra* note 48.

[47] State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999)(Cox, J., concurring).

[48] *See* Hope v. Klabal, 457 F.3d 784, 790 (8th Cir. 2006) ("we conclude that the voluntary dismissal of the remaining claims made the two earlier summary judgment orders final for purposes of this appeal. After the voluntary dismissal, there was nothing left for the district court to resolve, and the suit had ended as far as that court was concerned, thereby creating a final judgment."); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 158, 162 (D.C. Cir. 2005) (permitting manufactured finality), *cited in* Robinson-Reeder v. American Council on Educ., 571 F.3e 1333, 1339 (D.C. Cir. 2009) (which rejected manufactured finality, but declined to conclusively adjudicate the issue one way or the other); J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1250 (1st Cir. 1996); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) ("Generally, where the trial court allows the plaintiff to dismiss his or her own action without prejudice, the judgment is final for appeal purposes . . . [t]herefore, we hold that plaintiff's dismissal with the concurrence of the court of the only count of her complaint which remained unadjudicated imparted finality to the District Court's earlier order granting summary judgment."); Chrysler Motors Corp. v. Thomas Auto Co., 939 F.2d 538 (8th Cir. 1991) ("[f]ollowing the granting of the motion for partial summary judgment, the court, on the parties' joint motion to dismiss and stipulation of dismissal filed pursuant to [Rule] 41, dismissed without prejudice the remainder of the case. Chrysler Motors Corp. v. Thomas Auto Co., No. LR-C-88-718 (E.D. Ark. Jul. 25, 1990) (order of dismissal). The effect of that action was to make the judgment granting partial summary judgment a final

dismisses non-adjudicated claims without prejudice, appellate courts will exercise appellate jurisdiction.[49]

3. Discretionary Standard

The third approach applies a discretionary and manipulation–based standard to manufactured finality, and is referred to as the Discretionary Standard. This rule provides that circuit courts may review manufactured final judgments, but only if there is an absence of intent to manipulate appellate jurisdiction.[50] Traditionally, only the Ninth and Federal Circuits have followed this approach, although, others have occasionally used it in some form, as well.[51] Under this approach, if a party appeals a partial

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judgment for purposes of appeal, even though the district court had not so certified under [Rule] 54(b)."); Stewart v. District of Columbia Armory Bd., 863 F.3d 1013 (D.C. Circuit 1988) (permitting manufactured finality although not directly addressing the issue in the opinion); Merchants & Planters Bank v. Smith, 516 F.2d 355, 356 n.3 (8th Cir. 1975); *cf.* Acton v. City of Columbia, Mo., 436 F.3d 969, 974 (8th Cir. 2006) (disapproving of the use of a dismissal without prejudice to create what is in substance an impermissible interlocutory appeal, but noting that their prior case law did not foreclose that possibility); Porter v. Williams, 436 F.3d 917, 920 (8th Cir. 2006) (permitting manufactured finality); Morris v. Crawford County, Ark., 299 F.3d 919, 921 (8th Cir. 2002) (permitting manufactured finality); Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc., 198 F.3d 685, 690 (8th Cir. 1999) ("[t]hough we strongly disapprove of this use of a dismissal without prejudice to create what is in substance an impermissible interlocutory appeal, our prior case law did not foreclose that effort here").

[49] *See supra* note 48.

[50] *See infra* note 51.

[51] *See also* James v. Price Stern Sloan, 283 F.3d 1064, 1069-70 (9th Cir. 2002) (recognizing a circuit split and advocating for allowing appeal of partial judgments after dismissal of remaining claims without prejudice when there is an absence of intent to manipulate appellate jurisdiction as evidenced by district court participation in the dismissal, for example by continuing the statute of limitations and laches clocks on the dismissed claims, as well as a lack of intent to circumvent Rule 54(b)); West v. Macht, 197 F.3d 1185, 1189 (7th Cir. 1999) (acknowledging inter- and intra-circuit conflict on whether partial judgments can be appealed after dismissing remaining claims without prejudice, and ruling that a plaintiff obtaining *informa pauperis* (IFP) status on some but not all claims could not dismiss his viable claims to create a final judgment for purposes of appealing the denials of IFP status); State of Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1105-06 (8th Cir. 1999) (dismissing appeal); Boland v. Engle, 113 F.3d 706, 714-715 (7th Cir. 1997) (dismissing appeal); Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1075 (9th Cir. 1994) (denying appeal); United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993); Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1433 (7th Cir. 1992) (dismissing appeal); Cheng v. Commissioner, 878 F.2d 306 (9th Cir. 1989) (denying appeal); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530 (9th Cir. 1984) (allowing appeal); Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984) (disallowing the appeal of orders quashing writs of execution after appellants' causes of action were dismissed for want of prosecution); Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979) (disallowing appeal after class certification was denied and the appellants' causes of action were dismissed for want of prosecution); Fletcher v. Gagosian, 604 F.2d 637 (9th Cir. 1979) (finding an intent

adjudication and dismisses non-adjudicated claims without prejudice, the appellate court will accept or deny the exercise of appellate jurisdiction depending on whether there is an intent to manipulate appellate jurisdiction.[52]

B. Evaluation Criteria

Circuit courts throughout the country have grappled with the issue of manufactured finality for many years, without Supreme Court guidance on the issue. As a result, the case law has developed and been applied in a variety of different ways leading to circuit splits[53] and in some cases, intra-circuit divides.[54] Nonetheless, there have been several important

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to manipulate appellate jurisdiction: after a party sought Rule 54(b) certification but was denied, the party dismissed the remaining claims without informing the district court, filed a simultaneous appeal and before the appeal was even considered, re-filed the dismissed portion as a separate lawsuit); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266 n.1 (7th Cir. 1976) (per curiam) (allowing appeal); *see also infra* notes 63-66, 217 (acknowledging a more recent and open use of the standard by the Eighth Circuit and *de facto* uses of the standard in the Fifth and Eleventh Circuits). *But see* JTC Petroleum Co. v. Plasa Motor Fuels, Inc., 190 F.3d 775, 776 (7th Cir. 1999); International Marketing Ltd. v. Archer Daniels Midland Co., 192 F.3d 724, 727 (7th Cir. 1999); Fassett v. Delta Kappa Epsilon, 807 F.2d 1150, 1155 (3d Cir. 1986) (permitting appeal of partial judgment after the statute of limitations had run on remaining claims, but finding, nonetheless, that an expired statute of limitations is not required for permitting appeal); Cape May Green, Inc. v. Warren, 698 F.2d 179 (3rd Cir. 1983) (granting the plaintiff the right to appeal after losing on all its claims against all the defendants even when one of the defendants dismissed its cross-claim against another defendant without prejudice); Charles Alan Wright, et al., 15A FEDERAL PRACTICE AND PROCEDURE § 3914.8, at 623-26 (2d ed. 1992 & Supp. 1999). *See generally* Doe v. United States, 513 F.3d 1348 (Fed. Cir. 2008) (citing Nystrom v. TREX Co., 339 F.3d 1347, (Fed. Cir. 2003) (where the Federal Circuit identified several paths to appellate review of a partial judgment including: proceeding to trial, seeking Rule 54(b) certification, dismissal without prejudice of remaining claims, and 1292 (b) review)) (allowing appeal of a partial judgment after dismissal of remaining claims without prejudice).

[52] *See supra* note 51; *see also infra* notes 141–47 (listing criteria).

[53] *See supra* notes 44–51.

[54] *See generally supra* notes 39, 43, 46 and *infra* notes 189, 216-24. The Second Circuit has traditionally followed *Ryan*, but recently permitted conditional finality. The Third Circuit has recognized manufactured finality in earlier opinions, and more recently rejected manufactured and conditional finality. The Fifth Circuit originated the *Ryan* rule, but has recognized certain exceptions and permitted manufactured finality, as well as appeals of claims dismissed with conditions that amount to "legal prejudice." The Sixth Circuit has traditionally followed a *Per Se* approach, but recently rejected conditional finality. The Seventh Circuit has recently followed the *Ryan* rule, rejected conditional finality, but permitted manufactured finality in the past. The Eighth Circuit has in some cases used what appears to be forms of the *Ryan*, *Per Se*, and Discretionary Standard approaches. The Ninth Circuit used a Discretionary Standard as of 2002, but originally rejected manufactured finality, and currently rejects conditional finality. The Eleventh Circuit has been a traditional follower of the *Ryan* rule, but has recently acknowledged

overlapping factors courts consider regardless of which rule they apply in their circuit.

Below is a comparison of the three approaches based upon seven of those factors. Specifically the section below examines the three approaches to manufactured finality in light of: (1) the circuits' varying philosophies towards the final judgment rule; (2) interplay with Rule 54(b); (3) piecemeal litigation; (4) the effect on district courts; (5) the effect on appellate courts; (6) the effect on party rights; and (7) the treatment of conditional finality.

Each is addressed in turn and in certain cases, when appropriate, the rules are compared and contrasted individually, in groups, or by membership in a group category.

1. The Final Judgment Rule: Strict versus Pragmatic Finality

a. The Ryan *Rule: Strict Finality*

28 U.S.C Section 1291 states that "[t]he courts of appeals . . . shall have jurisdiction of appeal from all final decisions of the district courts of the United States . . . ."[55] A strict view of finality, as used in jurisdictions following the *Ryan* rule, is based on the historic understanding that a final judgment only exists if all claims have been decided on the merits or dismissed with prejudice.[56]

As a textual endeavor, proponents of a strict finality rationale have emphasized the word *final* in "final decision" and "final judgment rule" as justification for rejection of all forms of manufactured finality.[57] This

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certain exceptions and permitted manufactured finality in those limited cases. The D.C. Circuit has not taken a definitive stance, but recently rejected manufactured finality where the parties dismissed their claims without court approval, but has permitted the practice in other instances.

[55] 28 U.S.C § 1291 (2013).

[56] *Cf.* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS, § 3.02 Final-Decision Requirement, (Fed. Jud. Center, 2nd ed. 2009) (acknowledging that a complete emphasis on the word "final" in final decision or the final judgment rule in § 1291 leads to a strict interpretation of finality, which requires district court proceedings to proceed to termination before appellate review). Mr. Baker also recognizes, however, that a complete emphasis on the word "decision" in "final decision" would lead to the opposite extreme, where every district court ruling would be appealable. *Id.* The author ultimately concludes a proper interpretation of finality is one that strikes a balance between these two opposite views. *Id.*

[57] *See id.*; *see also* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 14 (11th Cir. 1999) (citing Chapelle v. Beacon Comm's Corp., 84 F.3d 652 (2d Cir. 1996); Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147 (10th Cir. 1992)) ("*Ryan*'s rule is sound, consistent with § 1291, which provides for appellate jurisdiction over only a 'final decision,' and is followed by two other circuits.").

view is based on faithfulness to a historic and 'true' concept of finality in line with the traditional idea that an appellate court's work begins only after there is a complete and final adjudication of all claims on the merits by the district court.[58] The Supreme Court has held that a decision is not final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[59]

Applying this rationale, a rejection of manufactured finality is not surprising. When parties dismiss non-adjudicated claims without prejudice, the claims may be re-filed, as long as the statute of limitations has not expired.[60] As a result, according to this view, as long as the claims can be re-filed, the district court's job is not yet complete, appellate review is premature, and there is no truly "final judgment.".[61]

Nonetheless, even though some have argued *Ryan* is clear, the strict finality rationale has been inconsistently applied.[62] For example, in cases where non-adjudicated claims are dismissed without prejudice before a partial adjudication, as opposed to after, the appellate courts have exercised jurisdiction. This has happened, even though the dismissed claims could still technically be re-filed.[63] Similarly, exceptions to strict

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[58] *See* BAKER, *supra* note 56.

[59] Catlin v. United States, 324 U.S. 229, 232 (1945).

[60] *Barry*, 168 F.3d at 12 (citing Mesa v. United States, 61 F.3d 20, 22 (11th Cir. 1995)). In *Barry*, the 11th Circuit recognized that

> The Court in *Mesa* agreed with the Fifth Circuit in *Ryan* that voluntary dismissal of the plaintiff's remaining claim could not be considered a 'final decision' under § 1291 because a voluntary dismissal is without prejudice to the moving party filing those claims again . . . The Court in Mesa reasoned that no final decision had been entered, because the remaining claim, which was dismissed without prejudice, could be resurrected . . . . Dismissing the appeal in *Construction Aggregates* for lack of jurisdiction, this Court held that there was no final decision from which to appeal, in light of the defendant's ability to re-file its second counterclaim, which had been dismissed without prejudice.

