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Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims

Rebecca A. Cochran*

"I can never get the Seventh Circuit to take an interlocutory appeal."¹

I. INTRODUCTION

In recent decades, the paths from federal district courts to the federal circuit courts of appeals have narrowed considerably. Appeals through rule 54(b),² section 1292(b),³ the collateral order doctrine,⁴ and other

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2. Federal Rule of Civil Procedure 54(b) provides for entry of judgment upon multiple claims or involving multiple parties:

   When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all of the parties.

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

979
avenues have become increasingly limited, compelling district court litigants and judges to test the limits of the most prevalent appellate path—appeal from a final judgment. This Article argues that the purposes of the final judgment rule, including judicial economy, are served, not hindered, by voluntary dismissals with prejudice of peripheral claims to render final an earlier ruling that decided the heart of the litigation.5

First, this Article profiles the district court cases in which peripheral claims dismissals typically occur. Then, the Article offers the contradictory appellate court responses to this dismissal practice.

The Article next contends that this controversial dismissal practice presents further evidence of ways in which the final judgment rule6 has been shaped by a caseload “crisis in volume” at both the trial and appellate levels.7 This volume has given rise to trial and appellate

3. 28 U.S.C. § 1292(b) (1994) provides:
   When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order:
   Provided, however, That application for an appeal hereunder shall not stay the proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

4. The collateral order doctrine, first articulated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), established a limited, judicially-created exception to the final judgment rule. See infra notes 78-84 and accompanying text for further discussion.

5. The practice of voluntarily dismissing some claims to make final an earlier decision does not have a distinct label. The term “peripheral claim” is coined and used here to indicate that after a partial summary judgment or dismissal ruling on a claim or several claims in a complaint has been rendered, the remaining or “peripheral” claims may be judged as meriting voluntary dismissal to allow an appellate review of the already adjudicated claims in the litigation. Peripheral claims are not frivolous or unimportant; they have simply assumed a different status after the district court has ruled on other claims in the litigation. Thus, “[a] party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected [peripheral] claims, invite a final judgment, and thereby secure review of the adverse ruling.” Atlanta Shipping Corp. v. Chemical Bank, 818 F.2d 240, 246 (2d Cir. 1987).

6. The final judgment rule is most readily defined as the doctrine now embodied in 28 U.S.C. § 1291 (1988): “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .” See also Bachowski v. Usery, 545 F.2d 363, 366 (3rd Cir. 1976).

7. The crisis in volume in the appellate court caseload is described and documented in Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume, 5-7 (1974) (as the 1960s began, “appellate courts in the United States, federal and state,
court case management techniques, designed to resolve cases before trial and to resolve appeals before briefing or oral argument. Trial courts have encouraged settlement by giving more autonomy to litigants to resolve their disputes and end the litigation, but some appellate courts find this trend goes too far when it includes concerted, deliberate efforts to create a final judgment. The growing reluctance of appellate courts to exercise their discretion in accepting rule 54(b), section 1292(b) and other discretionary appeals is analyzed as a case management mechanism.

The Article next focuses upon appellate courts' current response to the largest volume of appeals—final judgment orders under section 1291. The purposes and goals underlying the final judgment rule, including the goal of appellate case management, are reviewed. The present circuit conflict over the finality of voluntary dismissal of peripheral claims is analyzed within the framework of the crisis of volume and the judicial responses to overcrowded dockets. In particular, the trial and appellate courts' practice of overlooking or 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. The Article concludes that voluntary dismissal of peripheral claims, with prejudice, is an approach that advances, rather than subverts, the underlying purposes of the final judgment rule and ultimately supports the case management goals of trial and appellate courts. Some recent decisions, in which finality has been achieved through dismissal with prejudice of peripheral claims, wrongly deny appellate jurisdiction. Other decisions too readily accept appeals when peripheral claims are dismissed without prejudice, thereby undermining the final judgment rule by creating opportunities for

were ... inadequately equipped to cope with the torrent of appeals which lay ahead.); Thomas B. Marvell, Is There an Appeal from the Caseload Deluge?, 24 JUDGES' J. 34 (Spring 1985) (appeals have “increased rapidly—much faster than trial court caseloads, the number of judgeships, or any other factor one might associate with appellate volume.”); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 110 (1990) (“However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a ‘crisis of volume’ that has transformed them from the institutions they were even a generation ago.”).

8. See infra notes 36-53 and accompanying text analyzing case management techniques in trial and appellate courts.

9. Compare United States v. Kaufman, 985 F.2d 884, 889 (7th Cir. 1993) (finding appellate jurisdiction where record reveals no intent to manipulate appellate process) and Horwitz, 957 F.2d at 1433 (finding no appellate jurisdiction where parties intended to “force a decision” from appellate court) with Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 624 (7th Cir. 1986) (finding trial judge’s “intent” to create a final appealable order to be irrelevant).
piecemeal appeals. This approach advances a return to honoring the formalities of language. The dismissal order's language is viewed as a material condition of the relationship between the trial and appellate courts, rather than as a routine or empty formality. Reliance on the formal language, rather than a search of the trial court record for good or bad intent, will create a clear path to an appeal, as well as save time, curb frustration, and conserve judicial resources. Basing appellate jurisdiction on intent, rather than on the designation of dismissal with or without prejudice, weakens the final judgment rule and wastes much-needed judicial resources.

A. District Court Use of Voluntary Dismissal of Peripheral Claims to Achieve Finality

District court litigants and district court judges have manufactured or created appealable final orders by using or recommending voluntary dismissal of peripheral claims in district court litigation after the central or core claim or claims in the case have been dismissed or resolved in a summary judgment order.10 The voluntary dismissal11 with prejudice of remaining claims and counterclaims, which both parties may deem not worth pursuing, should render the earlier order dispositive, final, and appealable.

Often district court litigants have found significant portions of their cases are resolved by a district court's grant of a motion for summary

10. See, e.g., Cheng v. Commissioner of IRS, 878 F.2d 306, 311 (9th Cir. 1989)(appellate court suggesting to appellant that he may avoid "finality problem by simply dismissing his remaining claim and defenses without the option to pursue them should this court reverse"); Hanlin v. Mitchelson, 794 F.2d 834, 837 (2d Cir. 1986) (jurisdictional defect cured when appellant withdrew counterclaim after appellate oral argument); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 554 (9th Cir. 1986) (order may become final "when that portion of the case that remained in the district court has subsequently been terminated"), cert. denied, 484 U.S. 822, 823 (1987). See also 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914 (a final judgment may be "manufactured" by dismissing all of the remaining claims).

11. Voluntary dismissal is governed by Federal Rule of Civil Procedure 41. The voluntary dismissal at issue in these cases frequently falls under rule 41(a)(2).

FED. R. CIV. P. 41(a) Voluntary Dismissal: Effect Thereof.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
judgment or dismissal on several counts of a claim.\textsuperscript{12} Such decisions resolve the gist of the litigants' action, rendering unnecessary extensive and expensive trials.\textsuperscript{13} Experience may have taught counsel that their court of appeals reluctantly accepts interlocutory appeals under 28 U.S.C. § 1292(b),\textsuperscript{14} and rule 54(b) may also be unavailable because the remaining open counts may be tangentially related to claims already resolved.\textsuperscript{15} Entering a consent judgment or a stipulated dismissal order on the claim the district court has already determined may also result in loss of that claim's appealability.\textsuperscript{16} Suffering an involuntary dismissal on remaining claims could be a valid route to appeal,\textsuperscript{17} but some courts have closed that option also.\textsuperscript{18}

\textsuperscript{12} Horwitz, 957 F.2d at 1432 (trial court granted summary judgment motions and dismissed Counts I (civil RICO), II (breach of contract), III (constructive trust), IV (resulting trust), "leaving only Counts V-VII [trademark infringement, unfair competition, and unfair/deceptive trade practices] and defendants' counterclaim pending for trial"). \textit{See infra} notes 188-90.

\textsuperscript{13} Horwitz, 957 F.2d at 1438 ("[N]o, it doesn't make economic sense to try the balance of the case."); Otis v. City of Chicago, 29 F.3d 1159, 1172 (7th Cir. 1994) (concurring) (supporting use of dismissal with leave to reinstate to conserve district court's time and efforts because their "scarce resources" are "already overextended" they should not "expend even more time on cases that are going nowhere"). The time and expense currently involved in taking cases to trial in district court is well documented. Ordinary, as opposed to big or complex, litigation in the district court simply takes longer than it once did. The number of civil trials is up, and the average length of trials has increased. \textit{See} Michael Solimine, \textit{Revitalizing Interlocutory Appeals in the Federal Courts}, 58 GEO. WASH. L. REV. 1165, 1195 (1990) (explaining that current, "ordinary" district court litigation now tends to last longer when cases do go to trial); Judith Resnick, \textit{Failing Faith: Adjudicatory Procedure in Decline}, 53 U. CHI. L. REV. 494, 556 (1986) (analyzing trial length in data collected from 1945-1984).

\textsuperscript{14} Solimine, supra note 13, at 1166-67 (describing appellate courts as an "apparently hostile climate" for interlocutory appeals under either 28 U.S.C. § 1292(b) or the "collateral order" doctrine).

\textsuperscript{15} \textit{See}, e.g., Horwitz, 957 F.2d at 1433 (describing district court judge as dissatisfied with the "inhospitable attitude of this circuit to interlocutory appeals" under either rule 54(b) or 28 U.S.C. § 1292(b)).

\textsuperscript{16} \textit{See}, e.g., Amstar Corp. v. Southern Pac. Transp. Co., 607 F.2d 1100 (5th Cir. 1979) (per curiam) (disallowing appeal of consent judgment even when right of appeal was expressly reserved), \textit{cert. denied}, 449 U.S. 924 (1980); Jones v. Brown & Williamson Tobacco Corp., 840 F.2d 11 (4th Cir. 1988) (explaining that stipulated dismissal order encompassed "all claims that were or could have been raised"; party lost chance to appeal earlier court orders dismissing claims as barred or preempted).

\textsuperscript{17} Horwitz, 957 F.2d at 1438 ("The only alternative is to suffer a dismissal and appeal from [the] order."). \textit{See generally} \textit{5 James W. Moore et al., Moore's Federal Practice ¶ 41.11[2] at 41-147 (1995)} (involuntary dismissal is a final, appealable judgment).

\textsuperscript{18} \textit{See} Huey v. Teledyne, Inc., 608 F.2d 1234, 1239 (9th Cir. 1979), \textit{cert. denied}, 458 U.S. 1106 (1982); Marshall v. Sielaff, 492 F.2d 917, 919 (3rd Cir. 1974).
Recognizing and responding to the limited availability of appeals, litigants and trial judges have forged a new avenue for appeal that uses section 1291 and its mandatory right of appeal from a final judgment. Litigants and trial judges are highly motivated to seek a final judgment and appellate review of an earlier dispositive order because all agree the case is essentially concluded, save for the shouting and posturing. They may agree to amend allegations in the complaint or voluntarily dismiss the remaining counts of the complaint or a counterclaim still pending. The voluntary dismissal is often without prejudice, sometimes with prejudice. With these peripheral claims resolved, the judges and litigants view the earlier summary judgment or dismissal order as a final judgment and the parties appeal that final decision.

B. Appellate Court Response to Voluntary Dismissals

The district courts' use of voluntary dismissals to tie up the loose ends of litigation and thus appeal an earlier adjudication as a final decision has, however, split the circuit courts and divided three circuits within themselves. Splits arise over whether the appealability of the earlier

19. Solimine, supra note 13, at 1166 & n.6 ("Of course, the availability of such [appellate] review influences litigant and judicial behavior at the trial level.").


