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THE FINALITY OF PARTIAL ORDERS IN CONSOLIDATED CASES UNDER RULE 54(b)

INTRODUCTION

The losing party in any civil litigation generally has a right to appellate review.1 The right to appeal provides an aggrieved party with an opportunity to reassert the justness of his cause and permits judicial self-correction.2 Appellate review also satisfies a basic need for uniformity, and facilitates the development of new law.3

Congress has given the federal courts of appeals jurisdiction to hear appeals from final judgments.4 Determining when a judgment is final is critical because the right to appeal depends upon it. If a judgment or order is not final, but rather interlocutory, an appeal can only be taken with the aid of some other statutorily or judicially created appellate mechanism.5 Because appeals must be filed within a certain time,6 the right to appeal could be lost if a litigant mistakenly believes a judgment is not final. Absent an ascertainable threshold of finality,7 numerous premature appeals could be filed as protective measures to retain the right to appeal,8 thus clogging up the courts and diverting judicial attention from more deserving matters. A comprehensive definition of a final, and thus appealable, judgment, however, has proved to be elusive.9

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1. See R. Martineau, Modern Appellate Practice § 1.1, at 8 & n.9 (1983). The Supreme Court, however, has refused to find a due process requirement of appellate review in civil cases. See Cobblelick v. United States, 309 U.S. 323, 325 (1940); see also R. Martineau, supra, § 1.6, at 18 (noting Court’s refusal). In fact, the Court stated that “the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice.” Cobblelick, 309 U.S. at 325.
2. See R. Martineau, supra note 1, § 1.6, at 18-19.
3. See id. at 19.
4. See 28 U.S.C. § 1291 (1982). The final judgment rule provides, in pertinent part, “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.” Id.
5. See Ronel Corp. v. Anchor Lock of Fla., Inc., 312 F.2d 207, 208 (5th Cir.), aff’d on other grounds, 325 F.2d 889 (1963), cert. denied, 377 U.S. 924 (1964); Wallace Prods., Inc. v. Falco Prods., Inc., 242 F.2d 958, 959 (3d Cir. 1957); infra notes 51-53 and accompanying text.
6. See Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984); 11 C. Wright & A. Miller, Federal Practice & Procedure § 2781, at 6 (1973). The Federal Rules of Appellate Procedure specify a time frame within which an appeal must be filed in order to be timely. See Fed. R. App. P. 4(a). This time period begins to run from the entry of a final judgment. See R. Martineau, supra note 1, § 2.1, at 27.
7. See generally Carrington, Toward A Federal Civil Interlocutory Appeals Act, 47 Law & Contemp. Probs. 165 (Summer 1984) (suggesting statutory revisions of appellate rules to clarify finality); Cooper, Timing as Jurisdiction: Federal Civil Appeals in Context, 47 Law & Contemp. Probs. 157 (Summer 1984) (arguing need to revise rules of finality/appealability); Rosenberg, Solving the Federal Finality-Appealability Problem, 47 Law & Contemp. Probs. 171, 172 (Summer 1984) (recognizing need for change but criticizing Carrington and Cooper views).
9. A final judgment has been defined as “one which ends the litigation on the merits
The problem of determining finality is compounded when cases are consolidated, producing a unique conflict between federal judicial policy and the rights of individual litigants. Federal Rule of Civil Procedure 42(a) permits consolidation of cases involving common questions of law or fact. Consequently, consolidation, an old and familiar tool of the courts, facilitates judicial efficiency by avoiding duplicative litigation. Although the policies underlying the finality requirement and consolidation are the same—achieving maximum efficiency without sacrificing fairness to the litigants—the application of the final judgment rule to consolidated cases creates conflicting results.

At times, judgments or orders are issued in consolidated actions that entirely resolve fewer than all of the original actions involved in the consolidation. These orders are called partial orders, and appeals from

and leaves nothing for the court to do but execute the judgment.” Catlin v. United States, 324 U.S. 229, 233 (1945); see Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 90 (1975). There has been a great deal of litigation to establish a definition of finality for different situations. Various orders have been tested for finality through the taking of an appeal. See 15 C. Wright & A. Miller, supra note 8, § 3909, at 440-41; see, e.g., Parr v. United States, 351 U.S. 513 (1956) (grant of dismissal of indictment); Fox v. City of West Palm Beach, 383 F.2d 189 (5th Cir. 1967) (order denying injunctive relief but permitting pursuit of claims for damages); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966) (order dismissing class action but permitting litigation of individual claims), cert. denied, 386 U.S. 1035 (1967).

10. Rule 42(a) states:
When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.


12. See 9 C. Wright & A. Miller, supra note 10, § 2380; Comment, supra note 10, at 373-74.

13. Compare infra notes 33-38 and accompanying text (discussing the consolidation balancing test) with notes 45-54 and accompanying text (discussing the exceptions to the final judgment rule that ensure effective review).