Id. (citing Construction Aggregate, Ltd. v. Forest Commodities Corp., 147 F.3d 1334 (11th Cir. 1998)); *see also id.* at 13 ("The parties, and the concurrence here, advocate that a dismissal without prejudice is a 'good pillar to support implied final judgment under *Jetco*.' We disagree . . . in *Jetco*, the two orders left nothing that could be re-filed, [but] if the appeal failed in *Mesa* or *Ryan*, the plaintiff could re-file other claims.").

[61] *See Barry*, 168 F.3d at 12 (citing Mesa v. United States, 61 F.3d 20, 22 (11th Cir. 1995)).

[62] *See infra* notes 63–67.

[63] *See e.g.*, Schoenfeld v. Babbit, 168 F.3d 1257 (11th Cir. 1999). In *Schoenfeld*, the plaintiff brought causes of action for gender discrimination against two government officials after failing to get a position at the United States Department of the Interior, Fish and Wildlife Services. *Id*. at 1265–66. The plaintiff dismissed each causes of action against one of the defendants without prejudice, and later lost on the second defendant's motion for summary judgment covering all remaining counts in the complaint. *Id*. In deciding there was jurisdiction to hear an appeal of the adverse summary judgment ruling, the court

finality have been made for dismissals of entire actions without prejudice,[64] dismissals without prejudice of claims due to misjoinder,[65] and in cases involving dismissals of non-adjudicated claims without prejudice due to a lack of an indispensable party[66] or due to a party's desire to litigate those claims in state courts.[67]

b. The Per Se *& Discretionary Standard Rules: Pragmatic Finality*

In contrast to the *Ryan* approach, the *Per Se* and discretionary rules openly apply a pragmatic and policy–based approach to finality.[68] Circuits using this approach have emphasized that, ultimately, the final judgment rule is a *rule*, designed to balance the underlying competing policy interests of finality – the inconvenience and costs of piecemeal review on the one hand, and the danger of denying justice by delaying appellate review on the other.[69] As for the pragmatic considerations, these

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reasoned that because "[S]choenfeld dismissed the claim against [the first defendant] without prejudice [and] before the district court entered the order granting summary judgment [in favor of the second defendant] . . . [t]he district court order granting summary judgment adjudicated all the claims against all the remaining parties[;]" thus, "[t]here was . . . no reason for the district court to even consider . . . Rule 54(b)." *Id*. The court then found that the situation was "distinct from the one covered by *Ryan* . . . ." *Id*. at 1266.

[64] LeCompte v. Mr. Chip, 528 F.2d 601, 603 (5th Cir. 1976) (finding an appealable final judgment despite the fact that an entire action was voluntarily dismissed without prejudice by the plaintiff's attorney after the plaintiff went missing, because the dismissal was subject to conditions imposed by the district court which amounted to the requisite "legal prejudice" needed for finality); *see also* Kirkland v. National Mortg. Network, Inc., 884 F.2d 1367 (11th Cir. 1989) (allowing appeal of an order revoking attorney's *pro hac vice* status where the party dismissed its entire action without prejudice). In *Kirkland*, the lead plaintiff in a class action brought claims for an alleged violation of the Truth-in-Lending Act, as well as other causes of action stemming from a $15,000 loan made by a national mortgage company to the plaintiff. *Id*. at 1369. In the course of the litigation, the district court revoked the lead plaintiff's attorney's *pro hac vice* status. *Id*. Later, the plaintiffs obtained a Rule 41(a)(2) dismissal (with court approval) of their entire action without prejudice. *Id*. at 1367-68. After the dismissal, the attorney sought appellate review of the district court's *pro hac vice* revocation. *Id.* In that case, the circuit court found the exercise of appellate jurisdiction over the revocation order was proper because a dismissal without prejudice is a final judgment. *Id*.

[65] *See* Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516 (5th Cir. 2010).

[66] *See* Equity Inv. Partners, Lp v. Lenz, 594 F.3d 1338 (11th Cir. 2010).

[67] *See* Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785 (8th Cir. 2012).

[68] The Supreme Court has recognized a pragmatic approach to finality. *See* Brown Shoes Co. v. United States, 370 U.S. 294, 306 (1962). In that case the court stated:

> The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." A pragmatic approach to the question of finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action,": the touchstones of federal procedure. *Id.* (citations omitted).

[69] *See id*.

jurisdictions have also recognized the final judgment rule creates a division of labor between district and appellate courts, and that manufactured finality still creates a final judgment in the sense that there is "nothing for the court to do but execute judgment."[70] These jurisdictions balance the historic concerns against premature appeals against the potential injustice that can result from denying appellate review of a manufactured final judgment.[71]

In practice, appellate courts advancing pragmatic finality have still placed limits on judgments manufactured for finality by exercising jurisdiction only where remaining claims are dismissed with the district court's approval, and are subject to the statute of limitations.[72] Even in

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[70] *See also* Catlin v. United States, 324 U.S. 229, 233 (1945); Marianne Fogarty, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 FORDHAM L. REV. 637, 644 nn. 52-53 (1988), (describing the avenues under § 1292(a)-(b) to appeal, and judicially created exceptions to the final judgment rule including: (1) The All Writs Act, 28 U.S.C. § 1651 (1982); (2) the *Cohen* collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); (3) the *Forgay* doctrine, Forgay v. Conrad, 47 U.S. (6 How.) 201, 204-06; (4) the *Wood* doctrine, United States v. Wood, 295 F.3d 772, 776-78 (5th Cir. 1977); and (5) the death knell doctrine, Jetco Elec. Indus. V. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973)); *cf.* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS, § 3.01 Appeals From Final Decisions – Civil, (Fed. Jud. Center, 2nd ed. 2009) ("Functionally, the [finality] requirement structures the relationship between appellate court and trial court; within this relationship, each court performs its complementary role.").

[71] *See* American States Ins. Co. v. Dastar Corp., 318 F.3d 881, 892 (9th Cir. 2003) (Ferguson, J., dissenting). According to the dissent in *Dastar Corp.*,

> What the majority ignore[d] is that the inquiry into whether a decision is final requires evaluation of the competing considerations underlying all questions of finality — 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' Our own pragmatic approach to the issue of finality recognizes these competing considerations by allowing parties to voluntarily dismiss claims without prejudice prior to appeal, absent a finding of manipulation. Thus, the purpose of such a dismissal is to support efficiency, not undermine it.

Id. (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)) (citing James v. Price Stern, 283 F.3d 1064, 1066 (9th Cir. 2002)).

[72] *See e.g.,* Robinson-Reeder v. American Council on Educ., 571 F.3d 1333 (D.C. Cir. 2009) (declining to decide the issue of manufactured finality conclusively, but denying jurisdiction in that case because a lack of district court approval); *see also* Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) ("Therefore, we hold that plaintiff's dismissal with the concurrence of the court of the only count of her complaint which remained unadjudicated imparted finality to the District Court's earlier order granting summary judgment."); *cf. supra* note 38 (acknowledging situations where courts grant jurisdiction notwithstanding dismissals without prejudice in *Ryan* jurisdictions because the statute of limitations has expired on the claims dismissed). *See generally* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 20-21 (11th Cir. 1999) (Cox, J., concurring) ("Voluntary dismissal without prejudice is not, after all, a freebie from the litigant's point of view. When the litigant re-files [*sic*] the claims, he could face meritorious statute-of limitations arguments . . .).

Discretionary Standard review cases where other factors are present, courts have focused on these two factors.[73]

Nonetheless, in some *Per Se* and Discretionary Standard cases, the failure of the district court to approve the dismissals has neither been dispositive, nor an absolute bar to the exercise of appellate jurisdiction.[74] For example circuit courts have exercised appellate jurisdiction over unilateral dismissals without prejudice made as a matter of right using Rule 41(a)(1)(A)(i), which can only be used if an opponent has not yet filed an answer or motion for summary judgment.[75]

On the other hand, the majority of *Per Se* and Discretionary Standard jurisdictions have taken a hard–line stance to ensure that the statute of limitations continues to run on any non-adjudicated claims dismissed without prejudice.[76] As a result, in cases involving any impediment to the statute of limitations, even for a limited period of time, the courts in *Per Se* and Discretionary Standard jurisdictions generally find manipulation and decline to exercise jurisdiction.[77] The practical affect of this approach is to deny appellate jurisdiction to dismissals made with "conditional prejudice," where dismissals of non adjudicated claims "without prejudice" become "with prejudice," but only if a party's appeal of adjudicated claims is unsuccessful. Conditional dismissals admittedly interrupt the statute of limitations clock during the pendency of appeals.[78]

More recently additional limitations have been put in place, as some panels using a pragmatic view of finality have declined appellate

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[73] *See also* Romoland School Dist. v. Inland Empire Energy, 548 F.3d 738, 748 (9th Cir. 2010); Doe v. United States, 513 F.3d 1348, 1352-54 (Fed. Cir. 2008) (emphasizing statute of limitations as barrier to refiling); James v. Price Stern Sloan, 283 F.3d 1064, 1065-1069 (9th Cir. 2002) (recognizing statute of limitations and district court participation as factors weighing in favor of granting jurisdiction); Dannenberg v. Software Toolworks Inc., 16 F.3d 1073 (9th Cir. 1994) (rejecting jurisdiction in part due to mitigation of statute of limitations risk); Fletcher v. Gagosian, 604 F.2d 637 (9th Cir. 1979) (denying jurisdiction where there was no district court approval of the dismissals without prejudice). *See generally* Sneller v. Bainbridge Island*,* 606 F.3d 636, 638 (9th Cir. 2010).

[74] *See* Duke Energy Trading & Marketing v. Davis, 267 F.3d 1042, 1048-50 (9th Cir. 2001) (granting jurisdiction even without district court approval where dismissed claims were refiled in state courts); *see also* State of Missouri ex rel. Nixon v. Coeur D'Alene, 164 F.3d 1102 (8th Cir. 1999) (granting jurisdiction even without district court approval of claims dismissed without prejudice where claims were re-filed in a state court).

[75] *See Duke*, 267 F.3d at 1048-50; *Coeur D'Alene*, 164 F.3d 1102.

[76] Page Plus of Atlanta, Inc. and Snap Prepaid, LLC v. Owl Wireless, LLC, NO. 12-4551, NO. 12-4565 (6th Cir. Oct. 28, 2013) (rejecting conditional dismissals for undermining the concept of finality, Rule 54(b) and Section 1292, contributing to successive appeals, and avoiding statute of limitations risks). *See generally supra* notes 72-73.

[77] *See generally id.*

[78] *See generally id.*

jurisdiction in complex-multi-party cases, and in situations involving deceptive multi-step dismissals.[79]

2. Rule 54(b)

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.[80]

a. Ryan *Rule: Preserving Rule 54(b)*

Despite the *Ryan* rule's strict finality rationale, adherents argue that the rule is not unreasonable because of the availability of Rule 54(b) for early appellate review.[81] In fact, a strong justification for the *Ryan* rule is based on a desire to prevent parties from avoiding and undermining Rule 54(b) through the use of manufactured finality.[82] For example, the Tenth Circuit has found:

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[79] *See* American States Ins. Co. v. Dastar Corp, 318 F.3d 881, 885–86 (9th Cir. 2003).

[80] FED R. CIV. P. 54(B).

[81] *See infra* note 82.