21. Note that the appeal sought is from the central, adversely adjudicated claim, not the voluntarily dismissed peripheral claim. A party may voluntarily dismiss a claim, but may not then appeal the voluntarily dismissed claim because he has not suffered an adverse adjudication from the court on that claim. See generally 5 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 41.02[6] at 41-41 (2d ed. 1996) (citing Seidman v. City of Beverly Hills, 785 F.2d 1447 (9th Cir. 1986) (holding plaintiff could not appeal after voluntary dismissal of claim because such dismissal was not an adverse judgment)).

22. Compare Chappelle v. Beacon Communications, Inc., 84 F.3d 652, 653 (2d Cir. 1996) (precluding appeal of plaintiff's adjudicated claims when remaining, peripheral claims were dismissed without prejudice); Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1078 (9th Cir. 1994) (same); Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992) (same); Ryan v. Occidental Petroleum Corp., 577 F.2d 298, 302-03 (5th Cir. 1978) (denying appeal and finding voluntary dismissal without prejudice of peripheral claims could not make adjudicated claims appealable) with Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) (allowing appeal of adjudicated claims when peripheral claims were voluntarily dismissed without prejudice); Fassett v. Delta Kappa Epsilon, 807 F.2d 1150, 1155 (3rd Cir. 1986) (allowing appeal when remaining peripheral claims had been "voluntarily and finally abandoned"), cert. denied, 481 U.S. 1070 (1987).

23. The issue has split the Seventh Circuit: compare Horwitz, 957 F.2d at 1435-36 (finding no final judgment when parties stipulated dismissal without prejudice of peripheral claims and appealed earlier partial summary judgment decision) with Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266 & n.1 (7th Cir.) (allowing
adjudicated claim "turns upon . . . the dismissal of the remaining claims with prejudice." Splits and intracircuit inconsistencies leave district court litigants and judges frustrated and uncertain about which procedure will satisfy the appellate courts and permit an appeal to go forward. One court of appeals accepts the appeal, finding a final judgment resulted from a voluntary dismissal without prejudice. Or, the court of appeals dismisses the appeal for lack of a final judgment because the voluntary dismissal was without prejudice. Or the court of appeals accepts the appeal because it has previously instructed the litigants to return to the district court, voluntarily dismiss the outstanding claims, and then return once the judgment is made final.

Thus, the appellate courts variously characterize the dismissal practice as unacceptable—the parties exhibit a bad intent to manipulate the judicial system to gain appellate review—or as an acceptable alternative that they suggest to trial court litigants seeking a final, appealable judgment. Appellate courts discount the language of the dismissal orders and instead expend scarce judicial resources scrutinizing trial records for evidence of the parties and the district court judges' good or bad intent in creating a final judgment through this voluntary dismissal practice.

appeal following voluntary dismissal without prejudice of peripheral claims), cert. denied, 429 U.S. 1029 (1976) with United States v. Kaufmann, 985 F.2d 884, 889 (7th Cir.) (allowing appeal when peripheral claims dismissed without prejudice, but when no evidence parties or judge intended to "create" appellate jurisdiction), cert. denied, 508 U.S. 913 (1993); the Eighth Circuit: compare DuBose v. Minnesota, 893 F.2d 169, 171 (8th Cir. 1990) (dismissal without prejudice for failure to prosecute did not make earlier adverse adjudication appealable) with Chrysler Motors Corp. v. Thomas Auto Co., 939 F.2d 538 (8th Cir. 1991) (finding final judgment when parties stipulated dismissal without prejudice of peripheral claims, thus making the earlier judgment granting partial summary judgment a final judgment for appeal although no rule 54(b) certification issued); and the Eleventh Circuit: compare Mesa v. United States, 61 F.3d 20, 22 & n.5 (11th Cir. 1995) (denying appeal when peripheral claims voluntarily dismissed without prejudice) with Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1007-08 (11th Cir. 1986) (per curiam) (allowing appeal of adjudicated claims when peripheral claims dismissed without prejudice).

24. Chappelle, 84 F.3d at 654.
25. Chrysler, 939 F.2d at 540.
26. Dannenberg, 16 F.3d at 1075 (concluding that a stipulation to dismiss did not "finalize" previous summary judgment order).
27. United States v. Kaufmann, 951 F.2d 793, 795 (7th Cir. 1992) (advising parties to return to district court and dismiss remaining indictments); Kaufmann, 985 F.2d at 890 (finding appellate jurisdiction because no intent by parties to manipulate judicial appellate process).
II. FINALITY AND JUDICIAL RESPONSES TO A CRISIS OF VOLUME

Some observers believe that an overload of cases at the trial and appellate level shaped, and continues to shape, nearly every aspect of federal practice in the 1980s and the 1990s.\(^{28}\) Numbers of trial court filings and appeals reveal part of the story.\(^{29}\) The size of the cases entering the system, such as environmental mass torts or civil RICO claims with multiple parties, multiple claims, massive discovery, and expert testimony, also plays a role in this crisis.\(^{30}\) Judges openly express their frustration over a perceived caseload crisis; regardless of the substantive issue before the court, a judge may use the occasion to comment on a crowded docket.\(^{31}\) Some judges may publicly urge that new limits be placed on federal jurisdiction at both the trial and appellate levels.\(^{32}\) Others question the perceived crisis of volume, debating its severity and its effects upon judges and the judicial system.\(^{33}\)

Whether the size of the increase in their caseloads may be quantified precisely or not, at least some portion of the trial and appellate judiciary has perceived and responded to a crisis in case volume and individual

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28. DANIEL J. MEADOR, MAURICE ROSENBERG, & PAUL D. CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL, 329 (1994) ("A study of appellate institutions apart from the volume problem would be wholly unrealistic. Indeed, much of what currently goes on in appellate courts can be understood only in relation to the growth in the number of appeals.").


30. See, e.g., In re Boise Cascade Sec. Litig., 420 F. Supp. 99, 105 (W.D. Wash. 1976) ("The explosion of litigation in the past two decades in terms of both the number of filings and the complexity and scope of many of those cases has led thoughtful minds to wonder whether the judicial system as we now know it can cope with some of these cases.").

31. See, e.g., EDC, Inc. v. Navistar Int'l Corp., 915 F.2d 1082, 1084 (7th Cir. 1990) (referring to counsel's manipulation of brief pages limits, "Game-playing wastes the time of this court, time increasingly scarce as our docket grows at a rate exceeding 10% each year.").


33. Michael C. Gizzi, Examining the Crisis of Volume in the United States Courts of Appeals, 77 JUDICATURE 96 (1993) (questioning lack of empirical evidence to support the alleged "crisis of volume" after survey revealed that federal appellate judges reported their workload was not overwhelming).
case size. Judges, legislators, and litigants have developed and proposed a wide range of procedural rules, techniques, and methods to address large caseloads and delays in the judicial process. The responses at both levels have produced a federal court system tending to encourage independence in litigants and judges to resolve disputes either before trial or on appeal, to produce less written work product, and to limit jurisdiction by screening for jurisdiction defects.

These responses have laid the foundation for and contributed to the current controversy over voluntary dismissals of peripheral claims to achieve a final appealable decision. Case volume and judicial responses to volume have engendered a certain mistrust between the courts on issues concerning finality. Appellate courts express concern that trial courts certify appeals perhaps too readily or promote voluntary dismissals to move cases off their dockets.\textsuperscript{34} Trial courts express frustration that appellate courts have narrowed their jurisdiction to protect their own workloads.\textsuperscript{35} In addition, the sheer volume and size of the cases at both levels may contribute to an indifference as to whether a voluntary dismissal order is entered with prejudice or without prejudice. In the rush to resolve cases quickly at the trial level or in the appellate screening process, the status of each claim in large litigation and the nature of its dismissal or resolution may be overlooked or remain unanalyzed.

A. Finality and District Court Case Management Practices

At the trial court level, the growing caseload has fostered independence of the parties and encouraged experiments by litigants and district court judges to manage and settle cases in new ways. Increasingly, parties work together, without court involvement, to manage the course of litigation in the district court. The parties' willingness to use Alternative Dispute Resolution ("ADR"), to innovate and negotiate, has gained judicial interest and generated hope that such practices will reduce the trial court dockets and, in turn, appellate court dockets.\textsuperscript{36}

Efforts to conserve judicial resources are evident, for example, in the 1993 amendments to the federal civil discovery rules, which may require

\textsuperscript{34} See infra notes 65-67, 148-50.
\textsuperscript{35} See supra notes 3, 18.
\textsuperscript{36} Solimine, supra note 13, at 1180 (district court focus on ADR methods reflects "belief that ADR will reduce the large backlog of cases facing trial and appellate courts."); Jeffrey W. Stempel, Reflections on Judicial ADR, 11 OHIO ST. J. ON DISP. RESOL. 297, 302 (1996) (finding ADR has been embraced by the judiciary, but now "requires additional experimentation, learning, and selection of the appropriate court reaction to different forms of ADR").
litigants to exchange information and to make potentially crucial disclosures without any court supervision and which may also require written certification of their efforts to resolve problems before scarce judicial resources will be used to resolve them. More recently, parties almost gained the power to stipulate to protective orders without the court having to find good cause to enter the protective order.

While district court litigants and judges have worked to create new ways of fostering settlement and streamlining litigation, some appellate court judges have expressed concern that trial judges have become overzealous in their settlement and docket control efforts. They fear that trial judges have delegated tasks to others or abdicated their proper judicial roles by permitting parties to develop new methods of resolving their own disputes. For example, trial court ADR techniques have expanded to such an extent that one appellate court expressed concern that a district court magistrate judge had improperly turned arbitrator to help the parties resolve their dispute.

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37. Fed. R. Civ. P. 26(a), (b) (requiring exchange of basic, relevant information without a formal request or court order); Fed. R. Civ. P. 37(a)(2)(b) (requiring party moving to compel disclosure to “include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action”).

38. The Federal Rules of Civil Procedure currently allow parties to stipulate to discovery procedures, Fed. R. Civ. P. 28, including the entry of protective orders, Fed. R. Civ. P. 26(c), but only upon a finding by the court that the protective order is entered “for good cause shown.”

In March 1995, the Judicial Conference of the United States rejected a proposal that would have allowed judges to enter the parties’ stipulated protective orders without first showing good cause. The Conference concluded the proposed rule would “not serve the public interest.” Henry J. Reske, Orders in the Court, 81 A.B.A. J. 28 (May 1995).

39. DDI Seamless Cylinder Int’l, Inc. v. General Fire Extinguisher Corp., 14 F.3d 1163 (7th Cir. 1994). The district court proceedings are viewed as the product of the parties’ “brainstorm.” The opinion also notes, with some concern, the efforts of the parties to modify, and often shorten, the course of litigation. Id. at 1166.

Parties are free within broad limits to agree on simplified procedures for the decisions of their case . . . . They can, of course, agree to binding arbitration, albeit before an arbitrator rather than a judge.

. . . . [I]f judges . . . could double as arbitrators, Judge Aspen, say, might issue an arbitration award and the winner might take it to Judge Zagel for an order of confirmation. It’s an ingenious idea and since “alternative dispute resolution” is all the rage these days— . . . the day may not be distant when federal judges will be recommissioned . . . as arbitrators. But it has not arrived.