16. For purposes of this Note, partial orders are only those that entirely resolve fewer than all of the original actions that have been consolidated. While the term partial order may have other meanings in the law, those alternative meanings are not relevant to this analysis.
these orders are called partial appeals. As a threshold issue, courts clash over whether partial orders are categorically final and thus immediately appealable under the final judgment rule found in 28 U.S.C. § 1291.17 Some courts hold that partial orders are always final and immediately appealable because consolidation is an efficiency measure which has no effect on the original actions.18

When a partial order is not deemed automatically final, courts disagree whether a partial order may be final. In other words, courts disagree whether Rule 54(b) of the Federal Rules of Civil Procedure, which permits appeals from orders involving multiple claims or multiple parties, applies to partial orders and, if it does apply, whether it governs partial appeals.19 Some of these courts hold that partial orders may be final,20 depending on the nature of the cases and the extent of the consolidation.21 These courts make finality determinations on a case-by-case basis. Other courts hold that partial orders are never final.22 These jurisdictions treat consolidated actions as one single action. Therefore, no order is immediately appealable under section 1291 until all pending claims are resolved.23

This Note examines the appealability of partial orders. Part I of this Note describes consolidation, analyzing the language and policy of Rule 42(a), and advocates the treatment of consolidated actions as one single action within the terms of the consolidation order. Part II discusses ap-

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17. Some courts have held that a partial order may be final. See Hageman, 851 F.2d at 71; Ivanov-McPhee, 719 F.2d at 930. Others have held that a partial order is interlocutory. See Trinity Broadcasting, 827 F.2d at 675; Huene v. United States, 743 F.2d 703, 704-05 (9th Cir. 1984); State ex rel. Pacific Intermountain Express, Inc. v. District Court, 387 F.2d 550, 552 (Wyo. 1963). Still others have held that a partial order is final. Kraft, 683 F.2d at 133; In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439, 441-42 (1st Cir. 1972).

18. See, e.g., Kraft, 683 F.2d at 133; Massachusetts Helicopter, 469 F.2d at 441-42.

19. Compare Trinity Broadcasting, 827 F.2d at 675 (54(b) always applicable to partial orders) and Huene, 743 F.2d at 705 (same) with Hageman, 851 F.2d at 71 (rebuttable presumption that partial orders are not final and 54(b) applies) and Ivanov-McPhee, 719 F.2d at 930 (applicability of 54(b) determined on case-by-case basis).

Rule 54(b) permits appeals from actions involving multiple claims or multiple parties. See Fed. R. Civ. P. 54(b). For a general discussion of Rule 54(b), see infra notes 72-89 and accompanying text.

20. See, e.g., Hageman, 851 F.2d at 71; Ivanov-McPhee, 719 F.2d at 930; Ringwald v. Harris, 675 F.2d 768, 770 (5th Cir. 1982); Jones v. Den Norske Amerikalinje A/S, 451 F.2d 985, 987 (3d Cir. 1971).

21. Consolidation may be for less than all purposes. See supra note 10; infra notes 34-35 and accompanying text.

22. See, e.g., Trinity Broadcasting, 827 F.2d at 675; Huene, 743 F.2d at 705; State ex rel. Pacific Intermountain Express, Inc. v. District Court, 387 F.2d 550, 552-53 (Wyo. 1963).

peals generally, with emphasis on the final judgment rule, and concludes that partial orders are interlocutory, not final and appealable. Part III analyzes Rule 54(b) to determine its limitations and its applicability to consolidated actions. This Note concludes that partial orders are not final within the meaning of section 1291 and that Rule 54(b) should govern the appeal of partial orders in the absence of some other appellate mechanism.

I. CONSOLIDATION

Consolidation permits the joining of cases involving common questions of law or fact for some or all purposes. Consolidation takes three forms: as a stay, as a merger device, and as a way in which all actions are united procedurally, but retain their separate identities. This Note focuses on the third type of consolidation, by far the most frequently used. Consolidation can be requested by any party to the litigation or may be ordered sua sponte by the court; the consent of the parties is not re-

24. See supra note 10; infra notes 25-40 and accompanying text.
25. See 9 C. Wright & A. Miller, supra note 10, § 2382, at 254. These three forms developed out of the rule as it was originally codified in the Act of July 22, 1813, ch. 14, 3 Stat. 21. See Comment, supra note 10, at 373 n.2.
26. In this form all actions save one are stayed until the trial of that one. Judgment in one action is conclusive as to the others. See 9 C. Wright & A. Miller, supra note 10, § 2382, at 254. For example, in one action, a motion to consolidate was granted because common questions of law or fact were involved. See Masterson v. Atherton, 223 F. Supp. 407, 409-10 (D. Conn. 1963), aff'd, 328 F.2d 106 (2d Cir. 1964). The consolidation was conditioned on one action being decided prior to the other. See id. at 410.
27. In this form, several actions are combined into one, eliminating their separate identity and creating a single action in which one judgment is entered. See 9 C. Wright & A. Miller, supra note 10, § 2382, at 254; see, e.g., Lipp v. National Screen Serv. Corp., 290 F.2d 321, 322 (3d Cir.) (per curiam), cert. denied, 368 U.S. 835 (1961); Boots Aircraft Nut Corp. v. Kaynar Mfg. Co., 188 F. Supp. 126, 129 (E.D.N.Y. 1960).
28. This form exists when several actions are ordered to be tried together but each retains its separate character and requires entry of a separate judgment. See Johnson v. Manhattan Ry., 289 U.S. 479, 496-97 (1933) (decided under predecessor of Rule 42(a)); see also 9 C. Wright & A. Miller, supra note 10, § 2382, at 255 (identifying this as most common form). Suits are not merged into a single action and parties in one do not become parties in another. Such "consolidation is permitted as a matter of convenience and economy in administration." Johnson, 289 U.S. at 496.
29. Rule 42(a) authorizes all three common law uses of consolidation. Only the third type of consolidation, however, is regularly used, primarily because of courts' reliance on the Supreme Court's leading decision concerning consolidation in Johnson v. Manhattan Ry., 289 U.S. 479 (1933). See 9 C. Wright & A. Miller, supra note 10, § 2382, at 255.
30. See 9 C. Wright & A. Miller, supra note 10, § 2383, at 259.
Consolidated actions should be treated as one procedural unit. Although this may increase the potential for unfairness, tailoring consolidation orders will maintain fairness to the litigants while maximizing judicial efficiency. Fairness is further ensured by the process that a district court must follow to order consolidation.