[82] State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 14–16 (11th Cir. 1999). In *Barry*, the majority found:

> Our precedent guides our conclusion that exercising jurisdiction here 'would undermine the policies of judicial efficiency, avoiding piecemeal litigation, and district court independence that are the basis of the final judgment rule' . . . [r]repealing Ryan's rule significantly erodes Rule 54(b). Rule 54(b) allows the district court to control its docket and to make an independent determination whether an exception to the final decision rule is warranted in an individual case under appropriate circumstances . . . what is not conjecture is that abrogation of Ryan's rule will subvert Rule 54(b) and result in the parties, not the trial court's, controlling what interim orders are appealed and when . . . [o]ne countervailing concern is 'the specter of repeated appeals by litigants who dismiss claims in order to appeal and then resurrect them on remand in another action.
>
> [T]his circuit's bright-line rule fosters predictability . . . [t]he final decision rule is well known and longstanding. It is clear, easy to follow, and promotes judicial efficiency, avoiding piecemeal appeals. Most importantly, the rule as it stands today is consistent with Rule 54(b), is faithful to the statutory

> A plaintiff cannot be allowed to undermine the requirements of Rule 54(b) by seeking voluntary dismissal of her remaining claims and then appealing the claim that was dismissed with prejudice. [The plaintiff] has attempted to subvert the requirements of Rule 54(b) by voluntarily dismissing her first and second claims when the district court would not grant certification on her third claim for relief. [83]

The essence of the argument is that by allowing parties to manufacture finality, they obtain an end-around Rule 54(b).[84] This is because they can always dismiss non-adjudicated claims without prejudice, obtain appellate review, and avoid having to satisfying Rule 54(b)'s two main requirements: (1) that the adjudicated claim is a "separate claim for relief"; and (2) that there is "no just reason for delay" of the adjudicated claim's review.[85]

b. Per Se *and Discretionary Standard: Manufactured Finality as a Complement to Rule 54(b).*

Although it is true that manufactured finality creates an alternate route to appellate review, it may be unfair to characterize the route as an "end-around." Rule 54(b) appeals are still the only "risk-free" way a party can have its cake and it eat it too – that is, obtain appellate review for the partial adjudication while simultaneously continuing pursuit of any non-adjudicated claims at the district court.[86] This is because manufactured finality carries statute of limitations risks for non-adjudicated claims dismissed without prejudice while Rule 54(b) does not.

In this way, manufactured finality comes with fewer disadvantages in comparison to Rule 54(b) than anticipated.[87] In some cases, parties will

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> language and policies underlying § 1291, and allows the district courts to retain control of their dockets.

Id.; see also Robinson-Reeder v. American Council on Educ., 571 F.3d 1333 (D.C. Cir. 2009) ("Were we to permit the parties' dismissal without prejudice to generate an appealable judgment, we would effectively transfer to the litigants the "dispatcher" function that Rule 54(b) vests in the district courts."); Heimann v. Snead, 133 F.3d 767 (10th Cir. 1998) ("Thus Rule 54(b), not § 1291, provides Plaintiffs [*sic*] with the means for appeal in this case.").

[83] Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992) (following Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978)).

[84] *See supra* notes 82–83.

[85] *See supra* notes 82–83.

[86] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 20 (11th Cir. 1999).

[87] *See* James C. Martin & Jayne E. Fleming, *Can You or Can't You: Review of Partial Judgments Under Federal Rules of Civil Procedure Rule 54(B)*, ABA APP. PRAC. J. Vol. XXV, No. 1 (Spring 2006). The authors acknowledge that Rule 54(b) jurisprudence involve substantial analysis to determine if there is "more than one claim for relief" and

be best served by "proving" their desire for appellate review by taking the risk that any non-adjudicated claims dismissed without prejudice will be lost due to the statute of limitations, unlike situations where appellate review is obtained through Rule 54(b), where the statute of limitations risk of losing non-adjudicated claims is not present.[88]

3. Judicial Efficiency & Piecemeal Litigation

Two of the most historic and significant considerations in appellate procedure are judicial efficiency and piecemeal litigation.[89] In this article,

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"no just reason for delay." Circuits vary on how to determine if there is more than one claim for relief. Some circuits look at the degree of factual overlap between claims, others look to the nature of relief sought by the claims, and others determine if treating the claims separately would be contrary to claim-splitting rules. Some circuits look at the similarity of legal and factual issues. The authors note that the "no just cause for delay" standard is also a subject of controversy. At a minimum, "[t]he bare recitation of the "no just cause for delay" standard found in the text of Rule 54(b) is not sufficient, by itself, to properly certify an issue for immediate appeal." Instead appellate courts are forced to look at the district court record and consider factors such as the judiciary's administrative interests, the parties equitable considerations, and whether granting certification will allow the circuit courts to avoid having to determine: (1) the same issue more than once; (2) any questions that remain at the trial court; and (3) any issues that will become moot by future developments in the case. *Id.* Rule 54(b) jurisprudence also treats judgments determining liability but not damages differently depending on the circuit. The Second, Third, Fifth, Sixth, Ninth, and Tenth circuits have ruled judgments are not final if they decide only liability and leave open the question of relief. The Seventh circuit follows this general rule, but creates an exception, allowing a finality designation in cases where the computation of damages is mechanical and unlikely to produce another appeal. Despite following the general rule against considering liability findings without damages determinations final, the Fifth circuit has ruled an order requiring a defendant to pay the plaintiff royalties was a final judgment – even though the district court failed to quantify the amount of royalties owed. *Id*.; *see also* Andrew S. Pollis, *Civil Rule 54(B): Seventy-Five And Ready For Retirement*, 65 FL. L.REV. 711, 714-17 (2013)(arguing that Rule 54(B) should be "retired" in favor of a discretionary approach because there is uncertainty about what constitutes a separate claim, the level of articulation necessary to obtain certification, and disagreement about the standards to be applied with the rule and that a lack of Supreme Court clarification and attention to the rule has led parties to over-aggressively appeal for fear of losing appellate rights, and on the other extreme, to sitting on appellate rights and losing the ability to appeal.).

[88] *See supra* note 87.

[89] *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). The Court found in that case:

> [The] struggle of the courts [is] sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.

Id.; *see also* Schoenfeld v. Babbit, 168 F.3d 1257 (11th Cir. 1999).

piecemeal litigation is a reference to the filing and re-filing of claims in different district courts.[90] Piecemeal appeals on the other hand, involve the concern that parties will continuously appeal district court adjudications on a repeated and continuous basis.[91]

a. Horizontal Piecemeal Litigation

i. The Ryan *Rule & Horizontal Piecemeal Litigation Concerns*

Perhaps the biggest advantage claimed by advocates of the *Ryan* rule is the prevention of horizontal piecemeal litigation.[92] Specifically, the rule prevents parties from dismissing non-adjudicated claims without prejudice and re-filing them in another district court.[93]

Instead, parties seeking appellate review in *Ryan* jurisdictions can dismiss non-adjudicated claims with prejudice, litigate non-adjudicated claims to resolution, or obtain a Rule 54(b) certificate for early appellate review.[94] Nonetheless, whether the parties dismiss with prejudice, litigate remaining claims to finality, or obtain Rule 54(b) approval, the path to appellate review prevents a party from re-filing non-adjudicated claims in a different district court; thus, entirely eliminating horizontal piecemeal litigation concerns.[95]

ii. The Per Se *& Discretionary Standards: Manufactured Finality & Horizontal Piecemeal Litigation Concerns*

On the other hand, in *Per Se* and Discretionary Standard jurisdictions, which permit manufactured finality, there is a risk of horizontal piecemeal litigation.[96] Although in some, if not many or most cases, practical, common sense, and statute of limitations concerns will temper the decision to re-file non-adjudicated claims dismissed without prejudice there is still the potential for abuse of manufactured finality.[97]

For example, imagine a party has manufactured a final judgment to obtain appellate review, and then immediately re-filed its non-adjudicated

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[90] This is essentially the re-filing concern.

[91] This is the concern that appeals will be filed too early, and that cases will reappear before the appellate courts multiple times for multiple different reasons.

[92] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 12 (citing Mesa v. United States, 61 F.3d 20, 22 (11th Cir. 1995)).

[93] *See id.*

[94] *See* Barry, 168 F.3d 8, 14-15 (11th Cir. 1999).

[95] If the remaining claims are dismissed with prejudice, that is considered an adjudication on the merits, and the claims are lost. *See generally id.*

[96] *See infra* notes 98–115.

[97] *See Barry*, 168 F.3d at 20–21 (Cox, J., concurring).

claims in a different state or federal court. The party has not only avoided the requirements of Rule 54(b), but also successfully shopped for a new district court to hear its non-adjudicated claims while simultaneously obtaining appellate review.

A nuanced variation of this scenario took place in *State of Missouri ex. Rel. Nixon v. Coeur D'Alene Tribe*.[98] In *Coeur D'Alene*, the State of Missouri sued the Coeur D'Alene tribe and a privately affiliated corporation in Missouri state court.[99] The State of Missouri alleged the two defendants conducted an unlawful Internet gambling program with Missouri residents in violation of Missouri state gambling laws.[100]

The tribe and its affiliate removed the case to a federal district court in Missouri, and successfully prevented a remand back to state court. The tribe was also able to have all claims against it dismissed based on the doctrine of tribal immunity.[101] The claims against the other defendant were not dismissed however, because the district court refused to extend tribal immunity to a tribal agent.[102]

Soon after, the State of Missouri dismissed its non-adjudicated claims against the tribal affiliate without prejudice and appealed the district court's orders denying remand and granting the Coeur D'Alene tribal immunity.[103] With the appeal pending, the State of Missouri then re-filed its non-adjudicated claims against the tribe's affiliate in a separate state court action, this time adding two tribal leaders. The tribal affiliate removed the case again, and eventually had the action transferred to the same federal district court which presided over the State of Missouri's original suit.[104] Even after being aware of the State of Missouri's dismissal and re-filing of the non-adjudicated claims against the tribal affiliate, the Eighth Circuit exercised appellate jurisdiction and reviewed the district court's orders denying remand and granting the Coeur D'Alene tribal immunity.[105]

A similar "re-filing" scenario also took place in *Fletcher v. Gagosian*.[106] In that case, the plaintiffs were court-appointed trustees of a California corporation undergoing bankruptcy.[107] After plaintiffs filed an

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98 164 F.3d 1102 (8th Cir. 1999).
99 *Id*. at 1105.
100 *Id*.
101 *Id*. at 1104.
102 *Id*. at 1109.
103 *Id*.
104 *Coeur D'Alene*, 164 F.3d at 1110.
105 *Id.*
106 Fletcher v. Gagosian, 604 F.2d 637 (9th Cir. 1979).
107 *Id.* at 638–39.

amended two-count complaint against multiple defendants for insider trading, the district court dismissed the first count of the complaint and a single defendant from the second count.[108] The plaintiffs sought Rule 54(b) and Section 1292(b) interlocutory appeals of the district court's adjudications, but both were denied.[109]

Soon after, the plaintiffs manufactured finality by dismissing the non-adjudicated portions of the complaint without prejudice.[110] A notice of appeal followed.[111] Similar to *Coeur D'Alene*, the plaintiffs dismissed their complaint without court approval invoking Rule 41(a)(1), which permits voluntary dismissals of non-adjudicated claims without prejudice as a matter of right if no answer or motion for summary judgment has yet been filed in a case.[112] The plaintiffs then re-filed their dismissed claims as a separate lawsuit. [113] Unlike the Eighth Circuit however, the Ninth Circuit, declined to exercise appellate jurisdiction.[114] The court explained:

> [I]f we accept appellants' rationale, then we also accept the notion that the policies against multiplicity of litigation and against piecemeal appeals may be avoided at the whim of a plaintiff. He need merely dismiss portions of his complaint without prejudice, appeal from what had been an interlocutory order, and re-file the dismissed portion as a separate lawsuit. That is precisely what appellants did here.[115]

Overall, even if situations like *Coeur D'Alene* and *Gagosian* are uncommon, left "unregulated," manufactured finality has the potential to seriously undermine district courts, and create unacceptable risks of horizontal piecemeal litigation.[116]

b. Vertical Piecemeal Litigation

i. The Ryan *Rule & Vertical Piecemeal Litigation Concerns*

Traditionally, the *Ryan* rule is known for enhancing judicial efficiency while reducing and or entirely eliminating the risk that a party

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Fletcher*, 604 F.2d at 638–39.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id*. at 639.
[116] *See* State of Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999); *Fletcher*, 604 F.2d 637.

may file successive appeals and invoke appellate review of bits and pieces of district court rulings.[117]

Proponents of the *Ryan* rule point out that in order to obtain early appellate review, parties have two options even if Rule 54(b) review is denied. First, parties can dismiss non-adjudicated claims with prejudice.[118] Second, they litigate non-adjudicated claims to their resolution at the trial court.[119] In both cases, there is concern that appellate courts will be bothered by multiple appeals from issues arising in the same case.[120]

ii. The Per Se *& Discretionary Standards & Vertical Piecemeal Litigation Concerns*

Although the arguments in the immediately preceding section may be technically true, the issue of piecemeal litigation shouldn't be viewed in a vacuum.