Id. See also Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Masters, 137 U. Pa. L. Rev. 2215, 2216 (1989) (discussing appellate view of district court delegation of tasks to special masters and magistrates in response to trial court caseload); Stempel, supra note 36, at 302 (“Without a doubt, ADR has ridden a crest of popularity that at times resembles a fad.”).
This same appellate court concern that trial judges and litigants have gone too far in their brainstorming efforts to solve an overloaded docket extends to the practice of voluntary dismissal of peripheral claims to gain appellate review of adjudicated claims. When a meeting between the trial judge and the parties focused on creating a final judgment from voluntary dismissal of peripheral claims as the only remaining route to appeal open, the appellate court was offended. It found the conference sounded like the "meeting of a committee to reform the Civil Rules. That committee came up with a practical solution agreeable to all. . . . We need to examine this attempted de facto revision of the Civil Rules."  

A proliferating district court docket has spurred additional efficiency measures, including use of special masters and magistrates, summary jury trials, and a move to favor rulings from the bench, rather than written opinions. District court bench rulings may contribute to mistrust or miscommunication between the courts because the loss of a written opinion may weaken the ability of the appellate court to judge the factual and procedural record of the case below. When written opinions are issued, the appellate court, as well as the litigants, may

40. Horwitz, 957 F.2d at 1432-33.  
41. Magistrates are authorized to perform a range of district court tasks. Their appointment and duties are governed by 28 U.S.C. § 636 (1988).  

43. For example, the Northern District of Illinois recently circulated a proposed local rule that judges "rule orally whenever possible." The lower court opinions, therefore, would be available only through the transcriptions counsel obtain from the district court's court reporter. Such rulings from the bench do not create unpublished opinions to be picked up and distributed by Westlaw or Lexis-Nexis for on-line access. As a result, precedent that had been "inflated" by the rise of database services, particularly district court opinions, may be less inflated in the future. See Susan Brenner, PRECEDENT INFLATION 265 (1991) (studying the effects of putting "unpublished" opinions on-line, inflating precedent, and resulting in a "paradigm shift" into a "quantitative conception of precedent").
receive a fuller sense of the law, facts, and the district court's view of the case before it.44

B. Finality and Appellate Case Management Practices

Although the existence and extent of the crisis in volume continues to be debated, appellate courts, like trial courts, have implemented case management methods to help move an increasing appellate docket. Appellate courts have adopted no publication rules,45 limited oral argument,46 delegated tasks to clerks and staff,47 gained additional

44. The loss of a written opinion or the use of unpublished opinions has also been a concern at the appellate level. See infra note 51.


46. See, e.g., United States Court of Appeals for the Tenth Circuit Docketing Statement VI: "Indicate Whether Oral Argument Is Desired In This Appeal. If So, Why In Your Opinion Should Argument Be Heard?" See also WIS. APP. R. 809.19 (requiring appellant's brief to contain a statement with reasons as to whether oral argument is necessary); Fourth Circuit Rule 34(a) ("In furtherance of the disposition of pending cases under this rule, any party may include in his brief at the conclusion of the argument, a statement setting forth the reasons why, in his opinion, oral argument should be heard.").

Appellate judges express mixed opinions about the persuasive value of oral argument. Ruggero J. Aldisert, The Appellate Bar: Professional Responsibility and Professional Competence, 11 CAP. U. L. REV. 445, 456 (1982) (arguing that in 95% of appellate cases, written briefs are the basis for the court's decision). But see Myran H. Bright & Richard S. Arnold, Oral Argument? It May Be Crucial!, 70 A.B.A. J. 68, 70 (Sept. 1984) (offering a judge's statistics showing that oral argument changed his opinion about the outcome of the case in 51% of 139 cases heard during ten months).

47. Central staff attorneys are law clerks or assistants who serve the courts as a whole, rather than individual judges. Central staff attorneys perform a range of functions for state and federal appellate courts, including case management and settlement programs. See Ubell, Report on Central Staff Attorneys' Offices in the United States Court of Appeals, 87 F.R.D. 253 (1980).

Appellate judges also delegate certain tasks to their own judicial clerks, which has caused some commentators to suggest that judicial clerks may sometimes serve as "de facto" judges. J. Daniel Mahoney, Law Clerks: For Better or Worse?, 54 BROOK. L. REV. 321 (1988).
Appellate judges, and used district court judges to sit by designation on appellate panels. As in the district courts, appellate court opinions may be rendered verbally from the bench to save the time and resources required to generate a written opinion. This fast track appellate process results in no written opinion. When parties select the fast track, briefs are filed and the case is moved forward on the docket. The court may permit oral argument, pose questions, and then issue a ruling from the bench without a written opinion. The process eliminates a written opinion; thus, like the bench ruling below in the district courts, “the chief disadvantage is the lost opinion.” The loss of a written appellate opinion, or even unpublished opinions, may contribute to miscommunication or mistrust between the appellate and trial courts, evident in the current split over using voluntary dismissals to achieve appellate jurisdiction.

Additional appellate case management methods include settlement on appeal programs and CAMP programs. Some of these methods have, however, created derivative problems, in part because of the delegation of duties to court staff. When duties are delegated to staff attorneys and others, the tracking system itself may create confusion and inconsistencies in the granting of appellate jurisdiction.


50. See, e.g., D.C. Cir. R. 14(c).


52. See, e.g., Kaufmann, 985 F.2d at 887 (jurisdictional finality issue determined in unpublished order).

53. See, e.g., Dannenberg, 16 F.3d at 1047 n.1 (previous motions panel had found there was appellate jurisdiction, but court concludes there is none).
III. NARROWING DISCRETIONARY APPELLATE JURISDICTION TO LIMIT VOLUME

Case volume and judicial responses to case volume contribute to the current controversy over voluntary dismissal of peripheral claims to appeal a previously adjudicated central claim or claims. In the face of high volume, appellate courts may exercise discretion and narrow interpretations to limit the number of cases coming under appellate review. Outside the final judgment appeal of right under section 1291, discretionary appellate review may be available through either rule 54(b) or section 1292(b). Both of these avenues give trial court judges the discretion to enter and certify the orders to the court of appeals, rather than awaiting a final judgment order in the litigation. The appellate courts may exercise discretion to accept or reject the certification order. Appellate judges indicate an increasing reluctance to accept these appeals, thereby decreasing the volume of appeals.\(^5^4\)

Potential avenues of appeal under judicially-created interlocutory appeals, the collateral order doctrine, and the Gillespie test are infrequently available; moreover, they are not likely to be used any more frequently in the future.\(^5^5\)

A. Limiting Rule 54(b) Appeals

Rule 54(b) certification permits district court judges to create a final appealable order, but only for separable parties and claims.\(^5^6\) The rule recognizes that the single judicial unit has evolved into multiple judicial units and permits judges to enter a final judgment for individual claims in cases with multiple claims, multiple parties, or both. Rule 54(b) does

\(^{54}\) But see Horwitz, 957 F.2d at 1433 (district court’s decision to enter judgment under rule 54(b) is reviewed for abuse of discretion, but district court “discretion carefully exercised is rarely upset.”).

\(^{55}\) Not addressed here are the extraordinary routes to appeal available under mandamus, 28 U.S.C. § 1651 (1988), reviews of decisions granting or denying injunctions, 28 U.S.C. § 1292(a) (1988); or a judicially-created exception under Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) (exception for orders directing the immediate delivery or possession of property). These routes are employed in limited circumstances. The appeals analyzed here, however, have been more available in the past and are now more limited.

\(^{56}\) Rule 54(b) was designed to protect litigants whose claims are finally determined early in the course of a complex and protracted case. Randall J. Turk, Note, Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292, 67 GEO. L.J. 1025, 1030 (1979). Technically, Rule 54(b) orders are final, not interlocutory, but simply final as to a single party or a single claim.
not avoid the final judgment rule; rather, the ruling involved must be otherwise final under section 1291 to be eligible for a rule 54(b) order. 57 Under rule 54(b), appellate courts review district courts' certification under an abuse of discretion standard. 58 Appellate courts prefer that the district court exercise its discretion clearly by articulating the reasons supporting a rule 54(b) certification. 59 Some appellate courts' local rules expressly require such articulation. 60 Although the stated standard of review is abuse of discretion, appellate courts are reluctant to accept rule 54(b) appeals. 61 The appellate courts read rule 54(b) requirements strictly: certification for appeal should be made only as a remedy in "the infrequent harsh case." 62 Rule 54(b) is an exception to section 1291 finality, and an appeal under rule 54(b) is permitted "relatively rarely." 63 The appellate denial of jurisdiction following rule 54(b) certification orders often focuses upon improper collaboration between judge and parties, a practice appellate courts also fear in the context of voluntary dismissal of peripheral claims. In the context of rule 54(b) orders, appellate courts question a trial court judge's willingness to readily approve an order drafted by the parties. Certification "should not be entered routinely or as a courtesy or accommodation to counsel." 64 Abuse of discretion is found and appellate review denied when the judge "rubber stamps" the parties' requested certification. 65 When "it

58. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 10-11 (1980) (district court's decision to certify under rule 54(b) should not be overturned unless clearly unreasonable).
59. See, e.g., Horn v. Transcon Lines, 898 F.2d 589, 589, 592 (7th Cir. 1990) ("When a district court judge does not support a decision [to certify under rule 54(b)] an appellate court should be skeptical."); Knafel v. Pepsi Cola Bottlers, Inc., 850 F.2d 1155, 1159 (6th Cir. 1988) (cannot defer where district court recites words of rule without supporting reasons for rule 54(b) certification).
60. United States Court of Appeals for the Third Circuit, Local Rule 23 (cited in Anthius v. Colt Ind. Operating Corp., 971 F.2d 999, 1003 (3rd Cir. 1992)).
Rule 54(b) does not give this [appellate] court authority to decline to hear an appeal from final decisions disposing of separate claims and those interlocutory appeals of nonfinal orders. Under 28 U.S.C. § 1292(b) we may decline to hear an interlocutory appeal. The majority would prefer that we have the same power under Rule 54(b) and has devised an improper construction of the rule to achieve that result.
62. Allis-Chalmers, 521 F.2d at 362.
63. Solimine, supra note 13, at 1167 n.10.
64. Allis-Chalmers Corp., 521 F.2d at 363.
65. See, e.g., Horwitz, 957 F.2d at 1434.
appeared from the record that the district court had reflexively signed the Rule 54(b) order" that the parties drafted and presented, the Seventh Circuit Court of Appeals denied appellate review.  

B. Limiting Section 1292(b) Interlocutory Appeals

The district court may also certify an interlocutory order, under section 1292(b), containing: (1) a controlling question of law, (2) substantially arguable, and (3) that may materially advance the litigation. The appeal must materially advance the litigation, resulting in savings of litigants' and courts' time and expense. The substantial ground for difference depends on the trial court's estimation of the probability of reversal of the order in light of the circuit's law. Interlocutory appeals prevent injustice as a result of the final judgment rule. Without such avenues of appeal, certain interlocutory orders are effectively unreviewable on appeal from a final decision.

The appellate court "can then accept or reject the [section 1292(b)] appeal at its discretion." Thus, a section 1292(b) review does not defer at all to the district court, giving the appellate court much more control than the abuse of discretion standard used in a rule 54(b) review. The statute requires the district court to certify the order, but the appellate court accepts the appeal "in its discretion." The review of a section 1292(b) order requires no "review of or deference to


67. 28 U.S.C. § 1292(b) (1988); FED. R. APP. P. 5. The Supreme Court may now promulgate rules regarding the categories of interlocutory appeals available. Under 28 U.S.C. § 1292(e), "[t]he Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

The new provision of the statute acknowledges the very limited nature of interlocutory appeals and gives the Supreme Court the power to add new types of nonfinal orders to the list in section 1292. "The list of the appealable interlocutory determinations is in § 1292, and it's a small one." David D. Siegal, Commentary on 1988 and 1992 Amendments, 28 U.S.C. § 1292, at 335. See generally Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. PITT. L. REV. 717 (1993).