To order consolidation, the district court must perform a balancing test to determine whether the actions involve similar questions of law or fact such that consolidation would be appropriate. The efficiencies to be achieved by consolidation must be weighed against the possible inconvenience, delay, expense and prejudice to the parties involved. For ex-

33. For a limited discussion of unfairness see infra note 38.
34. See Comment, supra note 10, at 377; cf. 9 C. Wright & A. Miller, supra note 10, § 2382, at 257 (consolidation may be for less than all purposes).
35. Cf. Comment, supra note 10, at 376-77 (limiting consolidation is compromise between extremes of granting consolidation for all purposes and denying consolidation altogether).
36. While there is some indication that all courts do not perform the balancing test as they should, see Garber v. Randell, 477 F.2d 711, 717 (2d Cir. 1973), this does not present an incurable problem. Cases which have been consolidated can be severed pursuant to Rule 42(b) of the Federal Rules of Civil Procedure at the discretion of the district court, see Fed. R. Civ. P. 42(b), particularly if one party would encounter unfair prejudice. See Garber, 477 F.2d at 717; see also 9 C. Wright & A. Miller, supra note 10, § 2387, at 277 (42(b) intended to further convenience, avoid delay and prejudice, and serve the ends of justice). Additionally, where appellate rights are concerned, Rule 54(b) should act as a safety valve, permitting an appeal from partial orders where the preconsolidation balancing test may not have been properly performed. See infra notes 72-89 and accompanying text. Of course, there may be other applicable appellate mechanisms pursuant to which a party may successfully bring an appeal. See infra notes 51-53.
37. See 9 C. Wright & A. Miller, supra note 10, § 2383, at 259-61; Comment, supra note 10, at 374-76. Consolidation is proper if a denial of consolidation would violate the principles of multiparty litigation administration, including minimizing confusion, duplication and delay. See Tiernan v. Westext Transport, Inc., 295 F. Supp. 1251, 1253 (D.R.I. 1969); Comment, supra note 10, at 377. Consolidation would also be advisable where a denial of consolidation would protract the existence of virtually identical actions that were originally filed in different jurisdictions. See Thomas v. Deason, 317 F. Supp. 1098, 1099 (D. Ky. 1970); Tiernan, 295 F. Supp. at 1255.
Unfair delay might result when the common issues between the cases to be consolidated are not central to the litigation, such as the assertion of common defenses. Each party would have to sit through lengthy proceedings of little or no relevance to its own action, increasing the costs and delaying the resolution of each action. In such a situation, consolidation would not be appropriate. See Maschmeijer v. Ingram, 97 F. Supp. 639, 644 (S.D.N.Y. 1951).
Unfair prejudice could ensue from combining cases in which the various plaintiffs have conflicting interests because certain parties would be unable to assert all of their claims. This would be inequitable and prejudicial; thus the consolidation should not be ordered. See DuPont v. Southern Pac. Co., 366 F.2d 193, 196 (5th Cir. 1966), cert. denied, 386 U.S. 958 (1967).
Consolidation is generally encouraged by the courts and is used unless the negative
ample, consolidation of a relatively new action with one that is ready for trial would be inappropriate. Such a consolidation would stay the latter action while discovery and pretrial proceedings in the newer action were completed, thus unfairly delaying further proceedings in the older action. The balancing test therefore considers the possible disadvantages to the parties as a matter of course before consolidation is ordered.

II. APPEALS AND THE APPELLATE PROCEDURE

A. Background

Congress has empowered the courts of appeals to hear appeals only from final judgments to avoid piecemeal litigation and to promote judicial efficiency. As noted above, the courts of appeals can hear an appeal prior to a final judgment only if there is a rule, statute, or judicial ruling creating an exception. The parties involved in an action cannot confer jurisdiction on the court of appeals by consenting to finality.

The modern form of the final judgment rule combines considerations of effective review with guidelines sufficiently clear to prevent the great effects of its use, such as those mentioned above, would outweigh the potential benefits. See id. at 195-96.


40. See id.

41. See 28 U.S.C. § 1291 (1982). For the text of 28 U.S.C. § 1291, see supra note 4. A final judgment or decree is one that terminates the litigation on the merits so that in case of affirmance the trial court will have nothing to do but to execute the judgment or decree it originally entered. See St. Louis, Iron Mountain & S. R.R. v. Southern Express Co., 108 U.S. 24, 28-29 (1883). This appellate authority vested in the courts of appeals was codified in the first Federal Judiciary Act of 1789, §§ 21, 22, 25, 1 Stat. 73, 83-87. See Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 549 n.48 (1932) (providing history and development of final judgment rule).