First, in situations where a party's peripheral non-adjudicated claims are intended to supplement and "bolster" an adjudicated claim, litigating

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[117] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 16 (11th Cir. 1999) ("Lastly, this Circuit has followed Ryan 's rule for almost twenty-five years. Any procedural rule will engender policy arguments and the final decision rule is no exception. The final decision rule is well known and longstanding. It is clear, easy to follow, and promotes judicial efficiency, avoiding piecemeal appeals.").

[118] *See id.* at 15. The majority found:

> Instead, if a Rule 54(b) certificate is denied, Ryan's rule forces litigants to make hard choices and seriously evaluate their cases. The parties must assess the likelihood of a reversal of the adjudicated claims on appeal versus the likelihood of success on the remaining claims at trial. While some claims in lawsuits are close, many are not. Litigants often have to make much more difficult choices in the course of complex litigation. In order to appeal a court's rulings on some claims, a party may settle the remaining claims in some fashion and dismiss them with prejudice. Such a settlement might even incorporate a high or low amount on the remaining claims dismissed with prejudice, contingent upon the outcome of the appeal. As the concurrence notes, perhaps the remaining claims are not winners on their merits, but only offered other tactical advantages. A party seeking an appeal either has to give up that tactical advantage to gain the benefit of finality or has to convince the other party to do so. In fact, the options of resolving the dilemma faced by the parties are endless and only limited by the settlement creativity of the parties. *Id*.

[119] *See id*. at 20 (Cox, J, concurring).

[120] If the remaining claims are dismissed with prejudice, the only appeal will be of the partial judgment. On the other hand, if the remaining claims are adjudicated to resolution at the district court, appeal of the partial judgment and any remaining claims will be a part of a traditional final judgment.

the non-adjudicated claims to resolution is an inefficient use of judicial resources if the adjudicated claim is ultimately lost.[121]

For example, in cases involving third-party liability or cases involving indemnification, a defendant's claims against a third-party defendant may only be relevant if the defendant is still potentially liable for the underlying cause of action.[122] In the case that a defendant prevails on summary judgment against a plaintiff and an appellate court affirms that decision, there would be no reason to pursue a third-party complaint against a third-party defendant for indemnification or contribution.[123] In those cases, early appellate review is the missing ingredient necessary for the parties to make a meaningful choice about the pursuit of non-adjudicated peripheral claims to trial.

Second, in *Ryan* circuits, without the option of manufacturing finality, early appellate review requires Rule 54(b) approval or the use of an alternative appellate doctrine. But Rule 54(b) and its alternatives are merely codified versions of vertical piecemeal litigation, since district court proceedings on the non-adjudicated claims continue while the appellate court reviews an adjudicated claim.[124] Rule 54(b) and its alternatives also carry the risk of successive appeals, because appellate courts may be required to review non-adjudicated claims later decided by the district court.

Third, Federal Rule of Civil Procedure Rule 41 acts as a built in barrier to the risk of successive appeals. That rule provides that voluntary

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[121] *See Barry*, 168 F.3d 8 at 20 (Cox, J, concurring). Judge Cox clarified that:

> Ryan ignores the legitimate reasons that a litigant may opt for a voluntary dismissal without prejudice over further proceedings or a dismissal with prejudice. Most obviously, the demise of some claims may have "orphaned" the rest. For example, the remaining claim may share an element with the resolved claims; a conclusion that no evidence exists to support the common element may sound the tocsin on the remaining claim. Or perhaps the remaining claim was a setoff or a "defensive counterclaim," one that the defendant would not have bothered to bring had the plaintiff not picked a fight. Or maybe the claim (like some RICO claims) was not a winner on the merits, but offered other tactical advantages (such as wide-ranging discovery or a chance to blacken the opponent).
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> *Id*. (Cox, J. concurring).

See also Barry L. Pickens & Loyd Gattis, *The Finality Trap Revisited*, SPENCER FANE (March 23, 2010), http://www.spencerfane.com/The-Finality-Trap-Revisited-03-23-2010/ (recognizing the tough decision about handling supplementary claims upon an adverse partial judgment and the finality trap).

[122] *Cf. supra* note 120.

[123] *Cf. supra* note 120.

[124] *See Barry*, 168 F.3d 8 at 20 (Cox, J, concurring) ("Even if the litigant obtains an appeal, the Rule 54(b) route comes at a cost to finality. That is because, notwithstanding even an affirmance on appeal, the case is still pending below.").

dismissals of claims without prejudice and without court approval on more than occasion, results in an adjudication on the merits. This means that even in a *Per Se* jurisdiction, a party that unilaterally dismisses non-adjudicated claims on more than one occasion will be barred from obtaining appellate review for those non-adjudicated claims.[125] In light of this fact, the risk of successive appeals stemming from manufactured finality is overstated.

Overall, appellate review of judgments manufactured for finality involve less vertical piecemeal litigation than judgments approved for Rule 54(b) review. This is because Rule 54(b) is really a codified approval of simultaneous district and appellate court litigation, and because judgments manufactured for finality carry the risks that non adjudicated claims will be lost due to the expiration of the statute of limitations or the denial of appellate jurisdiction due to manipulation.[126]

4. District Courts

The Supreme Court has observed:

> [The final judgment rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine

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[125] Fed. R. Civ. P 41. Section (a)(1)(B) of the rule states that for voluntary dismissals without prejudice and without court approval, a second voluntary dismissal acts as an adjudication on the merits:

> (a) Voluntary Dismissal.
> (1) *By the Plaintiff.*
> (A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> (ii) a stipulation of dismissal signed by all parties who have appeared.
> (B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.
> (2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Id.

[126] *See generally supra* notes 72–73.

> the independence of the district judge, as well as the special role that individual plays in our judicial system.[127]

a. Ryan *Rule and District Court Authority*

One of the strongest rationales for the *Ryan* rule is preserving district court authority and integrity.[128] This is because the rule prevents parties from dismissing non-adjudicated claims without prejudice and later re-filing them in a different district court.[129] As seen in the section above, this concern is grounded in much more than theory.[130]

b. Per Se *and Discretionary Standard Rules and District Court Authority*

Nonetheless, re-filing concerns may be overstated. As an initial matter, the Discretionary Standard includes re-filing of dismissed claims as a factor showing manipulation.[131] As seen in *Fletcher*, circuits using a Discretionary Standard can deny jurisdiction if there is a re-filing concern, unlike circuits applying a *Per Se* rule, as in *Couer D'Alene*, where the circuit court accepted appellate jurisdiction over a partial adjudication, despite the plaintiff's decision to re-file non-adjudicated claims dismissed without prejudice in state court.[132]

Setting aside re-filing concerns where non-adjudicated claims are dismissed without district court approval, when dismissals of remaining claims are made with a district court's approval, manufactured finality can provide a valuable and desirable added option to the district court's for when they choose to bless a judgment for appellate review. For example, and ironically, in *Ryan*, the district court in that case certified a judgment for Rule 54(b) review, reversed its approval, and permitted the parties to manufacture finality.[133] This option also comes with added docket clearing

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[127] Cunningham v. Hamilton County, 527 U.S. 198, 203 (1999) (citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)).

[128] State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 13 (11th Cir. 1999) ("Our precedent guides our conclusion that exercising jurisdiction here 'would undermine the policies of judicial efficency, avoiding piecemeal litigation, and district court independence that are the basis of the final judgment rule.'").

[129] *See supra* notes 98–115; *see also Barry*, 168 F.3d 8 at 12.

[130] *See supra* notes 98–115.

[131] *See generally* Fletcher v. Gagosian, 604 F.2d 637 (1979).

[132] *Id*.

[133] *See* Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978) *cited in* Cook v. Rocky Mountain, 974 F.2d 147, 148 (10th Cir. 1992).

benefits since the dismissed claims may never return – unlike Rule 54(b) appeals where non-adjudicated claims remain with the district court.[134]

There is also reason to believe this added option, when exercised with district court approval, will boost district court authority in comparison to Rule 54(b). This is because, satisfying Rule 54(b)'s two-part requirement has been confusing and difficult for district courts to apply, leading to situations where appellate review has been denied despite a district court's certification.[135]

5. The Appellate Courts

a. The Ryan *&* Per Se *Rules & Appellate Courts*

Although the *Ryan* and *Per Se* rules are opposites in that one rejects and the other accepts manufactured finality, they share the common trait of uniformity and low procedural review costs.[136] In contrast to the Discretionary Standard which requires appellate courts to comb the record for manipulative intent, both the *Ryan* and *Per Se* rules either uniformly deny or grant parties the right to manufacture appellate review of a final judgment.[137]

One area where the rules, of course, end up differing, however, are their respective effects on appellate court dockets. The *Per Se* approach will likely increase them, while the *Ryan* rule will likely control them and keep them steady.[138]

b. The Discretionary Standard Rule & Appellate Courts

As the approach which places the greatest amount of added responsibility on the appellate courts, the discretionary rule comes with procedural review costs and increased appellate court involvement in cases

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[134] *Cf. Barry*, 168 F.3d 8 at 20 (Cox, J, concurring) ("Even if the litigant obtains an appeal, the Rule 54(b) route comes at a cost to finality. That is because, notwithstanding even an affirmance on appeal, the case is still pending below.").

[135] *E.g.*, Taco John's of Huron, Inc. v. Bix Produce Co. 569 F.3d 401, 402 (8th Cir. 2009); Ebrahimi c. City of Huntsville Bd. Of Educ., 114 F.3d 162, 167 (11th Cir. 1997); Nichols v. Cadle Co., 101 F.3d 1448, 1449 (1st Cir. 1996); Brandt v. Bassett (*In re* Sc. Banking Corp.), 69 F.3d 1539, 1550 (11th Cir. 1995); Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 860 F.2d 1441, 1444 (7th Cir. 1988); Spiegel v. Trs. of Tufts College 843 F.2d 38, 44–46 (1st Cir. 1988); FDIC v. Elefant, 790 F.2d 661, 667 (7th Cir. 1986). These cases are cited in Andrew S. Pollis, *Civil Rule 54(B): Seventy-Five And Ready For Retirement*, 65 FLA. L. REV. 711, 714–51 n. 275 (2013).

[136] *See Barry*, 168 F.3d 8 at 21.

[137] *Id*.

[138] This is because one virtually always denies and the other virtually always grants jurisdiction.

before the traditional notion of a final judgment.[139] This is because appellate courts will grant jurisdiction in some but not all cases, and be required to comb the district court record for evidence of intent to manipulate appellate jurisdiction.[140] Exactly what evidence? To date, there has never been a comprehensive and exhaustive list of criteria laid out, but throughout the case law appellate judges have identified several factors in their opinions which have been considered before accepting or denying appellate jurisdiction. The factors include but are not limited to whether: (1) the non-adjudicated claims are dismissals with or without courtapproval;[141] (2) the non-adjudicated claims are subject to the statute of limitations clock or whether there is an agreement to permit revival of the dismissed claims regardless of statute of limitations concerns;[142] (3) the losing or prevailing party has dismissed the non-adjudicated claims;[143] (4) parties have engaged in dilatory tactics, such as prodding the district court to dismiss non-adjudicated claims without prejudice for failure to prosecute;[144] (5) the non-adjudicated claims have been re-filed and if horizontal piecemeal litigation concerns are present;[145] (6) non-adjudicated claims are dismissed in multiple steps or through amendments;[146] (7) non-adjudicated claims dismissed without prejudice are closely related to the partial adjudication or the number of parties and complexity of litigation would invite piecemeal appellate review.[147]

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[139] *See generally Barry*, 168 F.3d 8 at 21 ("The Seventh and Ninth Circuits' practice of combing the record for evidence of manipulative intent and the Third Circuit's analysis . . . waste resources better spent on the merits of appeals. Jurisdiction is a threshold matter.").

[140] *Id*.; *see also supra* note 51.

[141] *See supra* notes 72–73.

[142] *See supra* notes 72–73; *see also infra* note 185.

[143] *See* Section II(B)(6)(b) *infra* notes 163–186 (describing case law where courts considered or made a note about whether a prevailing or losing party dismissed claims without prejudice and sought to appeal).

[144] *See* Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984); Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979).

[145] *See* Section II(B)(3)(a) *supra* notes 106-115 (describing situations where parties manufacture finality, refile claims dismissed without prejudice in a different district court, and simultaneously appeal any adverse rulings).

[146] *See* Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881 (9th Cir. 2003).