69. See generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW, TRIAL JUDGE: SUPERVISION AND DISCRETION § 4.11, 4-75 to 4-79 (2d ed. 1992).

70. As with the rule 54(b) certification, some appellate courts prefer that the section 1292(b) order include the district court's reasons for issuing the certification. See, e.g., Isa Fruit Co. v. Agrexico Agric. Export Co., 804 F.2d 24, 25 (2d Cir. 1986).

71. 28 U.S.C. § 1292(b) (1988). See also Martineau, supra note 68, at 731 ("A court of appeals . . . has absolute discretion to refuse to hear the appeal.").
the judge's decision to certify an order, since at that point the issue is one of appellate choice ...." 72 Thus, "[section 1292(b) is seldom a successful route to an interlocutory appeal." 73

With the increase in volume, the appellate courts have become even more reluctant to exercise discretion to receive interlocutory appeals under section 1292(b). Any factor, including appellate case docket congestion, may properly play a role in the appellate courts' decision to accept an appeal. 74 In exercising their discretion, some appellate courts have narrowed the statute's scope by requiring that the case be large and exceptional to qualify for section 1292(b) certification. 75 In the section 1292(b) setting, as well as in rule 54(b) cases, appellate courts also express concern that the district courts "not act routinely" in certifying such exceptional appeals. 76 Thus, "section 1292(b) by its terms" and by the courts' narrow reading, "is the most limited exception to the final judgment rule, statutory or otherwise." 77

C. Limiting Judicially Created Interlocutory Appeals

In addition to rule 54(b) and section 1292(b), judicially created interlocutory appeals are technically available, but infrequently successful. Interlocutory appeals may be permitted under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 78 which was

72. Childress & Davis, supra note 69, at 4-77.
73. Solimine, supra note 13, at 1167-68 (gathering statistics revealing "how few certified appeals are accepted by the circuit courts"); John C. Nagel, Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200, nn.133-135 (1994) (between 1985 and 1989, 1,411 appeals were certified by district courts and 504 were accepted).
74. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (under 28 U.S.C. § 1292(b), court may deny appellate jurisdiction for any reason, including congestion); Milbert v. Bison Lab., Inc., 260 F.2d 431, 433 (3d Cir. 1958) (exception "not intended to open the floodgates to a vast number of appeals . . . in ordinary litigation").
75. John C. Nagel, supra note 73, at 212 n. 97; Milbert, 260 F.2d at 433 (this exception to be used only in the "exceptional case"); Kraus v. Board of County Rd. Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966); In re Heddendorf, 263 F.2d 887, 888 (1st Cir. 1959); Solimine, supra note 14, at 1167 ("[S]ome federal courts have purported to limit the use of section 1292(b) to 'big cases,' and in fact, relatively few appeals are certified at the district court level or accepted by the circuit courts.").

With such an array of factors at hand in the realm of interlocutory appeals, proposals for reform of interlocutory appeals include creating new interlocutory categories or giving the appellate court discretion and factors to guide them in allowing interlocutory appeals. See generally Martineau, supra note 67, at 748-768.
76. Milbert, 260 F.2d at 433.
77. Martineau, supra note 67, at 731.
78. 337 U.S. 541 (1949). The case defined the four characteristics of an order, which when all are present, make an order effectively final and suitable for interlocutory appeal.
restated in Coopers & Lybrand v. Livesay\(^79\) to require that a collateral order may be appealable when: 1) it conclusively determines the disputed question; 2) it resolves an important issue; 3) it is completely separate from the merits of the action; and 4) it is effectively unreviewable on appeal from a final judgment.\(^80\) The doctrine remains viable, and the Supreme Court uses the doctrine,\(^81\) but "it is fair to say that collateral orders will not be a rich source of interlocutory appeals."\(^82\)

As with other routes to appeal, appeals under the collateral order doctrine have responded to caseload volume. Initially, appellate courts used the collateral order doctrine to allow an appeal from an order disqualifying opposing counsel.\(^83\) Several circuits followed this practice, but as the number of appeals based on this type of order increased, the courts retreated, deciding that this type of order should no longer be deemed a collateral order requiring appellate court review.\(^84\)

In another judicially created exception to the final judgment rule, the Supreme Court has formulated a balancing test for interlocutory appeals, allowing an appeal of an interlocutory order when the costs of continuing the litigation before an appeal outweighed the costs of piecemeal review.\(^85\) This balancing test, also known as the "practical (or pragmatic) finality" exception to the final order doctrine,\(^86\) "has

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First, the order was not tentative, informal or incomplete. Second, the order was separate from the merits of the case. Third, the delay of review risked serious irreparable harm to the defendant. Fourth, the dispute represented a serious and unsettled question.

80. Id. The collateral order doctrine recognizes the need for finality, but also recognizes the "worry that an aggrieved party will be denied review entirely." MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 121 (4th Cir.), cert. denied, 115 S. Ct. 510 (1994).
81. See, e.g., Swint v. Chambers County Comm'n, 115 S. Ct. 1203, 1207-08 (1995) (analyzing order denying summary judgment motion and concluding not an appealable collateral order under Cohen); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989)(collateral order exception interpreted with "utmost strictness in criminal cases" and court decisions denying collateral order appeals are "far more numerous" than those permitting such appeals).
82. Solimine, supra note 13, at 1171 (noting that opinions denying jurisdiction narrowly construe the doctrine because § 1292(b) is an available alternative route to an appeal).
84. See, e.g., In re Multipiece Rim Prod. Liab. Litig., 612 F.2d 377, 378 (8th Cir. 1980) (overruling Weber and joining sister circuits to find that order denying a motion for disqualification of counsel is no longer appealable under the collateral order rule); Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) (overruling previous decisions and holding that order denying motion for disqualification of counsel is not appealable under collateral order doctrine).
lived a checkered life, has been rejected by the commentators, and often has been avoided by the courts. Thus, the Gillespie test is not a likely avenue of appeal; it is narrowly interpreted, and indeed, its continued viability is in doubt.

IV. NARROWING FINAL JUDGMENT JURISDICTION TO CONTROL VOLUME

The most prevalent path to appellate jurisdiction is through an appeal of right from a final decision under section 1291. The appellate process typically begins when the trial court renders a final decision and files a separate judgment. Some appellate courts use the separate judgment requirement as a prerequisite to appellate jurisdiction — another means of dismissing the appeal for a jurisdictional defect, thereby limiting the number of appeals. Appellate courts then make
an independent review of the trial court records to determine if section 1291 jurisdiction exists. The section 1291 review gives none of the deference deemed present in a rule 54(b) certification review. In addition, unlike a section 1292(b) certification review, this review has no listed statutory factors to apply.

Because the majority of cases on the federal appellate courts' dockets comes from final judgment, rather than interlocutory appeal, this search of the record below for finality takes on an increased intensity in the setting of a crisis of volume. Indeed, "[t]he primary gatekeeper at the door to the federal courts of appeals is the rule that only final judgments are appealable."

The final judgment rule has long been a feature of appellate court function, and one long-established justification for the current federal rule is docket control. The Supreme Court, in interpreting the Judiciary Act of 1789 and the Judiciary Act of 1891, described the rule's history and justification, including the need to relieve the Supreme Court of the mounting burdens of increased litigation. The label "crisis of volume" does not appear, but


94. See, e.g., Marler v. Adonis Health Prod., 997 F.2d 1141 (5th Cir. 1993) (as a court of limited jurisdiction, court of appeals must determine whether it has jurisdiction before reaching merits of appeal). But see infra note 111 (citing cases where courts find jurisdictional question too difficult and simply reach merits of the appeal).


96. Nagel, supra note 73, at 200.

97. 15A Charles A. Wright et al., Federal Practice and Procedure § 3906, at 264-68 (1992) (tracing history of final judgment rule from the writ of error at English common law, but concluding that history provides "little useful guide for understanding or applying the requirement today"); Gerald T. Wetherington, Appellate Review of Final and Non-Final Orders in Florida Civil Cases—An Overview, Law & Contemp. Probs. 61 (Summer 1984) (describing history at English common law and need for final judgment rule because the trial court and appellate court could not simultaneously review the entire trial court record; thus, need for a final judgment rule).

98. McLish v. Roff, 141 U.S. 661, 665-66 (1891); M. Linda Concannon & Berniece A. Browne, What Ever Happened to the Right to Appeal?, 57 PLU/CorP. 511, 515 (1987) ("The requirement of finality was established in the Judiciary Act of 1789 for the purpose of conserving judicial resources."). The original rule did not share this purpose. Carleton M. Crick, The Final Judgment Rule as a Basis for Appeal, 41 YALE L.J. 539, 541-44 (1932) (noting that controlling volume of appeals was not an intent of the original final judgment rule, which may have begun simply as a part of courts' recordkeeping process).
it is manifest on the face of [the Judiciary Act], that its primary object was to facilitate the prompt disposition of cases in the supreme court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigation.\textsuperscript{99}

The final judgment rule remains, and few advocate its elimination.\textsuperscript{100} Its benefits include judicial efficiency because some issues a party seeks to appeal before a final decision may be mooted when the case is finally determined on its merits.\textsuperscript{101} The final judgment rule helps to avoid piecemeal appeals that may threaten the independence of trial judges.\textsuperscript{102} The rule prevents the potential harassment and cost that a series of separate appeals from the various individual rulings could create.\textsuperscript{103}

But the terse final judgment statute, unlike the certification standards defined in other appeals, does not list factors for the court to use in determining what is a final decision. A much-cited working definition for a final order is “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”\textsuperscript{104} The

\textsuperscript{99} McLish, 141 U.S. at 665-66.

\textsuperscript{100} See Carleton M. Crick, The Final Judgment Rule as a Basis for Appeal, 41 YALE L.J. 539 (1932) (arguing to eliminate appeals of right); Harlon L. Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 YALE L.J. 62 (1985) (arguing to eliminate appeals as of right).

The justification and goals of appellate review are not debated here. See Solimine, supra note 13, at 1175 (listing values of appeals as correcting factual and legal decisions, developing law applicable to “all geographically dispersed federal courts,” providing the litigants with review beyond the single trial court judge); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 16-19 (1994) (appellate courts perform dual functions of error correction and declaration of law).

\textsuperscript{101} Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987). See generally 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3913, at 462 (1992) (“Although well-established rules of appealability might at times cause an action to be determined unjustly, slowly, and expensively, they have nonetheless the great virtue of forestalling the delay, harassment, expense, and duplication that could result from multiple or ill-timed appeals.”).

\textsuperscript{102} Flanagan v. United States, 465 U.S. 259, 263-64 (1984) (the rule helps preserve the respect due trial judges by minimizing appellate court interference with the numerous decisions they must make in the pre-judgment stages of litigation); Parkinson v. April Indus., 520 F.2d 650, 652 (2nd Cir. 1975) (describing final judgment rule as “important tool” in regulating trial and appellate court relations). See generally ROBERT J. MARTINEAU, APPELLATE PRACTICE AND PROCEDURE 116 (1987).

\textsuperscript{103} Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

statute and the cases sum up the rule in a few catchwords, but the final judgment rule's flexibility has long made it a means of achieving appellate docket control.