42. See Canter v. American Ins. Co., 28 U.S. (3 Pet.) 306, 318 (1830); see also Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848) (purpose of Rule is to prevent unnecessary expense and delay). This philosophy of judicial economy underlying the right to appellate review was formally adopted with the enactment of the Federal Rules of Civil Procedure, in which the purpose of the Rules is stated as being to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Furthermore, Congress' actions were motivated, in part, to prevent the use of interlocutory review as a tool for harassment. See Cobbledick v. United States, 309 U.S. 323, 325 (1940); Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 351 (1961). The avoidance of partial appeals and the denial of unnecessary interlocutory review is designed to effect the most rapid determination of litigation. See Cobbledick, 309 U.S. at 324-25; Forgay, 47 U.S. at 205.

43. See Ronel Corp. v. Anchor Lock of Fla., Inc., 312 F.2d 207, 208 (5th Cir.), aff'd on other grounds, 325 F.2d 889 (1963), cert. denied, 377 U.S. 924 (1964); Wallace Prods., Inc. v. Falco Prods., Inc., 242 F.2d 958, 959 (3d Cir. 1957).

44. See Borne v. A & P Boat Rentals No. 4, Inc., 755 F.2d 1131, 1133 (5th Cir. 1985), aff'd on other grounds, 780 F.2d 1254 (1986); 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2660, at 121-22 (2d ed. 1983) (in keeping with policy that parties cannot confer appellate jurisdiction by failing to object to a jurisdictional defect).

45. Generally, effective review is considered to be review that provides an aggrieved
waste that could result from protective appeals and litigation over appellate jurisdiction. Yet, in order to provide effective review, the final judgment rule must be construed practically rather than technically. A technical construction of the final judgment rule could result in gross unfairness to the parties, including loss of the right to appeal. At times, piecemeal litigation may be required to ensure fairness to the parties involved despite the general judicial dedication to the avoidance of piecemeal appeals.

Recognizing this potential for unfairness, Congress and the Supreme Court have created several exceptions to the final judgment rule. As a result, certain types of appeals can always be taken, regardless of the party with an opportunity to reassert the justness of his cause, permits judicial self-correction, satisfies a basic desire for uniformity in the district courts, and facilitates the development of new law. See 15 C. Wright & A. Miller, supra note 8, § 3913, at 523; supra notes 2-3 and accompanying text.

46. See 15 C. Wright & A. Miller, supra note 8, § 3913, at 523. Protective appeals are appeals taken only to ensure that the right to appeal is not lost. See supra notes 6-8 and accompanying text.

47. See 15 C. Wright & A. Miller, supra note 8, § 3913, at 523. Because so many types of orders have been tested for finality, the boundaries of finality are becoming increasingly clear. See, e.g., Deckert v. Independence Shares Corp., 311 U.S. 282, 290-91 & n.4 (1940) (order permitting addition of new parties is interlocutory); EEOC v. American Tel. & Tel. Co., 506 F.2d 735, 742 (3d Cir. 1974) (orders permitting limited intervention are inherently interlocutory); NAACP v. Michot, 480 F.2d 547, 548 (5th Cir. 1973) (orders denying consolidation are interlocutory).

48. See Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848); see also Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) ("A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." (footnote omitted)); 15 C. Wright & A. Miller, supra note 8, § 3910, at 453 ("finality requirement should not be applied as a sterile formality, but should instead be applied pragmatically with an eye to fulfilling its underlying purposes").

One case, Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), "provided the first secure basis for interpreting the final judgment requirement flexibly in order to alleviate the hardship that may result if orders . . . cannot be reviewed until entry of the clearly final order." 15 C. Wright & A. Miller, supra note 8, § 3910, at 453.

49. This point is discussed in several cases that construed the final judgment rule practically to avoid unfairness to the litigants. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 470-71 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949); Forgay, 47 U.S. at 204-05; United States v. Wood, 295 F.2d 772, 777 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962); see also infra notes 51-54 and accompanying text (discussing exceptions to the final judgment rule).

50. Permitting piecemeal appeals, while less efficient, safeguards fairness to the litigants by providing a right to appeal that will satisfy the goals of appellate review. See supra notes 2-3 and accompanying text. Piecemeal appeals are appropriate when a subsequent right to appeal would serve no purpose, such as if the issue were moot. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 306-08 (1962) (divestiture order final despite need for court approval of divestiture plan; extent of order not contested, merely court's power to issue order); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 513 (1950) (affirming as final an order denying intervention despite continuing litigation, party wishing to intervene kept out of litigation if right to appeal is denied); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (order refusing to apply state statute was final; immediate appeal required to permit effective review).

51. See Redish, supra note 9, at 90 n.9.
traditional meaning of finality, pursuant to these legislatively\textsuperscript{52} and judicially created exceptions.\textsuperscript{53} While these rules may run contrary to the

\textsuperscript{52} Section 1292(a) involves a very limited set of exceptions to the final judgment rule. See 28 U.S.C. § 1292(a) (1982). The three specific types of interlocutory orders which might be immediately appealable under this section are: 1) orders involving injunctions; 2) orders involving receivers; and 3) decrees affecting the rights and liabilities of the parties in admiralty cases. See id. In 28 U.S.C. § 1292(c) and (d), Federal Circuit appeals and Court of International Trade and Court of Claims appeals are addressed.