[147] *See id.* The Supreme Court has also held closely related claims with overlapping factual allegations in complex litigation can still be successful candidates for Rule 54(b), although the relatedness of the claims can still be a factor weighing against the exercise of Rule 54(b) review. *See* Cold Metal Process Co. v. United Engineering Foundry Co., 351 U.S. 445, 451 n.6 (1956) ("Prior to the promulgation of the Federal Rules of Civil Procedure in 1939, it may well have been true that the Court of Appeals would not, at this stage, have had jurisdiction over United's appeal. Under the single judicial unit theory of finality which was then recognized, the Court of Appeals would have been without jurisdiction until United's counterclaim also had been decided by the District Court. That

In the majority of cases, answering these questions will not be any more difficult and likely much easier than completing the two-part "separateness" and "no just reason for delay" analysis required for Rule 54(b) appeals.[148] This means that in comparison to the *Ryan* rule, the discretionary approach comes with significant benefits in terms of clarity, deference to the district courts, and fairness to the parties, despite minimal procedural review costs.[149]

6. The Parties

Judge A. Leon Higginbotham has remarked:

> [T]he proper allocation of federal jurisdiction is of profound importance to federal judges, but it is of even more importance to the future welfare of American citizens. How we deal with [the] issues of . . . jurisdiction of federal courts has more to do with our values, our appraisal, and our vision of America than it does with any subtle issue[s] of . . . jurisdiction . . . . [I]f judicial reform benefits only judges, then it isn't worth pursuing. If it holds out progress only for the legal profession, then it isn't worth pursuing . . . . It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all of our citizens, have made our democracy, despite its faults and failures, a significant model for the world.[150]

a. Parties and the Ryan *Rule*

As discussed above, the *Ryan* rule comes with certain piecemeal litigation, district court, and appellate court resource benefits.[151] Nonetheless, these advantages may come at an extreme cost to parties in litigation. This is because the *Ryan* rule requires a choice between two extremes: incurring significant and potentially unnecessary costs to litigate peripheral claims to final adjudication in order to keep them, or dismissing them with prejudice and losing them forever to obtain early appellate

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would have been so even if the counterclaim did not arise out of the same transaction and occurrence as Cold Metal's claim.").

[148] *See supra* note 87.

[149] *See supra* note 87.

[150] *See* A. Leon Higginbotham, Jr., *Federal Jurisdiction: The Essential Guarantor of Human Rights*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 57, 61(C. Harrison & R. Wheeler, eds., 1989).

[151] *See* Sections II(B)(3-5)(describing the *Ryan* rule's piecemeal litigation advantages, disctrict court authority advantages, and appellate court preservation of resource advantages); *see also supra* notes 92–120, 132–34.

review.[152] If parties are unaware of the rule against manufactured finality in *Ryan* jurisdictions, there is the potential for overly harsh outcomes and unknowingly falling into a "finality trap."[153] In other cases, where a party is familiar with the *Ryan* rule, but their opponent is not, there is the potential for "pushing" an opponent into a "finality trap" after prevailing in a partial adjudication.[154]

b. Litigation Limbo & the Finality Trap

Imagine a party has brought a three count action in a circuit following the *Ryan* rule. The district court grants the defendant's motion to dismiss the first, most significant and major claim, but leaves the two other more minor and peripheral claims untouched. After conducting a cost-benefit analysis, the plaintiff determines the minor and peripheral claims aren't worth pursuing independently, but are still valuable for their "bolstering" and supplementary effect on the major claim. In light of this relatively reasonable analysis, the plaintiff dismisses its remaining claims without prejudice and appeals.

This seemingly innocent mistake can have harsh and drastic consequences. After dismissing the non-adjudicated claims without prejudice, and as a matter of right, the action is no longer on the district or appellate court dockets.[155] The case is no longer on the district court's docket, because all the claims have been adjudicated or dismissed.[156] Similarly, the case will never reach an appellate court's docket since in

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[152] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 15(11th Cir. 1999) (encouraging parties to make tough choices about dismissing claims with prejudice or litigating them to finality). *Id*. at 20 (Cox, J., concurring) (discussing the need to litigate claims to finality or lose them forever in *Ryan* jurisdictions).

[153] *See infra* note 155.

[154] *See infra* notes 177–87 (discussing the concept of a prevailing party that has the only remaining claims left in a suit dismissing their remaining claims without prejudice in order to block their opponents from appealing).

[155] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 19 (11th Cir. 1999) ("Once the district court has relinquished jurisdiction, the litigant has no sure way of obtaining finality that would permit review of the district court's order in this action. If the litigant begins a new action with the voluntarily dismissed claims, and that second action proceeds to judgment, the litigant of course cannot raise issues from the first action on appeal in the second action. The Federal Rules of Civil Procedure, moreover, do not provide any explicit mechanism for "undismissing," after judgment, any voluntarily dismissed claims so that the litigant could ultimately appeal."); *see also* Marshall v. Kan. City Southern Ry. Co., 378 F.3d 495, 499-500 (5th Cir. 2004) (where plaintiff dismissed remaining claims without prejudice and the appellate court denied jurisdiction); Pickens and Gattis, *supra* note 121 (acknowledging that after dismissals without prejudice and a denial of appellate jurisdiction the finality trap is sprung and the case is no longer pending in any court).

[156] *See supra* note 155.

Ryan jurisdictions there is no appealable final judgment.[157] The partial judgment is stuck in a finality trap – litigation limbo.[158]

This problem is not uncommon since the issue of manufactured finality and the rules governing the issue are not widely known by practitioners.[159] Nonetheless, some appellate courts have given parties an "out" and the option to dismiss remaining claims with prejudice at oral argument in order to create appellate jurisdiction.[160]

c. Prevailing Parties and the Finality Trap

In the hypothetical above, only the losing party dismissed non-adjudicated claims without prejudice. Nonetheless, *Ryan* rule jurisdictions have held true to the idea that *all* remaining claims must be dismissed with prejudice or litigated to finality in order to produce a final appealable judgment.[161] This is true even if the prevailing party is the party left with non-adjudicated claims, and the "losing party" has no control over whether the prevailing party chooses to dismiss its non-adjudicated claims with or without prejudice.[162]

For example, in *State Treasurer of Michigan v. Barry* all of the plaintiffs' claims were adjudicated or dismissed with prejudice.[163] The only non-adjudicated claims in the case were from the defendant's counterclaim.[164] By agreement, the parties stipulated that the defendant could dismiss its non-adjudicated counterclaims without prejudice in order to facilitate appellate review of the adjudicated claims and avoid

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[157] *See supra* note 155.

[158] *See supra* note 155.

[159] *See generally* Pickens and Gattis *supra* note 121.

[160] *See* Arrow Gear Co. v. Downers Grove Sanitary Dist., 629 F.3d 633, 637 (7th Cir. 2010) ("So at argument we gave Arrow's lawyer the following choice: stand your ground and we'll dismiss the appeal, or convert your dismissal of the other two defendants to dismissal with prejudice, which will bar your refiling your claims against them. He quickly chose the second option, committing not to refile the suit against them, and so, because the final judgment in the district court is now definitive, we have jurisdiction of the appeal.") (citing India Breweries, Inc. v. Miller Brewing Co., 612 F.3d 651, 657-58 (7th Cir. 2010)); Helcher v. Dearborn County, 595 F.3d 710, 717 (7th Cir. 2010); JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999); *see also* Nat'l Inspection & Repairs v. George S. May, 600 F.3d 878, 883-84 (7th Cir. 2010) (allowing dismissals with prejudice of remaining claims after oral argument resulting in the panel finding jurisdiction).

[161] *See* State Treasurer of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999).

[162] *See e.g.* Hood v. Plantation Gen. Med. Ctr, 251 F.3d 932 (11th Cir. 2001) (dismissing an appeal by one plantiff because another plaintiff had voluntarily dismissed the claim) (cited in Pickens and Gattis, *supra* note 121 at n.11.) *See generally infra* notes 163–86.

[163] 168 F.3d 8.

[164] *Id*. at 9–11.

potentially unnecessary litigation of the counterclaim.[165] Despite the approval of both parties, the appellate court found the losing party's agreement to the dismissal weighed against, not in favor of the exercise of jurisdiction.[166] A major reason for the ultimate denial of appellate jurisdiction was the fear that the parties could undermine the district court by manufacturing finality without the court's approval.[167]

Nonetheless, what if the district court approves dismissal of the non-adjudicated claims to alleviate this concern?[168] This is precisely what occurred in *Heimann v. Snead*, but still, it was not enough.[169] In that case, the Heimanns' filed a seven count diversity action against bank defendants alleging multiple theories of mortgage foreclosure improprieties.[170] Defendants counterclaimed alleging trespass.[171] The defendants successfully disposed of six of the seven counts in the plaintiff's complaint.[172] Soon after, the parties agreed the plaintiffs would dismiss their remaining claim with prejudice, while the defendant would dismiss its counterclaim without prejudice.[173] The parties submitted this agreement to the district court and obtained its approval for the dismissals.[174] The district court expressed its approval and stated that, "the matter is now final and immediately appealable."[175] Still, adhering to the *Ryan* rule, appellate jurisdiction was denied, and the circuit court justified its ruling based on a concern that manufactured finality undermined Rule 54(b).[176]

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[165] *Id*.

[166] *Id*. at 13 ("[P]laintiff, argues, it had no control of the manner in which the dismissal of the [Defendants'] counterclaim took place, either with or without prejudice. This argument fails, however, because Plaintiff consented to the dismissal without prejudice of Defendants' counterclaims.")

[167] *Id*. ("[i]t is well settled in this Circuit that parties to a suit cannot agree to grant this Court appellate jurisdiction.").

[168] *See* Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998).

[169] *Id.*

[170] *See id.at* 768.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Heimann*, 133 F.3d at 768.

[175] *Id.*

[176] *Id.* at 769 ("The plain language of Rule 54(b) . . . [controls where] the court disposed of "fewer than all claims" on the merits. Thus Rule 54(b), not § 1291, provides Plaintiffs' with the means for appeal in [that] case.").

d. Parties and the Discretionary and Per Se *Rules*

On the other hand, circuits permitting manufactured finality avoid the harsh consequences that the district courts and cooperative parties faced in *State Treasurer* and *Heimann*.[177]

Permitting manufactured finality also prevents prevailing parties from being able to strategically dismiss minor non-adjudicated claims in order to trap opponents in litigation limbo.[178] Unlike *State Treasurer* and *Heimann*, sometimes a prevailing party will dismiss its non-adjudicated claims without prejudice with the intention of stopping an opponent from obtaining appellate review.[179] Logically, since the goal of a prevailing party's manipulation is to block appellate review, *Ryan* jurisdictions only contribute to this manipulation, because the remedy to this dilatory tactic is to grant, not deny the exercise of appellate jurisdiction.[180]

For example, in *Local Motion v. Niescher*, the plaintiff, Local Motion, filed suit against a former distributor and licensee based on causes of action for breach of contract, tortious breach of contract, and breach of the covenant of good faith and fair dealing.[181] Local Motion prevailed on a motion for partial summary judgment on its breach of contract and breach of the covenant of good faith claims.[182] Shortly after, Local Motion dismissed the only remaining non-adjudicated claims without prejudice and the defendant then appealed.[183]

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[177] This is because appellate courts can grant jurisdiction and rule upon certain judgments manufactured for finality. *See generally* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 20 (Cox, J., concurring).

[178] *See Barry*, 168 F.3d at 20 (Cox, J., concurring).

[179] *See* Pickens and Gattis, *supra* note 121 at n. 12. ("In fact, the finality trap may create an opportunity for an egregious type of manipulation of the judicial process: If a party determines during the course of litigation that it will likely prevail, it might add a claim (or counterclaim) solely to dismiss it without prejudice later, and thereby arguably prevent its adversary from ever being able to appeal the adverse ruling – in effect, ensuring that its anticipated victory is unappealable."). *See generally infra* note 175–82.

[180] *See* Local Motion v. Niescher, 105 F.3d 1278, 1279 (9th Cir. 1997). The court found:

> Local Motion contends the dismissal of its remaining claims without prejudice means there is no final judgment. This court has held that a losing party may not "manufacture finality" by dismissing his or her remaining claims without prejudice. Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073 (9th Cir.1994). Here, however, the prevailing party has dismissed the remaining claims without prejudice in an effort to prevent an appeal. Dannenberg and similar cases disapproved a party's "manipulation" of the appellate process. Local Motion is not entitled to use similar manipulation to thwart an appeal. The district court's judgment is appealable. *Id.*

[181] *Id*.

[182] *Id*.

[183] *Id*.