The final judgment rule increasingly functions as a case management method for federal appellate courts. Indeed, independent review and screening for appellate jurisdictional defects is touted as a case management method that will "save appreciable appellate resources with a minimal investment." Staff attorneys in the Seventh Circuit, for example, seek to identify jurisdictional defects—often lack of a final judgment—and if a defect is perceived, issue an order to the appellant to state why the appeal should not be dismissed for lack of jurisdiction.

FED. R. APP. P. 28(a)(2).

107. Baker, Intramural Reforms, supra note 48, at 1332. See also United States Court of Appeals for the Tenth Circuit, Docketing Statement at 3.

3. Date final judgment or order to be reviewed was filed and entered on district court docket sheet.
   a. Does the judgment or order to be reviewed dispose of all claims by and against all parties? See FED. R. CIV. P. 54(b).
   b. If not, did district court direct entry of judgment in accordance with FED. R. CIV. P. 54(b)? When was this done?
   c. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)?
   d. If none of the above applies, what is the specific statutory basis for determining that the judgment or order is appealable?

108. Barrow v. Falck, 977 F.2d 1100, 1102 (7th Cir. 1992), appeal after remand, 11 F.3d 729 (1994). The order issued in Barrow stated:

A preliminary review of the short record indicates that the order appealed from may not be a final judgment within the meaning of 28 U.S.C. § 1291 . . . .

Generally, an appeal may not be taken in a civil case until a final judgment is
in about a fifth of all appeals” and that the screening process and jurisdictional orders successfully identify and often eliminate appeals that lack jurisdiction. Such screening procedures can, however, prolong the appellate process and create contradicting assessments of finality.

Recent interpretations of the final judgment rule respond to the crisis of volume. Although the statute and case law interpreting it appear to state the final judgment rule rigidly, it has been constantly open to judicial interpretation in response to the pressures of caseload volume and scarce judicial resources. Indeed, jurisdictional issues created by the dilemma of defining what makes an order final have sometimes rendered the jurisdictional question more difficult than the merits. Thus, some courts effectively punt by deciding the merits and simply not reaching...
the jurisdictional finality issue. The Judicial Improvements Act of 1990 recognized that the often "perplexing caselaw on what 'final' means" may too narrowly define finality and empowered the Supreme Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291...."

Circuit splits over finality issues have long existed and have continued to multiply. These splits and disputes reflect efforts of trial court judges to manage their dockets in the face of growing numbers of cases and the increasing complexity of individual cases. The courts split over the final nature of consolidated cases, consent judgments, and involuntary dismissals—all practices used to manage trial court dockets. Thus, case management practices at the district court level have often collided with the final judgment rule at the appellate level. Final judgments in consolidated cases divided the courts in the 1980s. The use of

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111. See, e.g., In re Villa Marina Yacht Harbor, Inc., 984 F.2d 546, 548 n.2 (1st Cir. 1993), cert. denied, 510 U.S. 818 (1993) ("Because the case is straightforward, and the party in whose favor the jurisdictional issue would operate is entitled to prevail on the merits, we elect to forgo unnecessary work and to bypass the question of appellate jurisdiction."); Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp., 980 F.2d 823, 829 (1st Cir. 1992) ("[W]e need not resolve the difficult jurisdictional issue ... since the contempt finding and sanctions were abundantly warranted."); In re DN Assocs., 3 F.3d 512, 515 (1st Cir. 1993) ("We do not reach the question of ... standing raised sua sponte by this court. After all, it is settled that an appellate court, confronted by a difficult jurisdictional or quasi-jurisdictional question, may forgo its resolution if the merits of the appeal are, as here, straightforward and easily resolved in favor of the party or parties to whose benefit the objection to jurisdiction would redound.").


114. 28 U.S.C. § 2072(c) (1994). "Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." Id.

115. Consolidated cases are allowed under Federal Rule of Civil Procedure 42(a). Under this Rule, district courts can more effectively manage their dockets. "District courts consolidate actions under a variety of circumstances to avoid duplicative proceedings." Jacqueline Gerson, The Appealability of Partial Judgments in Consolidated Cases, 57 U. Chi. L. Rev. 169, 172 (1990). These circumstances include actions which will require "identical legal or factual determinations," actions where claims are brought by "similarly situated plaintiffs or defendants," and where the district courts find the actions "could or should have been filed as a single action in the first place." Id. at 172-73.

116. Compare FDIC v. Caledonia Inv. Corp., 862 F.2d 378, 381 (lst Cir. 1988) (partial judgment always final because consolidated actions retain their separate identity) with Sandwiches, Inc. v. Wendy's Int'l, Inc., 822 F.2d 707 (7th Cir. 1987) (decide appealability on case-by-case basis) and Trinity Broadcasting Corp. v. Eller, 827 F.2d 673 (10th Cir. 1987) (partial judgments in consolidated cases require Rule 54(b) certification). See
consent judgments\(^{117}\) to reach a final appealable order generated controversy and conflict in the appellate courts.\(^{118}\) Appellate courts also debated the use of inviting the trial court’s involuntary dismissal to reach a final judgment.\(^{119}\)

The judicially created “death knell” doctrine presents further evidence of finality problems when trial courts must manage complex or large cases, particularly class actions. The doctrine holds that orders may be final judgments when they effectively end the lawsuit.\(^{120}\) The doctrine evolved from orders denying temporary relief,\(^{121}\) denying class certification motions,\(^{122}\) and orders, which, although not final in themselves, combined with other events or circumstances to end the action.\(^{123}\) Thus, some courts “permitted appeals from orders . . . on the theory that the denial sounded the death knell of the action.”\(^{124}\) Permitting such

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\(^{117}\) A consent judgment gives district court litigants a valuable process to resolve disputes. “A consent judgment results from mutual understanding and concerted action by the parties, as documented in a settlement agreement or stipulation which is consented to and sanctioned by the court.” Robert R. Zitko, *The Appealability of Conditional Consent Judgments*, 1994 U. ILL. L. REV. 241, 242 (1994).

Consent judgments, like the current practice of peripheral claim dismissal, were motivated by the litigants’ desire to resolve the case after a large or major portion of the claims have been resolved by a court decision: “To avoid the costs associated with litigating the case to its conclusion, particularly when the partial summary judgment has adversely decided the most important issues being contested, the party may enter into a consent judgment, expressly reserving its right to appeal the contested issues.” *Id.* at 243.


\(^{119}\) See, e.g., *DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990) (“[T]he sufferance of dismissal without prejudice because of failure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right.”), but see *id.* at 172 (Arnold, C.J., concurring in part and dissenting in part) (dismissal was with prejudice and appeal should have been permitted).


\(^{122}\) *Eisen*, 370 F.2d at 120-21.

\(^{123}\) *Staggers v. Otto Gerdau Co.*, 359 F.2d 292 (2d Cir. 1966).

\(^{124}\) 15A *WRIGHT, FEDERAL PRACTICE AND PROCEDURE* § 3912, at 451.
appeals allowed review of claims that would otherwise go unreviewed, and, if left in place, would end the action.\textsuperscript{125}

Now discredited in the class certification setting,\textsuperscript{126} the death knell doctrine offers some lessons about finality issues. Appellate courts have learned that speculating about the likely future of a case by examining the district court record for plaintiff’s intent, motivation to litigate, and individual financial resources is time-consuming, burdensome, and often futile.\textsuperscript{127}

V. VOLUNTARY PERIPHERAL CLAIM DISMISSAL WITH PREJUDICE CREATES A FINAL DECISION

With the limited use of discretionary appeals and the increasing scrutiny of final judgments, trial court judges and litigants began to use voluntary dismissal of peripheral claims to achieve a final decision and gain appellate review under section 1291. Voluntary claim dismissal is governed by Federal Rule of Civil Procedure 41(a)(2).\textsuperscript{128} A voluntary

\textsuperscript{125} See, e.g., \textit{Eisen}, 370 F.2d at 121 ("Dismissal of the class action in the present case . . . will irreparably harm Eisen and all others similarly situated, for . . . it will for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.").

\textsuperscript{126} \textit{Coopers & Lybrand} v. \textit{Livesay}, 437 U.S. 463 (1978) (finding that certification denial order was not final, appealable judgment under death knell doctrine and noting that death knell doctrine produced administrative nightmares, favored plaintiffs, and encouraged appellate court intrusion into trial court processes); \textit{King} v. \textit{Kansas City S. Indus.}, 479 F.2d 1259, 1260 (7th Cir. 1973) (per curiam) ("We decline to adopt and accordingly reject the so-called 'death knell' theory originally enunciated in \textit{Eisen}").

\textsuperscript{127} For example, appellate courts combed the district court record to determine the likelihood that the action would end without a class certification. \textit{Compare} \textit{Green} v. \textit{Wolf Corp.}, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (applying death knell doctrine and granting appellate jurisdiction to an individual plaintiff with a claim under $1,000) \textit{with} \textit{Shayne} v. \textit{Madison Square Garden Corp.}, 491 F.2d 397 (2nd Cir. 1974) (denying appellate review under death knell doctrine to individual plaintiff with claim of $7,482). \textit{See also} Randall J. Turk, Note, \textit{Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292, 67 Geo. L.J. 1025, 1034 (1979) ("Perhaps no exception to the final judgment rule has been as . . . difficult to apply as the judicially created death knell doctrine.").

Courts have retained, however, the concept underlying the death knell doctrine, the idea that some orders should become final because they "effectively terminate[] the litigation." See, e.g., \textit{McKnight} v. \textit{Blanchard}, 667 F.2d 477, 478-79 n.1 (5th Cir. 1982) (granting appeal where indefinite continuation of prisoner's trial would "make it impossible to produce . . . witnesses . . . and . . . effectively deprive him of his day in court.").

\textsuperscript{128} The voluntary dismissal orders at issue in the cases are dismissals sought after the defendant has filed an answer or a motion for summary judgment. Once these orders occur, the plaintiff can no longer voluntarily dismiss without leave of the court. Instead, the plaintiff must seek a court order by filing a motion for voluntary dismissal under Rule 41(a)(2). \textit{See supra} note 11 for text of this provision; \textit{Concha} v. \textit{London}, 62 F.3d 1493, 1506
dismissal may be with or without prejudice. Rule 41(a)(2) provides that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice."129

A. Honoring the Formalities of Language: Dismissal With Prejudice Is Required to Create Finality

The current finality controversy is rooted in the trial courts' often unexamined practice of designating the dismissal as a dismissal with or without prejudice, and the appellate courts' acceptance of an appeal, both without analysis of the designation. Yet the difference between the two designations—with or without prejudice—is night and day; they have opposite meanings. This lack of attention to essential designations may stem in both instances from the sheer number of cases and the number of claims and parties within each of those cases. With so many cases and so many claims within each case, the type of disposition rendered on each claim is difficult to locate at the trial court level and later within a voluminous appellate record. No appellate screening form focuses on peripheral claims; the focus is on the adjudicated, central claim being appealed.

The appellate courts' practices may also reflect suspicion that no matter which label the trial courts employ, the lower court judges and litigants may intend to move the case off the docket by wrongly creating appellate jurisdiction where, in reality, none exists. Therefore, some appellate courts have leapfrogged over the meaning expressly conveyed by the designation with or without prejudice to look for the trial court judges' and parties' intent.