Section 1292(b) permits interlocutory appeals of orders that involve a controlling question of law and contain substantial grounds for a difference of opinion. An appeal from the order in question must have the capacity to advance materially the termination of the litigation. See 28 U.S.C. § 1292(b) (1982 & Supp. VI 1988). This is a double-discretionary standard; the district court must, in its discretion, determine that an order meets the elements of section 1292, then the appellate court has discretion to decide whether to hear the appeal. See S. Rep. No. 2434, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Admin. News, 5255, 5257; 15 C. Wright & A. Miller, supra note 8, § 3929. This double-discretionary standard is designed to ensure that only truly deserving appeals are heard. See Note, supra note 42, at 379. This is not a broad alternative to the final judgment rule; the exception is limited in its application by the court and is not meant to provide an opportunity to circumvent finality. See Note, \textit{Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)}, 88 Harv. L. Rev. 607, 609 & n.12 (1975).

Another legislatively created exception to the final judgment rule is The All Writs Act, 28 U.S.C. § 1651 (1982), which permits a court of appeals to issue extraordinary writs giving it jurisdiction over the action and power to hear an appeal. See Note, supra note 42, at 375; \textit{see e.g.}, Schlagenhauf v. Holder, 379 U.S. 104 (1964) (mandamus to decide new, important questions of law); \textit{La Buy v. Howes Leather Co.}, 352 U.S. 249 (1957) (writs to exercise supervisory control over district courts). The writs are highly discretionary, and only gross abuses of trial court discretion, creating a likelihood of irreparable harm, can be remedied in this manner. See Note, \textit{Supervisory and Advisory Mandamus Under the All Writs Act}, 86 Harv. L. Rev. 595, 595-96 (1973).

Judicially created exceptions are generally very similar to each other. See Huckeby v. Frozen Food Express, 555 F.2d 542, 548-49 (5th Cir. 1977). These exceptions prevent undue prejudice or irreparable harm to the litigant that might result from the requirement of awaiting final adjudication of all pending litigation before an appeal can be taken. See id. at 547-49; see also 15 C. Wright & A. Miller, supra note 8, § 3907, at 433-34 (courts manipulate definition of finality to permit appeals where balancing of injury possible from delay and danger of inefficient litigation so warrants).

The most commonly used judicially created exception to the final judgment rule, the \textit{Cohen} collateral order doctrine, treats as final all interlocutory orders regarding collateral issues. See \textit{Cohen v. Beneficial Indus. Loan Corp.}, 337 U.S. 541, 546-47 (1949). The Court set out four criteria which must be met before an interlocutory order is appealable: 1) the decision must finally determine a claim of right; 2) the claim must be separate from and collateral to the rights asserted in the action; 3) the claim must be too important to be denied review; and 4) the claim must be too independent of the cause of action to require deferral of appellate consideration. See id. at 546-47.

Another judicially created exception is the \textit{Forgay} doctrine, which requires an order of near finality and a situation in which delay would render a later appeal of little value. See \textit{Forgay v. Conrad}, 47 U.S. (6 How.) 201, 204-06; Huckeby v. Frozen Food Express, 555 F.2d 542, 548 (5th Cir. 1977).

Under the \textit{Wood} doctrine, the denial of a temporary restraining order is a final and appealable order because denial of the restraining order was held to be similar to a dismissal of a claim for relief. See \textit{United States v. Wood}, 295 F.2d 772, 776-78 (5th Cir. 1961), \textit{cert. denied}, 369 U.S. 850 (1962). The order determined substantial rights of the parties which would be lost if review was delayed until final judgment. See id. at 778.

The death knell doctrine provides that if orders, when considered together, terminate the litigation just as effectively as a single order to dismiss the action entered by a trial
goals of judicial efficiency, they serve the important countervailing goal of preserving fairness to litigants.54

B. The Finality of Partial Orders

Partial orders present a unique problem in finality because they implicate the strong policies underlying Rule 42(a). Partial orders, by definition, only arise in consolidated actions. Consolidation is permitted to maximize judicial efficiency, and the balancing test performed by courts prior to ordering a consolidation ensures that efficiency is not achieved at the expense of fairness to the litigants.

Despite this balancing and the purpose of the final judgment rule to avoid piecemeal litigation, some courts hold that partial orders are always final and immediately appealable.55 For example, the First and Sixth Circuits rely on a case decided in 1933, Johnson v. Manhattan Railway,56 in which the Supreme Court held that original actions which have been consolidated retain their separate identities.57 Under this separate identity approach, a partial order that completely resolves at least one original action is always final.

Johnson, however, is easily distinguished from the finality issue58 because Johnson did not involve any questions of finality. In that case consolidation was ordered by the district court in an effort to simplify the litigation, to elucidate the status of other pending actions and avoid the potential disorder of a collateral attack in an already complex lawsuit.59 It was in holding the consolidation improper that the Supreme Court

court judge, the court should hear the appeal. See Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973).

54. See 15 C. Wright & A. Miller, supra note 8, § 3907, at 433-34; Crick, supra note 41, at 553; Redish, supra note 9, at 90-91.

55. See, e.g., Federal Deposit Ins. Corp. v. Caledonia Inv. Corp., 862 F.2d 378, 380-81 (1st Cir. 1988); Kraft, Inc. v. Local 327, Int'l Bhd. of Teamsters, 683 F.2d 131, 133 (6th Cir. 1982) (per curiam); In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439, 441-42 (1st Cir. 1972).