At the appellate court, *Local Motion* argued against appellate jurisdiction asserting that, "the dismissal of its remaining claims without prejudice means there is no final judgment."[184] The Ninth Circuit found that a prevailing party's unilateral dismissal of non-adjudicated claims without prejudice, even with court approval, was a manipulative attempt to block appellate jurisdiction.[185] The court found that although in the typical case, a losing party's manipulation is an attempt to create jurisdiction, in cases involving a prevailing party's manipulation, the appropriate remedy is to exercise jurisdiction.[186]

Without manufactured finality, on the other hand, the prevailing party's manipulation would successfully block jurisdiction, leaving the losing party stuck with an adverse decision and without the ability to obtain appellate review– stuck in a finality trap and in litigation limbo.[187]

7. Conditional Finality

Throughout the case law and academic literature, "conditional dismissals," or dismissals with conditional prejudice, are dismissals of non-adjudicated claims where the ultimate "with" or "without prejudice" designation depends upon the outcome of an appeal.[188] Here both terms are used interchangeably.

The Ryan*,* Per Se*, and Discretionary Standard Rule Jurisdictions, the Second Circuit, and the Supreme Court: Dismissals With Conditional Prejudice*

a. The Majority

To date, apart from the Second Circuit, every circuit faced with scenarios involving conditional dismissals have rejected the practice.[189]

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[184] *Id*.

[185] *Local Motion*, 105 F.3d at 1279.

[186] *Id*.

[187] *See generally* Section II(B)(6)(b), *supra* notes 155–79 (describing situations where prevailing parties dismissed remaining claims without prejudice and the losing party was denied the right to appeal regardless of whether the district court approved).

[188] *See generally* Joseph Struble, *An Early Roll of the Dice: Appeal Under Conditional Finality in Federal Court*, 50 HOUS. L. REV. 221 (2012).

[189] *See* Page Plus of Atlanta, Inc. v. Owl Wireless, LLC, 733 F.3d 658 (6th Cir. 2013) (rejecting conditional dismissals for undermining the concept of finality, Rule 54(b) and Section 1292, contributing to successive appeals, and avoiding statute of limitations risks); SEC v. Gabelli, 653 F.3d 49, 55–56 (2nd Cir. 2011) (allowing conditional dismissal); India Breweries, Inc. v. Miller Brewing Co., 612 F.3d 651 (7th Cir. 2010) (rejecting conditional dismissals but exercising jurisdiction after dismissal of remaining claims with prejudice at oral argument); National Inspection & Repairs v. George S. May, 600 F.3d 878 (7th Cir.

Even circuits currently applying a *Per Se* or Discretionary Standard rule have rejected conditional finality.[190] This is because historically, jurisdictions permitting manufactured finality justified the practice based on the fact that non-adjudicated claims dismissed without prejudice were subject to the statute of limitations and couldn't be re-filed indefinitely.[191] Since dismissals with conditional prejudice often times interrupt or stop the statute of limitations clock, conditional dismissals have been categorically considered manipulative and denied appellate review.[192]

b. The Second Circuit

Surprisingly, the Second Circuit traditionally a *Ryan* jurisdiction, approved of conditional dismissals in *Purdy v. Zeldes*.[193] In that case, the plaintiff, Purdy filed a legal malpractice action against his former criminal defense lawyers alleging they were negligent in: (1) failing to learn that 29 other first-time offenders were charged with the same offense, pled guilty, and avoided prison sentences; (2) failing to inform Purdy of statements made by the prosecutor; and (3) failing to inform him that cooperation and a reduced sentence were still possible at post-sentencing.[194]

The attorneys argued that the first two negligence allegations were barred by collateral estoppel based on earlier rulings in an ineffective assistance of counsel claim brought against them during Purdy's

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2010) (same); Clos v. Corr. Corp. of Am, 597 F.3d 925 (8th Cir. 2010) (where the district court approved Rule 54(b) certification and denied conditional dismissals, the appellate court disapproved of both Rule 54(b) and conditional finality leading the appeal to be dismissed for lack of jurisdiction); Purdy v. Zeldes, 337 F.3d 253 (2nd Cir. 2003) (allowing conditional dismissal); Federal Home Loan Mortg. Corp. v. Scottsdale Ins. Co., 316 F.3d 431 (3d Cir. 2003) (rejecting conditional finality, but ultimately exercising jurisdiction after remaining claims were dismissed with prejudice) (citing Verzilli v. Flexon, Inc., 295 F.3d 421 (3d. Cir. 2002) (rejecting conditional finality)); First Health Group v. BCE Emergis Corp., 269 F.3d 800 (7th Cir. 2001) (decision cited by many more recent Seventh Circuit opinions and other circuits rejecting conditional finality, but one which questions and does not ultimately decide whether conditional dismissals properly can be held to create a final judgment); Dannenberg v. Software Toolworks Inc., 16 F.3d 1073 (9th Cir. 1994) (rejecting conditional finality for creating risk of successive appeals, undermining Rule 54(b), and not ending the litigation on the merits) (citing Cheng v. Comm'r, 878 F.2d 306 (9th Cir. 1989) (but in *Cheng* there was no provision stating that the dismissals would be with prejudice if the appellate court affirmed the district court unlike more modern conditional dismissals)).

[190] *See supra* note 189.

[191] *See* State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999). *See generally supra* note 189.

[192] *See generally supra* note 189.

[193] 337 F.3d 253 (2nd Cir. 2003).

[194] *Id.* at 257.

incarceration.[195] The district court agreed collateral estoppel barred the first two allegations, but denied defendant's motion for summary judgment as to the third allegation that Purdy's defense attorneys failed to inform him of vital post-sentencing information.[196]

Nonetheless Purdy felt the post-sentence allegation was not worth pursuing independently, and moved to dismiss the third claim with conditional prejudice, that is, Purdy agreed to a "with prejudice" dismissal of his the third claim, but only if, the adverse adjudications of his first two allegations were upheld on appeal.[197] The district court approved of the conditional dismissals.[198] The Second Circuit similarly approved stating:

> A plaintiff's attempt to appeal a prior adverse determination following the dismissal of his remaining claims without prejudice necessarily implicates the policies of the final judgment rule . . .
>
> [W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way. Unlike the plaintiff in *Chappelle*, Purdy runs the risk that if his appeal is unsuccessful; his malpractice case comes to an end. We therefore hold that a conditional waiver such as Purdy's creates a final judgment reviewable by this court.[199]

Ultimately, the Second Circuit affirmed the district court's order, the appeal was unsuccessful, and as a result, Purdy's case ended.[200]

Despite the rejection of conditional finality by the majority of circuits, there is still historical precedent for dismissing claims with attached conditions. For example, even before the *Ryan* rule was created, in *LeCompte v. Mr. Chip, Inc.*, the Fifth Circuit acknowledged that a district court's dismissal of a plaintiff's action without prejudice but with certain heightened conditions and limitations on the ability to reopen the case carried with it the requisite "legal prejudice" to be considered a final judgment. [201] Specifically, in *LeCompte*, the Fifth Circuit recognized that a dismissal without prejudice but with the court imposed conditions that:

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195 *Id*.
196 *Id*.
197 *Id*.
198 *Id*.
199 *Purdy*, 337 F.3d at 258.
200 *Id*. at 260.
201 528 F.2d 601 (5th Cir. 1976).

(1) any later suits be re-filed in the same court; (2) a showing of extraordinary circumstances be made, and (3) an affirmative demonstration of a valid cause of action be presented before the suit could be revived was an appealable final judgment. [202] The Seventh Circuit has more recently recognized a dismissal with certain conditions may lead to the "legal prejudice" necessary for an appeal, leaving open the possibility that other circuits may later adopt a similar view.[203]

c. The Supreme Court, Conditional Dismissals, and Manufactured Finality: SEC v. Gabelli

More recently, the Supreme Court decided a case involving claims dismissed with conditional prejudice, although the opinion centered on a securities law tolling issue, and declined to the address the issue of manufactured finality.[204] In *Gabelli*, the SEC brought a three count

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[202] *See id*. at 602.

[203] Palka v. Chicago, 662 F.3d 428, 438 n.4 (7th Cir. 2011) ("[i]f the district court imposes conditions on the voluntary dismissal, and if those conditions amount to 'legal prejudice,' the plaintiff then may have grounds for appeal.") (citing Parker v. Freightliner Corp., 940 F.2d 1019, 1023 (7th Cir. 1991)).

[204] Gabelli v. SEC, 133 S. Ct. 1216 (2013). The Court's unanimous decision rejects the discovery rule in determining when the statute of limitations begins to run on SEC claims based on the Investment Advisers Act for civil penalties. *See* Jonathan Macey, *Opinion analysis: That Which Does Not Kill the SEC May Make the Agency Stronger*, SCOTUSBLOG (Feb. 28, 2013, 12:04 PM), http://www.scotusblog.com/2013/02/opinion-analysis-that-which-does-not-kill-the-sec-may-make-the-agency-stronger/ (pointing out the decision on balance favors the SEC because if the statute of limitations ran according to when the SEC could have reasonably discovered fraud that it might be compelled to refute arguments in virtually every case that, had it been reasonably diligent, the SEC would have known of the fraud much earlier and therefore is time barred from bringing the case); Rachel McKenzie &Robert Cohen, *Supreme Court Unanimously Limits SEC's Ability to Bring Civil Penalty Claims to Conduct Older than Five Years*, ORRICK – SECURITIES LITIGATION AND REGULATORY ENFORCEMENT BLOG (Feb. 27, 2013), http://blogs.orrick.com/securities-litigation/2013/02/27/supreme-court-unanimously-limits-secs-ability-to-bring-civil-penalty-claims-for-conduct-older-than-five-years/#more-326 (evaluating the application of 28 U.S.C. § 2462 and explaining the Supreme Court's decision as being significant for three reasons: (1) Section 2462 applies to district court and agency enforcement proceedings; (2) its potential application to equitable tolling arguments involving Section 2462; (3) its potential application to injunctive relief and the Supreme Court's *SEC v. Bartek, et. al.* decision.); Christopher M. Mason, et al., *Gabelli v. SEC,* NIXON PEABODY: SECURITIES LITIGATION ALERT (March 1, 2013), http://www.nixonpeabody.com/Gabelli_v_SEC/ (claiming the *Gabelli* decision represents a victory for the defense bar, but cautioning that even if penalties are subject to a five year limitations period that other equitable relief may still be available to the SEC); Stephen A. Fogdall, *Gabelli v. SEC*: *The Supreme Court's Statute of Limitations Rulings Puts Pressure on Federal Agencies to Investigate More Aggressively and Sue More Quickly*, SCHNADER – FINANCIAL SERVICES LITIGATION ALERT (March 2013), http://www.schnader.com/files/ Uploads/Documents/FSLPG%20Alert_Gabelli%20v%20SEC_03-2013.pdf (highlighting the distinction between the SEC and privately aggrieved parties, and emphasizing that the decision may

complaint against a mutual fund's portfolio manager and the CEO of the fund's adviser.[205] The SEC sought civil monetary damages, disgorgement, and injunctive relief based on violations of the 1933 Securities Act ("'33 Act"), the 1934 Securities & Exchange Act ("34 Act"), and the Investment Advisors Act ("IAA" or "Advisors Act").[206]

The district court dismissed the first two counts of the complaint seeking injunctive relief, and also dismissed a portion of the third count seeking civil penalties under the Investment Advisers Act.[207] Only the SEC's claim for disgorgement based on the Advisors Act in the third count remained.[208]

The SEC ultimately felt disgorgement alone was an inadequate remedy and moved to voluntarily dismiss that claim with conditional prejudice [209] In other words, the SEC agreed it could only re-file the disgorgement claim "if but only if, the SEC [was] successful" on appeal.[210] The district court granted the SEC's motion to conditionally dismiss the disgorgement claim over the defendant's objections.[211] The Second Circuit affirmed the validity of the conditional dismissal, finding there was a final judgment, since, unlike a traditional dismissal without prejudice and nothing more, a party replaces the risk posed by the expiration of the statute of limitations with the risk that claims will be lost forever if their appeal is unsuccessful.[212] Upon exercising appellate jurisdiction, the Second Circuit reversed all of the district court's dismissals, and reinstated the '33,'34 and Advisors Act causes of action, including all claims for injunctive relief and civil penalties.[213]

Gabelli appealed, and the Supreme Court granted certiorari to resolve the limited question of whether the statute of limitations barred the SEC from recovering civil penalties through the Advisors Act.[214] Ultimately, on this issue, the Supreme Court unanimously reversed the Second Circuit

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put more pressure on the SEC to use its investigative parties more frequently and earlier in order to assume a litigation posture more promptly and minimize the risk of a limitations bar); Walter Olson, *Gabelli v. SEC: Fairness Wins, 9–0*, CATO AT LIBERTY (February 28, 2013), http://www.cato.org/blog/gabelli-v-sec-fairness-wins-9-0 (championing the *Gabelli* decision as a limitation upon the SEC's discretionary powers).