Simply stated, a dismissal without prejudice leaves the party free to return to press the claim at a future date.130 A dismissal with prejudice creates the entirely opposite effect: the plaintiff has agreed "to a judgment that serves to bar his claims forever."131 The confusion

129. Fed. R. Civ. P. 41(a)(2). Whether to grant a voluntary dismissal under this provision of the Rule is within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994).


131. Concha, 62 F.3d at 1493. See also Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530, 534 (4th Cir. 1991) (finding that voluntary dismissal with prejudice has same effect as judgment on the merits).
began when some trial and appellate courts failed to analyze the labels attached to voluntary dismissals of peripheral claims. The labeling of a voluntary dismissal order as with or without prejudice is, however, not simply a ministerial detail readily waived or remedied after the fact. Nor is the label a matter of form that should be ignored so that an appellate court can focus on the intent of the lower court's decision; the choice of designation is the substance.

The finality of an earlier adjudicated claim should not be created by a peripheral claim dismissal without prejudice. That practice undermines finality and ignores the meaning of the term without prejudice. A peripheral claim dismissal without prejudice leaves the party free to pursue that claim against the same parties. The potential for piecemeal appeals becomes greater when the peripheral claim dismissal is without prejudice. A peripheral claim, dismissed without prejudice in the trial court, may be renewed and litigated again after the appellate court issues a decision on the central claim. A second appeal may arise from the same parties and the same litigation, the very result the final judgment rule seeks to prevent.

A peripheral claim dismissal with prejudice, however, forces the litigant to make difficult choices and to live with the consequences, while furthering the underlying purposes of the final judgment rule. The litigant can accept the adverse ruling on the central claims, take the time and money to pursue the remaining claims to trial or other completion, and then appeal. But, if the peripheral or remaining claims

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132. See supra note 94.

133. Albright v. UNUM Life Ins. Co., 59 F.3d 1089, 1092 (10th Cir. 1995) (where amount of disability benefits was not reduced to a sum certain, then appellate court could disregard label of order as final and “analyze the substance of the district court's decision, not its label or form.”); Concha, 62 F.3d at 1508 (9th Cir. 1995) (“We must still consider whether the Conchas Rule 41(a)(1) dismissal, though labelled a dismissal without prejudice, should nevertheless be treated as a dismissal with prejudice.”).

134. Dannenberg, 16 F.3d at 1077 (“litigants should not be able to avoid the final judgment rule without fully relinquishing the ability to further litigate unresolved [peripheral] claims”) (emphasis added); Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992) (“When a plaintiff voluntarily requests dismissal of her remaining claims without prejudice in order to appeal from an order that dismisses another claim with prejudice, we conclude that the order is not ‘final’ for purposes of § 1291.”).

135. See, e.g., Fassett v. Delta Kappa Epsilon, 807 F.2d 1150, 1168 (Adams, J., dissenting) (concluding that dismissal without prejudice means plaintiffs retained the cause of action and disallowing an “end-run” around the finality rule; “if 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 refile the dismissed portion as a separate lawsuit.”) (quoting Fletcher v. Gagosian, 604 F.2d 637, 639 (9th Cir. 1979)).
are judged to be weaker or ultimately less fruitful, they can be dismissed with prejudice and sacrificed to pursue an appeal on the claims that are most central to recovery for the litigant. If the case is going nowhere after a partial summary judgment or dismissal decision, then dismissal with prejudice of the peripheral claims efficiently and fairly permits an appeal that will not beget another later appeal and, thus, undermine the final judgment rule embodied in section 1291.\textsuperscript{136} Voluntary dismissal with prejudice followed by an appeal of the earlier adjudicated claims "furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end."\textsuperscript{137} Thus, the practice promotes judicial economy and preserves, not manipulates, the finality requirement of section 1291.

Finality for earlier adjudicated claims should be created only through dismissal with prejudice of peripheral claims. The practice of allowing dismissals of peripheral claims without prejudice to finalize earlier adjudicated claims likely evolved from a lack of analysis of peripheral claim dismissal in the press of cases waiting on the trial court and appellate court dockets. Often, such appeals are accepted without analysis of the peripheral claim dismissal.\textsuperscript{138} For example, the Supreme Court of the United States appeared to accept, without analysis, a voluntary dismissal of a peripheral claim without prejudice to seek the appeal of an earlier decision.\textsuperscript{139} A closer look at the case, however, demonstrates that any reliance upon it is misplaced. In \textit{National Broilers Marketing}, the Court noted a procedural history including efforts by the district court litigants "to facilitate the appeal" of a claim against one set of defendants by withdrawing without prejudice claims against another set of defendants.\textsuperscript{140}

In the district court, the Government brought an antitrust claim against the National Broilers Marketing Association (NBMA), claiming its status rendered it exempt from antitrust liability.\textsuperscript{141} In ruling on cross-motions for summary judgment, the trial court found the NBMA was a farmers cooperative entitled to a limited exemption under the law.\textsuperscript{142} In response to the ruling and "to facilitate the appeal," the

\begin{footnotes}
\item[136.] Dannenberg, 16 F.3d at 1077 n.3 (where claims dismissed with prejudice, plaintiffs were "not free to relitigate dismissed claims" and thus, there was "no reason to be concerned about circumvention of the final judgment rule").
\item[137.] Chappelle, 84 F.3d at 854.
\item[138.] See, e.g., Desnick v. American Broadcasting Cos., 44 F.3d 1345 (7th Cir. 1995).
\item[140.] Id. at 819-20 n.5.
\item[141.] Id. at 818.
\item[142.] Id.
\end{footnotes}
Government “amended the complaint to limit its allegations of conspiracy to the members of the NBMA.” The amendment “was done without any prejudice to any later renewal of allegations abandoned by the amendment,” and the trial court then “dismissed the amended complaint with prejudice.”

By accepting this practice, the Fifth Circuit and the Supreme Court permitted the Government to test the decision’s validity as to NBMA members through appeal, while allowing it the chance to pursue related claims against nonmember defendants after the appellate decision. The dismissal of the amended complaint with prejudice presented a final order. The appellate courts focused on the dismissal with prejudice of the amended complaint, a plainly appealable order, and did not consider closely the peripheral claim against nonmembers, a claim dismissed without prejudice and amenable to later reinstatement.

The decision in National Broilers Marketing reveals that in screening appeals, the primary finality focus is often on the central claim being appealed—the summary judgment decision, not the peripheral claim dismissal. Only more recently have appellate courts come to focus on the nature of the peripheral claims dismissal. The decision in National Broilers Marketing, however, does not support use of voluntary dismissal of peripheral claims without prejudice. The peripheral claim in National Broilers Marketing concerned a separate and distinct set of defendants and, thus, fell within rule 54(b). The claim could readily be viewed as final and appealable under that rule.

The current voluntary dismissal practice of some courts, however, involves dismissal without prejudice of peripheral claims involving the same parties as the already adjudicated central claim on appeal. The result of the National Broilers Marketing decision would not undermine the final judgment rule, nor create the potential for repeated appeals. The result of the current practice of voluntary dismissal without prejudice allows expressly for reinstatement and repeated or piecemeal appeals generated by the same litigation below.

B. Honoring the Formalities of Language Eliminates An Unnecessary and Wasteful Search for Intent

Appellate jurisdiction based on an intent requirement undermines finality and certainty in the appellate process. An intent requirement has been manufactured by some appellate courts, partly out of concern that the district court judge and litigants, pressed by the desire for volume and docket control, may manipulate the appellate process to gain

143. Id. at 819-20 n.5.
144. Id.
a quick, but unwarranted, early review. As a result of a wasteful focus on intent, terms with opposite meanings—with prejudice and without prejudice—have become interchangeable and been rendered meaningless in the appellate process.

The distinction between dismissal with and without prejudice is crucial. Ignoring labels and searching for intent replaces district court certainty with uncertainty and speculation. Peripheral claims must be dismissed with prejudice to preserve the final judgment rule. When appellate courts ignore or disregard the label assigned to the dismissal and simply search the record for intent as the real indicia of finality, the appellate process breaks down. Appellate jurisdiction is denied when intent is present and is granted when it is absent.

Evidence suggests that the appellate courts’ search of trial court records for intent comes, in part, from the appellate courts’ mistrust of the district courts’ desire to get cases off their dockets and onto the appellate courts’ dockets. Rather than relying upon the designation given in the dismissal orders, the appellate courts search for the district courts’ bad intent to manufacture appellate jurisdiction. The search for bad intent stems from broader appellate court concern over party independence and trial court responses to overloaded dockets. For example, in analyzing section 1291 finality within the context of a district court judge’s dismissal of a suit with leave to reinstate, the Seventh Circuit considered the district court judge’s motives for such a dismissal.

One difference between a dismissal with leave to reinstate and a continuance with dismissal in store if a step is not taken is that the immediate dismissal makes the district court’s statistics look better.

145. See, e.g., Horwitz, 957 F.2d at 1433.
146. See supra notes 36-53 and accompanying text discussing crisis of volume and case management techniques.
147. Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994).
148. Id. at 1163. The docketload statistics the appellate court refers to are required by 28 U.S.C. § 476(a) (1993), which states as follows:
   (a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending; (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and (3) the number and names of cases that have not been terminated within three years after filing.
Never should a court jeopardize a litigant's rights for the purpose of burnishing its own reputation.\textsuperscript{149}

Thus, the appellate panel openly viewed finality as vulnerable to manipulation by trial court judges for docket control purposes.\textsuperscript{150}

The search for intent may also be a search for good intent. For example, good intent may be found where, although the parties have dismissed without prejudice and preserved the right to a later appeal on the peripheral claims, the appellate court does not believe they really intend to bring such an appeal and create a problem with repeated appeals of the same case.\textsuperscript{151} Thus, although the dismissal without prejudice undermines finality principles, the court trusts the good intent of the parties not to bring another appeal in the future.

The appellate courts' willingness to ignore labels and search for intent has resulted in several distinct, but related, problems. First, some courts permit peripheral claim dismissal without prejudice to finalize an earlier order, satisfied by the parties' good intent not to relitigate after the appeal. Second, some courts recognize dismissal without prejudice will permit later appeals and, therefore, deny appellate jurisdiction, but still search the record for good or bad intent. Third, a few courts have denied jurisdiction even when the claims are dismissed with prejudice, again relying on evidence of the parties' intent.

In the first category of appeals, peripheral claims are dismissed without prejudice, but the appellate courts find finality. The designation leaves parties free to relitigate, creating the potential for piecemeal review. Rather than deny the appeal for lack of finality, the appellate courts ignore the dismissal designation. The courts accept the appeal, relying on the perceived good intent of parties not to exercise the right to litigate the dismissal affords them.\textsuperscript{152} Thus, the appellate courts

\textsuperscript{149} Otis, 29 F.3d at 1163.
\textsuperscript{150} Id. The concurrence in Otis, however, defends the practice and the district court judge's conduct, while noting the docket congestion at the trial court level.

In the current judicial climate, where congressionally-imposed time constraints on the civil docket compete with the Speedy Trial Act restrictions of the criminal docket, we should not be so quick to condemn a practice [dismissal with leave to reinstate] that has proved useful to our district court colleagues simply because it may, in a few isolated instances, create jurisdictional questions on appeal. Given the degree of docket congestion in the Northern District of Illinois, I think it incumbent upon us, as a responsive reviewing court, to provide our colleagues with all reasonable means of efficiently and intelligently managing their case loads.