56. 289 U.S. 479 (1933).

57. See id. at 496-97.

58. Johnson did not involve any issues of finality, see id., but rather involved disputes over the appointment of receivers. See id. at 483. The derivative suit, filed by a shareholder on behalf of himself and all shareholders, demanded the appointment of receivers and called upon the court to hear both cases. The court, wishing to vacate orders in both suits, ordered the consolidation of the matters because it was unsure whether an order to vacate issued in one could affect the collateral suit. See id. at 494. Consolidation clarified the status of the pending actions and eliminated any possible confusion from the collateral attack. The Supreme Court, in holding that the consolidation was improper, stated that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." Id. at 496-97 (footnote omitted). This is known as the separate identity theory.

first revealed the separate identity theory that now governs consolidation.60

The language and purpose of consolidation, the federal policy against piecemeal appeals,61 and the purposes of the Federal Rules of Civil Procedure62 do not support the application of Johnson's separate identity theory in this context. The policies underpinning Rule 42(a), particularly that of maximizing judicial efficiency,63 urge treating original actions as one procedural unit.64

Moreover, no unfairness to the litigants is created and no rights are lost when a partial order is considered interlocutory. Any possible unfairness, additional delay and expense have already been considered prior to consolidation and deemed outweighed by the benefits of judicial efficiency, the avoidance of duplicative litigation, and the benefits to some of the litigants to have all of the related actions tried together.65

In the event that all factors were not properly balanced prior to consolidation,66 or that circumstances have sufficiently affected the pending actions to warrant an immediate appeal, Rule 54(b) should act as a safety valve to provide for an appeal where one would not normally be permissible under section 1291.67

A partial order, issued in a consolidated action resulting from a thorough district court balancing of fairness and efficiency factors, is interlocutory, and not immediately appealable. The parties still have a right to appeal, but it is not triggered until all pending actions in the consolidation are resolved.68 If the delay would prove prejudicial or unduly detrimental to the party desiring an appeal, the party can petition for an appeal under Rule 54(b), or any of the other applicable appellate mechanisms.69

61. This extension of the separate identity theory frustrates the federal policy against piecemeal appeals by allowing plaintiffs to put all claims in separate complaints and then consolidate them. See Bergman v. City of Atlantic City, 860 F.2d 560, 565-66 n.9 (3d Cir. 1988). The plaintiff would then benefit from the efficiencies of consolidation, yet would be able to appeal an adverse judgment in each claim even while other claims are still pending. See id. Therefore, appeals should await the issuance of a final judgment resolving all pending claims.
63. See supra notes 33-35 and accompanying text.
64. See supra note 32 and accompanying text.
65. See supra notes 33-40 and accompanying text.
66. See supra note 36 and accompanying text.
67. For a discussion of Rule 54(b) and the factors considered in a 54(b) certification analysis, see infra notes 72-89 and accompanying text.
68. See supra notes 41-44 and accompanying text.
69. For a brief discussion of other appellate mechanisms, see supra notes 51-54 and accompanying text. For a discussion of Rule 54(b) see infra notes 72-89 and accompanying text. For the basic elements of a 54(b) certification and fairness analysis see infra note 80.
III. THE APPLICABILITY OF RULE 54(b) TO PARTIAL ORDERS

Courts disagree whether Rule 54(b) always applies to partial orders.\(^70\) Because consolidated actions clearly fall within the language of the rule, either as "an action" or because multiple parties are involved, Rule 54(b) should invariably apply to appeals from consolidated actions, particularly partial appeals.\(^71\)

A. Rule 54(b)

Rule 54(b), which is equally applicable to orders and judgments,\(^72\) allows appeals from actions involving multiple claims or multiple parties when fewer than all pending claims are resolved.\(^73\) Rule 54(b) serves the often countervailing interests of judicial economy and fairness to the litigants.\(^74\) The purpose of 54(b) is to balance the benefits of accelerated

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\(^70\) Compare Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987) (54(b) always applicable to partial orders), cert. denied, 108 S. Ct. 2883 (1988) and Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984) (same) with Hageman v. City Investing Co., 851 F.2d 69, 71 (2d Cir. 1988) (rebuttable presumption that partial orders are not final and 54(b) applies) and Ivanov-McPhee v. Washington Nat'l Ins. Co., 719 F.2d 927, 930 (7th Cir. 1983) (applicability of 54(b) determined on case-by-case basis).

\(^71\) Analyzing the language of the rule, specifically "[w]hen more than one claim for relief is presented in an action, ... or when multiple parties are involved," Fed. R. Civ. P. 54(b) (emphasis added), suggests that Rule 54(b) multiple parties or multiple claims must appear within a single action. However, "action" refers only to "more than one claim for relief" and does not limit multiple parties to appearance in a single action. This is because "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Sutherland Stat. Const. § 47.33 (4th ed. 1984). Based on this rule of the last antecedent, the singular "action" should be construed to apply only to the words preceding it, and should not be interpreted as extending to or including others more remote. Thus, any combination of actions containing multiple parties, including consolidated actions, potentially falls within the terms of the Rule.

\(^72\) See 10 C. Wright, A. Miller & M. Kane, supra note 44, § 2660, at 116-17 (citing Thompson v. Trent Maritime Co., 343 F.2d 200, 203 (3d Cir. 1965)).