205 SEC v. Gabelli, 653 F.3d 49, 52 (2d Cir. 2011).

206 *Id*.

207 *Id*.

208 *Id*.

209 *Id*. at 56.

210 *Gabelli*, 553 F.3d at 57.

211 *Id*.

212 *Id*.

213 *Id*. at 61.

214 Gabelli v. SEC, 133 S. Ct. 1216 (2013).

and found the "discovery rule" did not apply to SEC actions based on the Advisors Act, that the statute of limitations had expired, and the SEC could no longer recover civil penalties.[215]

The Court's decision to grant *certiorari* but failure to specifically address the issues of conditional dismissals and manufactured finality may be for a variety of reasons. On the one hand, it could be that the Court simply overlooked the issue or found it lacked enough importance for its resolution in that term. On the other hand, the Court may have felt it was an inopportune time to address them for any number of reasons (docket management, lack of urgency, a desire to allow the doctrine to develop among the circuits before intervening, implicit approval of manufactured finality, or other reasons). Regardless, one thing is certain, the Court, unlike many of the circuits, has not yet decided that appellate jurisdiction is categorically improper in the presence of a conditional dismissal or a judgment manufactured for finality.

III. LIMITED ACCEPTANCE OF MANUFACTURED FINALITY

In this section, Part A argues that a gradual shift towards limited acceptance of manufactured is largely inevitable and already underway. Part B argues limited acceptance of manufactured finality and the Discretionary Standard is the most advantageous approach because of its net fairness, efficiency, and piecemeal litigation benefits, despite appellate resource and uniformity cost disadvantages. Part C argues that despite the disadvantages discussed, the Supreme Court should act to harmonize the transition towards limited acceptance of manufactured finality by: (1) adopting a discretionary approach and providing enumerated criteria for appellate courts to consider when deciding whether to exercise appellate jurisdiction and (2) explicitly permitting the dismissal of remaining claims with conditional prejudice in order to minimize the expenditure of appellate resources and maximize uniformity in the transition to acceptance of limited manufactured finality.

A. A Shift Towards Limited Acceptance of Manufactured Finality

Up until this point, the article has treated the three approaches to manufactured finality as entirely distinct and separate. Nonetheless in practice, through the creation of exceptions and intra-circuit divides, some

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[215] *Id*.

of the circuits are converging towards limited acceptance of manufactured finality, albeit at different paces and in different manners.[216]

On the one hand, the Eighth Circuit, usually a follower of the *Per Se* rule, recently applied a discretionary approach by finding appellate jurisdiction existed after determining there was an absence of manipulation.[217]

On the other hand, some of the *Ryan* circuits have created exceptions to strict finality and moved closer to a *de facto* Discretionary Standard.[218] For example, in the Fifth Circuit, a district court's dismissal of claims without prejudice for improper joinder did not prevent the plaintiff from seeking appellate review.[219] Similarly, in the Eleventh Circuit, a party's dismissal of claims without prejudice did not prevent appellate jurisdiction where an appellate panel ruled the district court improperly denied the joinder of an indispensable party.[220]

The transition is also found in the Second Circuit's acceptance of conditional finality.[221] For example, absent alternative appellate doctrines, *Ryan* jurisdictions refuse to consider a judgment final, unless remaining claims have been dismissed with prejudice or the claims have been fully adjudicated on the merits .[222] Nonetheless, as acknowledged in *LeCompte v. Mr. Chip, Inc.*, *Ryan* jurisdictions may eventually expand their views to embrace conditional finality, since "legal prejudice" does not necessarily require non-adjudicated claims to be dismissed with prejudice.[223]

At the same time, circuits that have historically applied a pragmatic view towards finality have carefully placed boundaries and limitations on their doctrines. For example, the Sixth Circuit and Eighth Circuit, traditionally *Per Se* jurisdictions, have recently found that conditional

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[216] *See generally* notes 44, 48, and 51 and accompanying text. These notes cite to *Ryan*, *Per Se*, and Discretionary Standard rule cases throughout the circuits. Although many appellate panels expressly endorse a single rule, some circuits have different lines of cases for different rules, while others adopt characteristics or rulings from competing rules in practice.

[217] Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785, 792 (8th Cir. 2012) ("In short, the circumstances here are inconsistent with a conclusion that Gannon sought to manipulate our appellate jurisdiction. So, we turn to the merits of the appeal.").

[218] *See* Brown Shoes Co. v. United States, 370 U.S. 294, 306 (1962); *Gannon Int'l, Ltd.*, 684 F.3d 785; Equity Inv. Partners, Lp. v. Lenz, 594 F.3d 1338 (11th Cir. 2010).

[219] *See* Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516 (5th Cir. 2010).

[220] *See* Equity Inv. Partners, Lp v. Lenz, 594 F.3d 1338 (11th Cir. 2010).

[221] *See generally* Section II(B)(7)(b), *supra* notes 193–215 (describing the Second Circuit's adoption of conditional finality despite being a traditional *Ryan* rule jurisdiction).

[222] *See generally* note 44.

[223] *See* Palka v. City of Chicago, 662 F.3d 428, 438 n.4 (7th Cir. 2011); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976).

dismissals were categorically inappropriate and denied the exercise of appellate jurisdiction.[224]

B. In Advocacy of Acceptance of Limited Manufactured Finality and the Discretionary Standard

Consideration of the seven criteria support the idea that the shift towards limited acceptance of manufactured finality is more than just a coincidence. Specifically, as *Ryan* jurisdictions face finality trap issues, and *Per Se* jurisdictions face piecemeal litigation concerns, exceptions and the need for movement towards a more moderate approach will become apparent. Admittedly, the limited acceptance of manufactured finality and the Discretionary Standard isn't without its own associated costs.[225] Nonetheless, between the three approaches it is the most advantageous approach in terms of its fairness, efficiency, and piecemeal litigation benefits versus its uniformity and appellate resource costs.[226]

Below is a discussion of the advantages and disadvantages of an adoption of the discretionary approach in light of the background section, fairness, efficiency, piecemeal litigation, uniformity, and appellate resources considerations.

1. Advantages

a. Fairness & Efficiency

Limited acceptance of manufactured finality balances the heightened fact pleading standard requirements marked by *Iqbal* and *Twombly*.[227] As plaintiffs are required to plead more fully developed factual accounts of their causes of action, the ability of parties to appeal partial judgments to obtain clarity on the application of legal authority makes sense in a world where pre-trial rulings can determine the terms of settlement.[228] In terms

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[224] *See supra* note 189.

[225] *See generally Barry*, 168 F.3d 8 at 21 ("The Seventh and Ninth Circuits' practice of combing the record for evidence of manipulative intent and the Third Circuit's analysis . . . waste resources better spent on the merits of appeals. Jurisdiction is a threshold matter."). *But see supra* note 87 (detailing that the added procedural review costs are not as great as they seem when compared to the alternative Rule 54(b) analysis which some have argued is unclear and is as burdensome if not more burdensome than the one applied by Discretionary Standard jurisdictions to reveal manipulative intent).

[226] This is generally because a Discretionary Standard simultaneously avoids the *Ryan* rule's potential unfairness to parties from the finality trap, and the *Per Se* rule's potential for creating significant piecemeal litigation. *See generally* Section II(B)(3-6), *supra.*

[227] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (adopting a heightened plausibility pleading standard).

[228] *See* Bergeron and Khula *supra* note 5.

of resources costs, the Discretionary Standard is also advantageous, since, unlike the past, the resource burden of appeals are significantly less burdensome than from large-scale discovery and trial proceedings.[229]

As noted in the introduction and background sections, the majority of high-stakes and complex cases are settled after pre-trial motions and discovery refine bargaining positions.[230] Because parties are less likely to proceed to trial in modern litigation, preventing parties from being able to manufacture finality, even in cases where the parties intentions are innocuous, creates situations where party's are forced to sacrifice viable and important supplementary claims, critical for bargaining leverage and resolving litigation without any appellate oversight or involvement. [231] In other words, without manufactured finality, trial courts are unintentionally left with the unexpected responsibility of having the last word on both fact and legal issues, rather than on fact issues alone.[232]

For this reason, the option to manufacture finality complements rather than undermines Rule 54(b).[233] Rule 54(b) still presents the only option for parties to obtain early appellate review, while remaining claims continue to be litigated at the district court.[234] There is reason to believe district courts will embrace the increased flexibility of manufactured finality as a complement to Rule 54(b).[235] As noted above, in *Ryan v. Occidental Petroleum*, the trial court in that case granted Rule 54(b), reversed its ruling, and then permitted the parties to manufacture finality.[236] Furthermore, the additional appellate oversight provided by a discretionary standard, especially in areas of law where vanishing trials

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[229] *See* Carrington *supra* note 15. Professor Carrington is troubled by the lack of access to appellate review in several respects. First appellate rulings are key to uniformity, fairness, and equality. In addition, appellate insight into complex legal issues facilitates settlement, and also potentially "fairer" settlements, because the parties are afforded a more detailed and nuanced understanding of their bargaining positions as the legal issues in their disputes will become clearer and more refined. Perhaps most importantly, access to the appellate courts before a traditional final judgment saves precious judicial resources. Unlike the times which spurned a strict interpretation of the final judgment rule, today, Justices no longer have to travel great lengths in order to hear an appeal.

[230] *See supra* notes 3–12.

[231] *See supra* notes 82–83.

[232] *See supra* note 13.

[233] *Cf.* State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 13 (11th Cir. 1999) ("Our precedent guides our conclusion that exercising jurisdiction here 'would undermine the policies of judicial efficency, avoiding piecemeal litigation, and district court independence that are the basis of the final judgment rule.'").

[234] *See id.* at 15.

[235] *See id. at* 13 ("Our precedent guides our conclusion that exercising jurisdiction here 'would undermine the policies of judicial efficency, avoiding piecemeal litigation, and district court independence that are the basis of the final judgment rule.'").

[236] *See generally* Ryan v. Occidental Petroleum, 577 F.2d 298 (5th Cir.).

and settlement are especially common, will likely be a much welcomed addition by district court judges and parties, since district courts may not necessarily wish to exercise the responsibility of administering justice in solitude.[237]

Unlike *Ryan*, the discretionary standard avoids the grave injustice of the finality trap.[238] For many trial attorneys, the issue of manufactured finality is an unfamiliar one. As a result, it is not uncommon for parties to manufacture finality unwittingly, and then be denied appellate jurisdiction.[239] Although some appellate panels have permitted parties to dismiss their remaining claims with prejudice at oral argument, this *ad hoc* solution is not a sustainable, workable, and long-term comprehensive solution, in light of its inability to prevent prevailing parties from blocking appellate jurisdiction.[240]

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[237] *See* Paul D. Carrington, *U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future*, in C. Harrison & R. Wheeler, eds., THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 71-79 (Federal Judicial Center 1989). Professor Carrington notes that the federal judiciary is at the heights of its influence, and that simultaneously that influence is entrusted to district court judges who are "at the cockpit" of the federal judiciary not only relative to the citizenry, but also relative to support from magistrates, special masters, and arbitrators.

In light of these circumstances, Professor Carrington argues district courts welcome and recognize the need for appellate court added involvement:

> [I]t is my impression that [district court judges] need and even want the appellate courts to share more in their many moments of travail. None, I am sure, wish to be reversed more frequently. But only an uncaring or unknowing judge would wish to perform so awesome a duty without others near at hand to give approval, advice, occasional correction, and moral support. Appellate judges are their "support group." Under the best of circumstances, their job is very difficult. It must be very trying to exercise so much responsibility in so great a solitude. Not only are our district judges increasingly undercompensated by their penurious employer, but they must suffer increasing neglect from those who are their support. It is a wonder that their professionalism remains as high as it does.

Id. at 78. Professor Carrington also believes that Roscoe Pound would advance a theory of appellate court involvement in deciding legal issues, even before trial, and that this involvement would facilitate more and better settlements. *Id*. at 80-82.