\textsuperscript{151} See, e.g., United States v. Kaufman, 985 F.2d 884, 891 (7th Cir. 1993); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).
\textsuperscript{152} Kaufman, 985 F.2d at 891.
looked past the dismissal of a peripheral claim without prejudice, which allowed future piecemeal appeals, to search the record to speculate or determine the party's intent to actually exercise its right to a later appeal: "There is no evidence here that the parties and the district judge were attempting deliberately . . . to 'create' appellate jurisdiction. Although the government is free to seek a new indictment on the dismissed counts, there is nothing to indicate its intention to do so."153 Because the party exhibited no bad intent to manipulate the appellate process or to press the claims anew after appeal, the court deemed the dismissal of peripheral claims without prejudice as making the earlier adjudicated claim final.154

Within this same category of appeals, good intent may also be implied when a peripheral claim dismissal without prejudice is openly acknowledged by the district court judge.155 Apparently, the district court judge's knowledge of the dismissal order's terms is evidence the party did not try to deceive the trial court judge or manipulate the appellate process:

Where a court has entered judgment against a plaintiff in a case involving more than one claim and the plaintiff voluntarily dismisses the claim or claims, which made the judgment non-appealable and the dismissal [without prejudice] is brought to the attention of the district court, this Court will not penalize the plaintiff by dismissing his or her appeal.156

In this first category of appeals, the court should simply accept the party's expressed intent, which is a dismissal without prejudice, preserving the right to pursue a later appeal. Because of the possibility that piecemeal appeals will be created by a dismissal of peripheral claims without prejudice, the court should deny the appeal. The court's search for indicia of future conduct and motivation to determine if the party really will pursue the peripheral claims it has preserved and cause piecemeal appeals is time-consuming and entirely unnecessary. Parties should be held to the type of dismissal chosen.157 A dismissal without

153. Id.
154. Id.
155. Hicks, 825 F.2d at 120 (implying good intent and allowing appeal where district court had knowledge of dismissal without prejudice).
156. Id.
157. Even when statute of limitations appears to have run on claim dismissed without prejudice, the wiser choice is to honor the label. See Mesa v. United States, 61 F.3d 20, 22 n.6 (11th Cir. 1995) (rejecting argument that appellate jurisdiction exists because statute of limitations on the claims dismissed without prejudice have run and thus they cannot be relitigated, "[s]tatute of limitations matters often need much thought. And, an appellate
prejudice leaves the litigants to renew those claims. Allowing an appeal in these instances frustrates the final judgment rule and complicates what should be a straightforward process.

In a second category of appeals, the peripheral claims are dismissed without prejudice, and the appeals are dismissed, not only because dismissal without prejudice could generate later appeals and undermine finality, but in addition, because of the party's bad intent to manipulate appellate jurisdiction. For example, rather than simply accept the district court's dismissal without prejudice and find no appellate jurisdiction, the Seventh Circuit examined the record and found a bad intent to manipulate the appellate process. In describing the intent of a party who dismissed a counterclaim without prejudice, the court concluded: "It was clearly not the intention of the defendants to abandon their counterclaim which was not otherwise in jeopardy."

Where the dismissal is without prejudice, the court should accept the label and look no further for intent. It is not productive to criticize parties for intending to exercise in the future a right they preserved by dismissing without prejudice. Nor is it conducive to maintaining good relations between two courts who share a common enemy—an expanding docket of cases.

In the third category of appeals, the peripheral claims are dismissed with prejudice, precluding future appeals of those claims, but the court denies appellate jurisdiction over the remaining claims because of the party's bad intent. A peripheral claim dismissed with prejudice indicates that the parties have given up the claim completely. One appellate court, however, held the decision was not final despite that label. Although it dismissed the claim with prejudice, the court feared that even this dismissal allowed for the claim's "possible resuscitation." The court's majority glanced at intent, but stated that intent did not influence its decision: "[W]e are not disposed to fashion a rule that would depend upon nice calculations as to a

court, such as this one, is poorly situated to litigate and to decide, in the first instance, whether a statute of limitation has run to the point of barring an action; we cannot, for example, rule out the possible existence of tolling events which would not appear on the record on appeal."); Contra Fassett, 807 F.2d at 1155 (finding appellate jurisdiction and concluding dismissal, without prejudice rendered earlier adjudication final where two-year statute of limitations had run at the time and thus "the dismissal which was nominally without prejudice, was for our purposes, a final dismissal") (citing Carr v. Grace, 516 F.2d 502 (5th Cir. 1975)).

158. Horwitz, 957 F.2d at 1433.
159. Id.
161. Id.
plaintiff's motives, or lack thereof, for permitting a Rule 41(b) dismissal to be entered. 162

The dissent quite correctly accepted the with prejudice designation and found the dismissal rendered the earlier decision final and appealable. 163 But the dissent did not stop at the designation and chose to engage in an additional exercise—the search for intent: "I see no suggestion in this record that DuBose deliberately manipulated the system so as to obtain an early review of decisions that would otherwise not have been appealable." 164

In these appeals, the party has dismissed the peripheral claims with prejudice, giving up the right to pursue them at a later date. This makes final the earlier adjudicated claims and allows for appellate review. The search for intent wastes time by answering a question which has already been answered: Will the litigants create a series of future appeals by virtue of this dismissal? The answer is no—the dismissal has been entered with prejudice; thus, the claim cannot be resuscitated.

The practice of ignoring peripheral claim dismissal orders and searching the trial court record for intent is wasteful and confusing. Appellate jurisdiction should not depend upon the “nice calculations” of intent. In similar settings, courts have recognized that appellate jurisdiction should not turn upon the district court’s purpose or intent, but rather should turn upon the formal content of the judgment. 165 The search for intent under the death knell doctrine has proven nearly impossible to apply. Like the current search for intent, the death knell doctrine involved speculation about a party’s future conduct and motives. Thus, courts found the doctrine created “administrative nightmares” and encouraged appellate court intrusion into the details of the trial court’s processes. 166

In addition to wasting scarce appellate judicial resources, the search for intent and the contradictory decisions it has engendered have left district court litigants and judges with a defined path to an appeal under section 1291. Judges and litigants need to, but cannot, rely upon the meaning of the voluntary dismissal orders entered to communicate to the appellate courts. They “need objective [known] . . . criteria to guide their

162. Id.
163. Id. at 171-72 (Arnold, J., dissenting).
164. Id. at 172.
165. Glidden, 808 F.2d at 624 (finding district court judge’s “intent” irrelevant in the Rule 54(b) certification setting).
166. See supra notes 120-27.
decisions," but instead have received subjective and speculative searches of the record and a disregard for the formalities of dismissal orders. The frustration and uncertainty inherent in the appellate court's search for intent are exemplified in a recent district court decision, Desnick v. American Broadcasting Co. In that case, a district court dismissal order was assigned its opposite meaning based upon the district court's search for and discovery of earlier wrongful intent to manufacture finality by dismissing a peripheral claim. The unique aspect of this district court's search for intent, however, is that it occurred after the party's appeal and after the appellate court's opinion had already issued.

In Desnick, plaintiffs dismissed a peripheral claim without prejudice and then appealed the adjudicated central claims. Upon returning to the district court after their appeal, plaintiffs were denied reinstatement of a claim they had dismissed without prejudice, unless they could prove that they intended to dismiss it with prejudice, but later changed their minds.

The case fits a familiar profile of an action in which voluntary dismissal with prejudice of the peripheral claims would efficiently resolve the litigation. The dismissal, however, was without prejudice. The gist of the claims had been adjudicated: six counts of plaintiffs' seven-count complaint were dismissed, leaving only Count VI, a breach of contract claim. After the court dismissed Counts I through V and Count VII, plaintiffs filed a notice of dismissal of Count VI without prejudice, and the "Court dismissed Count VI without prejudice on May 31, 1994." Although the peripheral claim dismissal was without prejudice and thus undermined finality, the Seventh Circuit accepted the appeal without analysis and without expressing any concern that plaintiffs were free to revive Count VI. Thus, the appellate court disregarded the potential for repeated appeals. The Seventh Circuit affirmed the dismissals of Counts I, II, III, IV, and V, but reversed and remanded on Count VII, the defamation claim.

167. Glidden, 808 F.2d at 624.
168. Id.
170. Id. (The seven-count complaint originally included: Count I action for trespass; Count II invasion of privacy; Count III federal wiretapping violations; Count IV Wisconsin's wiretapping statute violations; Count V fraud; Count VI breach of contract; and Count VII defamation).
171. Id. at 958.
The parties returned to district court, and, not surprisingly, plaintiffs moved to reinstate Count VI, the count previously dismissed without prejudice. As plaintiffs succinctly stated the matter, "the phrase 'without prejudice' means precisely that an action may be reinstated . . . ." The district court, however, was not satisfied with the label, nor with the Seventh Circuit's acceptance of the appeal as a section 1291 appeal from a final decision. The district court retroactively searched for and found the plaintiffs wrongly intended to manufacture a final judgment. This wrongful intent was the basis for disallowing reinstatement after appeal of a claim dismissed without prejudice. Failing to find any direct evidence "indicating efforts to create finality," the court required plaintiffs to somehow prove that their dismissal without prejudice was really intended to be precisely the opposite—a dismissal with prejudice that would permanently end the claim. Failing proof of this wholly contradictory intent, the court denied the motion to reinstate:

Without any showing from plaintiffs that the voluntary dismissal of Count VI was intended to be a permanent dismissal and that the present effort to refile the claim in federal court is the product of a recent change of heart, the court concludes it cannot grant Plaintiffs' motion without sanctioning piecemeal appeals and undermining finality.

The results of the decision in Desnick, a party forfeiting a claim it expressly preserved, eloquently argues for finding intent in the terms of dismissal the parties choose to employ and nowhere else. Plaintiffs explicitly signaled their future intent to reinstate the count when they dismissed it without prejudice. The Seventh Circuit accepted the appeal, apparently willing to take the appeal in ignorance of, or in spite of, the language of the dismissal order on Count VI. The district court conditioned reinstatement on plaintiffs' ability to show they somehow, in their hearts and minds, had meant to dismiss Count VI with prejudice when, in reality, they employed the opposite label, without prejudice. The district court examined intent retroactively, requiring plaintiffs to prove their previous conduct was not an attempt to wrongfully gain appellate review when, in fact, they had already gained appellate review. Failing such proof, plaintiffs lost Count VI, a claim they sought to preserve by dismissing without prejudice.

173. Desnick, 31 Fed. R. Serv. 3d at 959.
174. Id. at 960.
175. Id.
Appellate courts have also manufactured appellate jurisdiction by disregarding labels, sensing the parties' intent, and prescribing a route to an appeal. Their prescriptions for jurisdiction share the same motivation as the district court judges and litigants who manufacture a final appeal: the recommended course of action will promote judicial economies of time and expense in the face of a large docket. For example, one appellate court suggested to litigants seeking an appeal that to create appellate jurisdiction, they needed to return to the district court to dismiss with prejudice the peripheral claims or to obtain a rule 54(b) certification.\(^\text{176}\)

The appellate courts also contribute to the finality problem, rather than curing it, because they fail to recognize the materiality of dismissal labels and thus fail to direct the litigants how to dismiss those claims—with or without prejudice—as if the designation were of no significance. In response to a party's first effort to appeal, the court offered this solution to appealability: "If counts three and four of the indictment are dismissed upon the government's motion, and if the defendant again files a notice of appeal, then in the interest of judicial economy the same panel will decide the appeal on the same briefs, without further oral argument."\(^\text{177}\) Unfortunately, the party returned to the district court, dismissed the remaining counts without prejudice, leaving them open to later reinstatement, and returned to the appellate court.\(^\text{178}\)

The appellate court allowed the appeal, despite the dismissal without prejudice, for two reasons. First, the court ignored the label because it did not think the party would really exercise its right to reinstate.\(^\text{179}\) Second, the appellate court concluded that because the litigants' dismissal with prejudice "was in response to our suggestion, it can be distinguished from . . . [an] attempt to bypass, rather than follow, the rules."\(^\text{180}\) Thus, appellate courts have contributed to the confusion in the appellate process by ignoring dismissal labels and through misdirections that fail to specify dismissal labels to litigants hoping to enter the appellate process. There is no principled distinction between the busy district court judge and the parties who determine how best to proceed with remaining peripheral claims after an earlier adjudication and the

\(^{176}\) Dannenberg, 16 F.3d at 1078 ("If, upon return to the district court, the plaintiffs dismiss their remaining § 11 claim with prejudice or procure Rule 54(b) certification and then file a timely appeal, . . . all papers filed in this appeal will be transferred to the new appeal and the case will be assigned to this panel.").