\(^73\) See Fed. R. Civ. P. 54(b) advisory committee's note (1946 amendment).

\(^74\) See Fed. R. Civ. P. 54(b) advisory committee's note (1946 amendment). Rule 54(b) was created to avoid the possible injustice of delay resulting from delaying the appeal of a distinctly separate claim to await adjudication of the entire case. See id.; Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States by Advisory Committee on Rules for Civil Procedure, 5 F.R.D. 433, 472-73 (1946) [hereinafter Report of Proposed Amendments]. Rule 54(b) was also devised to counteract the greater potential for unfairness which arises through liberal joinder rules. See id. at 472-73. Such unfairness might include additional costs incurred as a
review against the waste and hazards of piecemeal litigation, not to overturn the longstanding federal policy of discouraging piecemeal litigation. Consequently, the Rule does not supplant the use of any other statute controlling appellate jurisdiction.

An appeal under Rule 54(b) requires what is known as certification. In this certification process, when confronted with an order resolving fewer than all pending claims in an action, a district court must make an express statement of finality and the lack of a just reason for delay. A balancing test is used to determine whether certification is appropriate. The district court must ask if certifying the finality of the judgment advances the interests of sound judicial administration and justice to the litigants.

The Rule implicitly directs the court to make reasonable accommodation between the policy of limiting normal appellate jurisdiction to review of final judgments, and problems of timing of review. The court result of delay, loss of right to appeal due to mootness, or other forms of hardship which might be caused by delay. See, e.g., Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 5, 10-12 (1980); Consolidated Rail Corp. v. Fore River Ry., 861 F.2d 322, 325 (1st Cir. 1988); Indiana Harbor Belt R.R. v. American Cyanamid Co., 860 F.2d 1441, 1445 (7th Cir. 1988); Allis-Chalmers v. Philadelphia Elec. Co., 521 F.2d 360, 366 n.14 (3d Cir. 1975).

75. See Indiana Harbor Belt R.R. v. American Cyanamid Co., 860 F.2d 1441, 1445 (7th Cir. 1988); Fed. R. Civ. P. 54(b) advisory committee's note (1946 Amendment); Report of Proposed Amendments, supra note 74, at 472-73.

76. See Fed. R. Civ. P. 54(b) advisory committee's note (1946 Amendment); Report of Proposed Amendments, supra note 74, at 472-73.

77. See Meyer v. Indian Hill Farm, Inc., 258 F.2d 287, 290 (2d Cir. 1958); 10 C. Wright & A. Miller, supra note 44, § 2658, at 72.

78. See Fed. R. Civ. P. 54(b). In effect, the district court must expressly state that a particular order is final and spell out the reasons why an appeal is permissible immediately, and need not await the resolution of all pending issues. See 10 C. Wright, A. Miller & M. Kane, supra note 44, § 2655, at 40-41.


80. The key elements to the balancing test are: 1) whether certification would result in unnecessary appellate review; 2) whether the claims to be adjudicated are separate, distinct and independent from any others; 3) whether review of the claims would be mooted by future developments; 4) whether the nature of the claims is such that no appellate court would have to decide the same issues more than once, even with subsequent appeals in the same action; and 5) the general considerations of justice to the litigants, including financial implications, undue delay, prejudice, and any other relevant factors. See, e.g., Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 5-6 (1980); Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975).

81. The Supreme Court, in a leading Rule 54(b) decision, stated that with the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. [Sound judicial administration] demonstrate[s] that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated . . . .
cannot, however, in exercising its discretion, "treat as 'final' that which is not 'final' within the meaning of § 1291." The status of a party or claim must be entirely resolved to allow appeal even under 54(b). Because the district court is in the best position to explore all facets of the case and perform this balancing test, it has the sole discretion to determine the finality of an order.

Appellate courts may review certification orders to be sure that the district court did not abuse its discretion in granting certification. This appellate review ensures that the district court's evaluation is scrutinized to prevent unnecessary, piecemeal appeals. If no abuse of discretion is found, the appellate court gives substantial deference to the certification decision of the district court.

Partial orders are interlocutory and thus require the use of some appellate mechanism before an appeal can be taken. Rule 54(b) can and should be applied to partial orders to determine whether certification and subsequent appeal would be appropriate.

B. Application of 54(b) to Consolidated Actions

1. Case-by-Case Approach

Some courts adopt a flexible approach in applying Rule 54(b) to partial orders. These courts make finality determinations on a case-by-case
basis and hold that the nature of the cases involved and the extent of the consolidation can be determinative. When consolidation is for less than all purposes, these courts reason that certification might not be required because the original actions could still be considered stand-alone suits in which all claims have been resolved. This reasoning, however, suffers the same deficiencies as that of courts which permit immediate appeal of all actions involving partial orders. Unfortunately, a suit involving an appeal from a partial order in a consolidation clearly for less than all purposes has not yet arisen in the circuits adopting this rationale. Thus this scheme has not been tested, and the inadequacies of the plan have not yet become obvious.