[238] *See Barry*, 168 F.3d at 20 (Cox, J., concurring) (noting the *Ryan* jurisdictions rejection of manufactured finality leads parties into a finality trap where claims are no longer on trial or appellate court dockets); *see also* Local Motion v. Niescher, 105 F.3d 1278 (9th Cir. 1997) (in contrast to *Ryan* jurisdictions, the Ninth Circuit exercised jurisdiction where a prevailing party attempted to manipulate the appellate panel into blocking appellate review of the losing party's adverse judgment).

[239] *See* Pickens and Gattis, *supra* note 121.

[240] *See supra* note 160.

b. Piecemeal Litigation

As the most fundamental and historic concern underlying the final judgment rule, any proposed solution to manufactured finality must address piecemeal litigation concerns.[241] Admittedly, re-filing and successive appeals scenarios are rare, but nonetheless enormously costly and detrimental to the administration of justice by the federal and state judiciaries.

In light of *Coeur D'Alene*, the *Per Se* rule's re-filing risks and potential for creating horizontal and vertical piecemeal litigation is too great.[242] Permitting the possibility of dismissed claims to be re-filed or for successive appeals to be made without limit fails to acknowledge fundamental concerns underlying the final judgment rule.[243]

On the other hand, "regulated" access to the appellate courts through a discretionary standard and denial of jurisdiction to parties that have re-filed their dismiss claims or are likely to file successive appeals is a long-term, comprehensive, and workable solution. Similarly, parties that conditionally dismiss their claims avoid horizontal and piecemeal litigation concerns since a party's claims are only revived if successful on appeal.

2. Disadvantages

The discretionary standard approach carries with it uniformity and procedural review costs which its alternatives do not. These are briefly discussed below.[244] Part C of this section also addresses means to minimize these disadvantages.

a. Uniformity & Appellate Resources

In comparison to the *Ryan* and *Per Se* rules, the Discretionary Standard carries with it uniformity and appellate review resource costs that the others approaches do not.[245] The primary concern will be whether

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[241] *See supra* notes 82–83.

[242] *See* State of Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999); Fletcher v. Gagosian, 604 F.2d 637 (9th Cir. 1979).

[243] *See supra* notes 82–83.

[244] *See American States Ins. Co. v. Dastar Corp*, 318 F.3d 881 (9th Cir. 2003); State Treasurer of State of Michigan v. Barry, 168 F.3d 8, 21 (11th Cir. 1999) (Cox, J., concurring).

[245] *See Barry*, 168 F.3d 8, 21 (Cox, J., concurring) (Arguing in favor of a *Per Se* rule, Judge Cox believes the "practice of combing the record for evidence of manipulative intent . . . waste[s] resources better spent on the merits of appeals. Jurisdiction is a threshold matter. A bright-line rule is therefore preferable to determine whether

scenarios involving similar material facts would be granted appellate jurisdiction in some cases, but denied in others.[246] Similarly, if appellate dockets are overloaded, it is possible some of the circuits may believe their resources would be better spent on substantive issues rather than on the issues surrounding manufactured finality.[247]

Nonetheless, although these concerns are valid, the Supreme Court can and should act to minimize the uniformity and appellate resource costs by enumerating or codifying as many factors as it can to guide the federal appellate courts when deciding whether to grant jurisdiction. In large part, many of the factors have already been identified by the appellate courts and the only thing lacking is Supreme Court attention, interest, guidance and action on the issue.[248]

C. The Supreme Court Should Harmonize the Move Toward Limited Acceptance of Manufactured Finality by Adopting the Framework of a Discretionary Standard Permitting Conditional Finality

> There are important and related consequences of indeterminacy in our law. It affects the conduct of lawyers in both litigation and settlement; and it reallocates power within the judiciary, making appellate courts less effective and conferring increased discretion on individual district judges.
>
> With respect to lawyers, increasing indeterminacy of federal law weakens the constraints of professionalism that operate on lawyers as they draft and file pleadings, motions, and discovery requests to be filed in federal courts. The willingness of lawyers to make contentions resting on legal premises of doubtful merit is increased. Lawyers are more likely to "press the inside of the envelope" of legal entitlements to the bursting point, thus imposing unjust costs on adversaries as well as courts and themselves.[249]

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jurisdiction exists or not . . . . [D]ismissals without prejudice should be considered a proper component of a final decision . . . ." (citations omitted)).

[246] *E.g., American States Ins. Co.*, 318 F.3d 881 (where the majority ruled against the exercise of appellate jurisdiction over a lengthy dissent by Justice Ferguson).

[247] *See Barry*, 168 F.3d at 21 (Cox, J. conurring).

[248] *See* Section II(B)(5), *supra* 141–47 (describing different factors appellate courts have evaluated when deciding whether to reveiew a judgment manufactured for finality).

[249] *See* Paul D. Carrington, *U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future*, in C. Harrison & R. Wheeler, eds., THE FED. APP. JUDICIARY IN THE 21ST CENTURY (Federal Judicial Center 1989).

Uniformity is critical to provide the clarity the courts, lawyers, and the citizenry need to understand their rights in federal court.[250] In *Gabelli*, the Supreme Court declined to provide guidance or issue an opinion on the portion of the case involving manufactured finality.[251] At best, the non-clarification could be construed as an implicit approval of the practice since the Court is under an on-going obligation to address all jurisdictional questions regardless of whether the parties raise them in their briefs.[252] On the other hand, there is case law where the Supreme Court has declined to address a virtually identical jurisdictional issue in one case, later acknowledged it another – only to ultimately find in the later case that jurisdiction was likely inappropriate for both.[253]

Irrespective of *Gabelli*, the Court should endorse a discretionary standard and permit parties to dismiss claims with conditional prejudice through its rulemaking authority or *stare decisis*.[254] Specifically, the Court should identify factors weighing in favor and against the exercise of jurisdiction with the recognition that none are entirely dispositive.

> Factors weighing in favor of the exercise of jurisdiction would be where:
>
> (1) dismissals are with court approval;[255]
>
> (2) dismissals are with party approval;[256]

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[250] *Id*.

[251] Gabelli v. SEC, 133 S. Ct. 1216 (2013).

[252] *Cf.* Bowen v. Massachusetts, 487 U.S. 879, 882–83 (1988) (noting implicit approval of jurisdictional issue by granting jurisdiction and deciding the merits in *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524 (1985)) *cited in* Catherine T. Struve, Memorandum to Advisory Committee on Appellate Rules Re: Item No. 08-AP-H at n.17 (March 25, 2013) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/AP2013-04-Vol-1.pdf.

[253] United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) *cited in* Struve, *supra* note 252 at n.18.

[254] THOMAS E. BAKER, *A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS* § 3.01 (Fed. Jud. Center, 2nd ed. 2009) ("In 1990, in a noteworthy legislative development, Congress amended the general rule-making statute to provide that the Supreme Court 'may define when a ruling of a district court is final for purposes of appeal' under § 1291. No such finality rules have yet been promulgated; therefore, appellate jurisdiction remains a function of court opinions interpreting and applying the statute.").

[255] *See* FED. R. CIV. P. 41(a)(2) (dismissal is with court approval); *see also supra* notes 72–73.

[256] *See* FED. R. CIV. P. 41(a)(1)(A) (dismissal as a matter of right and without party approval where the opposing party has not yet filed an answer or motion for summary judgment); FED. R. CIV. P. 41(a)(1)(B) (dismissal is with opposing party's approval). In both these types of dismissals, the court is not required to approve of the dismissals.

> (3) there is a reasonable risk that dismissed claims will be lost either due to the expiration of the statute of limitations or because there is an agreement between the parties that the dismissed claims may only be revived in the same district court if the appellate court reverses in whole or in part; [257]
>
> (4) the prevailing party has dismissed their remaining claims and it appears the dismissals are designed to prevent the exercise of appellate jurisdiction.[258]
>
> Factors weighing against the exercise of appellate jurisdiction would be where:
>
> (1) parties have engaged in dilatory tactics, including but not limited to prodding the district court to dismiss remaining claims without prejudice for failure to prosecute;[259]
>
> (2) dismissed claims have been re-filed and the presence of horizontal piecemeal litigation concerns;[260]
>
> (3) claims are dismissed in multiple steps or through amendments[261]
>
> (4) claims being dismissed closely relate to the claims being appealed and the number of parties and complexity of litigation would invite piecemeal appellate review.[262]

The enumerated criteria for courts to consider would be virtually identical to those already present in the case law, with the modification that dismissals with conditional prejudice would no longer *categorically* weigh against the exercise of appellate jurisdiction. This type of rule would acknowledge that what matters most is whether there is *some recognizable risk* to refiling, regardless of whether that risk comes from the expiration of the statute of limitations or the likelihood that an appellate court will affirm a district court's ruling on appeal.[263]

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[257] *See supra* notes 72–73, 185.

[258] *See* Section II(B)(6)(b), *supra* notes 163–86 (describing cases where prevailing parties dismissed remaining claims without prejudice to create appellate jurisdiction, and *Local Motion* where the prevailing party dismissed its remaining claims with the intent of blocking appellate jurisdiction).

[259] *See* Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984); Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979).

[260] *See* Fletcher v. Gagosian, 604 F.2d 637 (9th Cir. 1979).

[261] *See* American States Ins. Co. v. Dastar Corp., 318 F.3d 881 (9th Cir. 2003).

[262] *See id.*

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

Although agreements dismissing claims with conditional prejudice often times remove the statute of limitations risk traditionally applied to dismissed claims– the removal of that risk is not the end of the analysis. Put in another way, although parties avoid the risk that dismissed claims will be lost due to the expiration of the statute of limitations, parties instead run the risk that dismissed claims will be lost if the appellate court affirms the district court's rulings . In the event the appellate court reverses, unlike other judgments manufactured for finality, dismissed claims are *revived* and heard by the same district court where they were first dismissed. This prevents a new district court from having to familiarize itself with the facts of the case, saves resources avoids horizontal piecemeal litigation, and promotes district court authority[264]

Assuming that eighty percent of federal district court judgments are affirmed on appeal, conditional finality is also efficient, because in most cases, the remaining claims will be dismissed with prejudice.[265] As a result, a party's willingness to tie their ability to revive their claims to a twenty percent chance that the appellate court will reverse the district court is a risk of losing those claims that is likely much greater than from the expiration of the statute of limitations. With time, parties should discover that taking the risks associated with conditional finality is only rational if there is a high degree of confidence that the district court made a blatant error in its adjudication.

This type of rule is also fairer regardless of whether the appellate courts affirms or reverses on appeal. In cases where a party is right, the district court has made an error, and the appellate court reverses, the parties will not have been "forced" to dismiss their remaining claims with prejudice and lose them forever on account of an oversight. On the other hand, in cases where the party is wrong, there is no district court error, and the appellate court affirms, cases will end, but with the added fairness and understanding that the decision to seek early appellate review was taken voluntarily, and at the high risk that their remaining claims would be lost.

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[264] Revival of claims in the same district court prevents a new district court from having to learn the facts and circumstances surrounding remaining claims. Also, it avoids undermining the original district court, even if this approach requires a more expansive view of finality than traditionally used by even *Per Se* and Discretionary Standard jurisdictions. *See generally supra* notes. 55–79 and corresponding text.

[265] THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 3.01 (Fed. Jud. Center, 2nd ed. 2009) ("Pragmatically, the final-decision requirement recognizes that most decisions appealed after final judgment – more than four out of five – are affirmed, and presumably so would most interlocutory appeals."); *see also* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Affect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 (2005) (finding the Supreme Court reverses 64% of the time, but that appellate courts affirm 90% of the time) *cited in* BAKER, *supra* at 8, § 1.03 n.42.

CONCLUSION

Ultimately, a discretionary standard which permits conditional finality is designed to reward parties acting in good faith with the desire for early appellate review. By increasing access to the appellate courts in an incremental fashion, modernizing the final judgment rule to permit limited forms of manufactured finality will adjust federal practice to the new cost structures of litigation, while respecting the historic and deeply rooted interests underlying the final judgment rule. Supreme Court action and endorsement of discretionary criteria will help smooth the inevitable transition to a modernized view of the final judgment rule. The resulting increase in access to the appellate courts will save federal court resources, provide a more level playing field for parties, and increase the quality and fairness of settlements which define today's high-stakes, complex, and international litigation playing field.