\(^{177}\) United States v. Kaufman, 951 F.2d 793, 796 (7th Cir. 1992).

\(^{178}\) Kaufman, 985 F.2d at 887.

\(^{179}\) Id. at 891.

\(^{180}\) Id.
appellate court judge who offers litigants a route to finality and the chance to have the same panel hear the case on later appeal now that the record is familiar.

VI. PERIPHERAL CLAIMS: CURRENT AND PROPOSED PRACTICES

The practice of voluntary dismissal with prejudice of peripheral claims can and should be used to finalize earlier adjudicated claims in litigation that has grown larger and more protracted in recent years. Appellate courts cannot accept this practice, however, unless its origin in the trial courts and its appealability are made clear to the appellate courts. Litigants have the responsibility to obtain dismissal orders of peripheral claims that state they are dismissed with prejudice and to account for the resolution of all pieces of the district court litigation.

At the trial court, judges and litigants may too often rush past the language of the voluntary dismissal order to get an appeal underway or to settle an old and tortured case and get it off the current docket. The phrasing of rule 42 simply adds to the problem of labels. Because a dismissal under the rule is without prejudice "[u]nless otherwise specified," the consequences of a dismissal without prejudice are not put in words plainly before the judge or the litigants in the text of the order itself.\textsuperscript{181} The order is signed, and the significance of the type of dismissal remains silent, certainly not the subject of an opinion or other discussion at the trial court level.

Some formalities of language are simply that—empty forms and routine words that can be set aside in a search for the substance of an issue or situation.\textsuperscript{182} However, the effect upon finality of a dismissal order with or without prejudice is not an empty form that either the trial or appellate court can ignore. Rather, the label is like a material condition or term in a contract between two parties: that term cannot be ignored, rendered meaningless, or allowed to assume an opposite meaning without destroying the relationship between the two parties.\textsuperscript{183}

A better voluntary dismissal practice, by individual judge or local rule, is to state both designations in the dismissal order itself—without

\textsuperscript{181} See supra note 10 for text of the Rule.

\textsuperscript{182} Willits v. Yellow Cab Co., 214 F.2d 612, 616 (7th Cir. 1954) (in construing the grounds for an objection under Rule of Criminal Procedure, the goal is to apprise the judge of the objection and the litigant is not required to adhere to "formalities of language and style").

\textsuperscript{183} In re ABC-Federal Oil & Burner, Co., 290 F.2d 886, 889 (3rd Cir. 1961) ("These disputed terms were not mere formalities or routine language, but material conditions in a specialized contract.").
prejudice or with prejudice—so that the docket entry and any other paper before the trial or appellate court would be clear beyond any doubt. Formal language in the order, rather than intent, would be the basis for analysis. Intent would not be based upon whether the district court judge knew of the type of dismissal order requested\textsuperscript{184} or whether the litigants were hoping the judge would not notice the nature of the dismissal order.\textsuperscript{185}

Appellate courts already employ well-developed screening procedures for jurisdictional defects. The current procedures suffer from tunnel vision by focusing nearly exclusively on the "order being appealed from" and its status as final or nonfinal.\textsuperscript{186} The court examines the central claim being appealed and searches for finality evidenced through section 1291, section 1292(b), rule 54(b), or some other means by which the central, adjudicated claim has become appealable and ripe for review. The analysis of the central claim on appeal is made difficult because of the number of cases, the large, complex cases with multiple claims brought by multiple parties, and the length of the case's history below. Trial court dockets with dozens of pages and hundreds of entries are not unusual.

As a result of the problems of volume and size in cases being appealed, appellate courts have not screened or analyzed peripheral claim dismissals consistently for their status as terminated with prejudice or open to reinstatement through dismissal without prejudice.\textsuperscript{187} Because of the large and complex nature of the cases coming in, appellate courts need a better method of accounting for all claims within cases. Such accounting has already taken place, at least partially, when the district courts and litigants use voluntary peripheral claim dismissal to finalize earlier adjudicated claims. After a dismissal or summary judgment on some of the central claims changes the tenor of litigation involving multiple parties and many claims,\textsuperscript{188} the parties sort out the impor-

\textsuperscript{184} Hicks, 825 F.2d at 120.

\textsuperscript{185} Kaufman, 985 F.2d at 891.

\textsuperscript{186} See supra notes 109-11. See also U.S. Ct. of Appeals for the Fourth Circuit, App. IV. App. of Forms, at 2 (including questions regarding final nature of "order or judgment appealed from a final decision on the merits," referencing Rule 54(b), collateral or interlocutory appeal, related cases, but not questioning status of other claims in the litigation).

\textsuperscript{187} See, e.g., Desnick v. American Broadcasting Cos., 44 F.3d 1345 (7th Cir. 1995) (appellate court accepted without any comment or analysis on the dismissal without prejudice of peripheral claims and rendered decision on the merits).

\textsuperscript{188} See supra note 15; Chapelle, 84 F.3d at 653 (plaintiff alleges various causes of action under federal, New York, and California law); Mesa v. United States, 61 F.3d at 21-22 (Federal Tort Claim action with multiple counts, including negligent procurement and service of an arrest warrant, assault and battery, false imprisonment, intentional infliction
tance of the claim. The process of discovery and pretrial litigation motions may have made litigating the central claims costly and time-consuming as it has the the prospect of litigating the remaining peripheral claims. The result of this sorting out process may be a voluntary dismissal with prejudice of peripheral claims that finalizes the earlier adjudicated claim.

Current appellate screening practices are already well in place and focused on the central claims on appeal. These screening processes, however, need a broader scope to include the resolution of the peripheral claims in the process. The district court litigants have already determined the status of all the claims, central and peripheral. They examined the status of these claims and then chose to finalize the central one or ones by voluntarily dismissing with prejudice the peripheral claims. This information needs to be conveyed quickly and completely to the appellate court screening committee or panel.

The appellate screening process for the information might take the form of a chart or formalized scorecard, with elements similar to the information typically sought in a trial court's pretrial order forms. Thus, a court's docketing statement or equivalent document would include a scorecard indicating: (i) each count or claim, separating claims against different defendants, (ii) the count's current status and if voluntarily

of emotional distress, invasion of privacy, and a Bivens action); Dannenberg, 16 F.3d at 1073-74 (class action securities litigation against group of auditors and underwriters); Fassett, 807 F.2d at 1153 (combining four related cases, named defendants filed cross-claims and impleaded a number of third party defendants).

189. See, e.g., Chappelle, 84 F.3d at 652 (Rule 12(b)(6) dismissal of claims against both defendants under New York law: sex discrimination, assault, intentional infliction of emotional distress; followed by voluntary dismissal without prejudice of remaining claims); Dannenberg, 16 F.3d at 1074 (granting summary judgment for all underwriters on all claims and all auditors on all but one claim; followed by voluntary dismissal without prejudice of single remaining claim); Cook, 974 F.2d at 148 (court dismissed "outrageous conduct" claim as preempted by federal law; plaintiff voluntarily dismissed remaining claims without prejudice); Chrysler Motors Corp., 939 F.2d at 540 (court granted partial summary judgment on counterclaims, including claim for punitive damages; followed by dismissal without prejudice of remaining claims); Fassett, 807 F.2d at 1154 (granting summary judgment on to each individual defendant; followed by voluntary dismissal of remaining claims); Studstill, 806 F.2d at 1008 (granting summary judgment on Counts II and III; followed by voluntary dismissal of Count I).

190. See supra note 13; Horwitz, 957 F.2d at 1432 (describing second amended complaint of 118 pages; fifteen depositions with "thousands" of documents; a summary judgment motion "supported by four substantial volumes of evidence" and observing that "[u]nfortunately this controversy has grown old in the system and not aged well.").

dismissed, an indication of dismissal with prejudice or without prejudice, and (iii) a reference to the proper docket sheet entry for each order cited in the document. The status of each count or claim would include cross-claims, counterclaims, defenses, or related claims that could affect finality of the central claim.

Such a chart, or grid screening form, would permit the appellate court screening committee or panel to review not only the status of the claim being appealed, but also the status of the dismissed peripheral claims. Voluntary dismissal with prejudice should be an accepted route to an appeal because it promotes judicial efficiency and preserves finality as well. Currently, such a route is difficult to recognize and accept because it is achieved in steps that are hard to locate in the record. Appellate courts cannot skim a docketing statement or other materials and readily spot this route to finality. It is much easier to recognize a rule 54(b) or section 1292(b) certification than it is to search through pages of entries to find partial summary judgment orders, voluntary dismissal orders, and then ascertain that all claims against all parties are fully resolved. The grid, or chart of claims, will give this route to appeal a clear profile for judges and appellate staff to recognize when determining proper appellate jurisdiction.

VII. CONCLUSION

The on-going conflict within and among the circuits as to whether a voluntary dismissal is made with or without prejudice and whether such a dismissal finalizes earlier decisions has needlessly plagued district and appellate courts. The lack of precision in use of language at both levels has cost circuit and district courts considerable time and trouble. The language issue has been caused by growing mistrust, fear of manipulation, and bad motives between the courts brought on by the sheer number of cases passing through the federal court system.

A return to the formalities of language will serve the efficiency of the judicial system and the final judgment rule. A dismissal without prejudice cannot finalize an earlier adjudication because by definition the claim dismissed without prejudice can be renewed, and the case may return for a second trip to the appellate court. A dismissal with prejudice, on the other hand, bars the claim forever; a future second appeal will not be heard. Such a dismissal should be permitted to

192. For example, the pretrial order form for the Northern District of Illinois requires the title of the count or claims: "this is an action for [insert nature of action, e.g., breach of contract, personal injury]," an indication of "waivers of any claims or defenses that have been abandoned by any party." Northern District of Illinois Local Rules 123, 125 (amended through 3/1/96).
finalize an earlier adjudication because it is an effective, valid means of settling a case and seeking a single appeal.

Honoring the formalities of language will eliminate any need to search for good intent not to refile a claim or for bad intent to manipulate the appellate process. Any and all intent is communicated through the order's designation, rather than speculating on the party's likely future conduct.

The pace of litigation is not likely to slacken any time soon. Both trial and appellate courts must develop more precise methods for screening appellate jurisdictional defects that arise, not in the claim being appealed, but in the status of the peripheral claims. Grids or other forms of reporting the status of claims in large, complex cases will help keep track of the details. The screening chart will make visible the twists and turns of increasingly complex, large-scale litigation and identify the claims remaining, if any, in the district court litigation. Such a return to the formalities of language is becoming more imperative as the press of litigation continues in this decade.