Courts following the flexible case-by-case approach require the circuit court to perform an analysis virtually identical to the certification analysis required pursuant to Rule 54(b). This approach ignores the fact that the district court, not the circuit court, best knows the reasons behind, and the extent of, the consolidation, and is in the best position to evaluate the situation. Finally, this approach provides no clear standard for the litigants, and may frequently cause untimely filings for

Norske Amerikalinje A/S, 451 F.2d 985, 986 (3d Cir. 1971) (order in case where consolidation not for all purposes is probably final) (dicta).  
91. See, e.g., Bergman v. City of Atlantic City, 860 F.2d 560, 567 (3d Cir. 1988); Sandwiches, Inc. v. Wendy's Int'l, Inc., 822 F.2d 707, 709 (7th Cir. 1987); Ivanov-McPhee, 719 F.2d at 930; Ringwald, 675 F.2d at 770-71; Jones, 451 F.2d at 987 (dictum); cf. Hageman v. City Investing Co., 851 F.2d 69, 71 (2d Cir. 1988) (a strong presumption against finality, rebuttable by "unusual circumstances").

92. See, e.g., Bergman, 860 F.2d at 564; Sandwiches, Inc., 822 F.2d at 709-10.

93. See supra notes 55-69 and accompanying text.

Treating partial orders as final when a consolidation is less than total may defeat the purposes for which the actions were consolidated. For example, Rule 42(a) advocates treating consolidated actions as one procedural unit. This can best be accomplished by treating partial orders as interlocutory. If actions were improperly consolidated or if there is some need for an immediate appeal from a partial order, it should be taken pursuant to one of the existing exceptions to the final judgment rule, particularly Rule 54(b), which, by its terms, is applicable to partial orders.

94. See supra notes 79-85 and accompanying text (elements of a 54(b) certification analysis). In 54(b) decisions, as in the case-by-case finality decision, prejudice to the litigants is balanced against the interest of sound judicial administration. Compare notes 75-85 and accompanying text with supra notes 91-93 and accompanying text.

For example, the finality factor looking at the relationship between the claims, see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949), is quite similar to a factor in the Ivanov-McPhee analysis, that considers the nature and relationship of the claims involved. See Ivanov-McPhee, 719 F.2d at 930. The factor looking at mootness considered in a practical determination of finality, see Cohen, 337 U.S. at 546, is, essentially, the analysis being applied by the court of appeals according to Ivanov-McPhee. See Ivanov-McPhee, 719 F.2d at 930. The remaining factors of a certification analysis as laid out by Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 364 (3rd Cir. 1975), all go to judicial efficiency and fairness to the litigants. These are also components of a practical finality determination under Cohen. See Cohen, 337 U.S. at 546.

95. See Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987), cert. denied, 108 S. Ct. 2883 (1988); Huene v. United States, 743 F.2d 703, 704-05 (9th Cir. 1984).

96. See supra notes 79-85 and accompanying text.
Alternatively, the courts following the flexible approach reason that when a consolidation is for all purposes, Rule 54(b) applies and certification is required before an appeal will be heard. These courts distinguish actions consolidated for less than all purposes, stating that the extent of the consolidation may be dispositive. Despite distinguishing the possible determinative impact of the extent of consolidation, these courts uniformly require 54(b) certification. Although the courts say 54(b) may apply, in reality, 54(b) always applies. The case-by-case approach is thus inefficient and contrary to the Federal Rules.

2. The Certification Approach

Courts following this approach require certification pursuant to Rule 54(b) for partial orders unless another appellate mechanism is available. This approach comports with Rule 54(b), the policies underlying consolidation, and the Federal Rules of Civil Procedure. First, the policies supporting Rule 54(b) advocate a requirement of certification for a partial order to be appealable. Because the rule was not intended to overturn the well-settled federal rule prohibiting piecemeal disposal of litigation, appeals are permitted only from final judgments, except in special instances covered by statute or other appellate mechanism.

Second, interpreting a partial order to be final and appealable undermines the goal of consolidation to move cases forward as one procedural

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97. See Huene, 743 F.2d at 704. This result undercuts judicial efficiency because the litigants cannot predict, with uniformity, how the courts will rule on the finality of any partial order where the consolidation was for less than all purposes. See supra notes 7-9 and accompanying text.

98. See Ivanov-McPhee v. Washington Nat'1 Ins. Co., 719 F.2d 927, 928-30 (7th Cir. 1983); Ringwald v. Harris, 675 F.2d 768, 771 (5th Cir. 1982).

99. See, e.g., Ivanov-McPhee, 719 F.2d at 929; Ringwald, 675 F.2d at 770-71; Jones v. Den Norske Amerikalinje A/S, 451 F.2d 985, 986-87 (3d Cir. 1971).

100. See, e.g., Bergman v. City of Atlantic City, 860 F.2d 560, 567 (3rd Cir. 1988); Ivanov-McPhee, 719 F.2d at 930; Ringwald, 675 F.2d at 771. These courts have, in each case, performed a balancing test, and found that the rights of the litigants were not threatened by a certification requirement. Perhaps this is because the rights were protected by the balancing test performed before consolidation.


102. See Report of Proposed Amendments, supra note 74, at 472-73; see also Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 5 (1980) (determining the appropriate standard for granting 54(b) certification).

103. See supra notes 41-54 and accompanying text; supra notes 72-77 and accompanying text.

As noted earlier, this should not present any unfairness because the right to appeal is not lost. See supra notes 65-67 and accompanying text. Furthermore, if unfairness or prejudice might result, the parties have the opportunity to petition for 54(b) certification, or may take advantage of the other exceptions to the final judgment rule. See supra notes 50-54 and notes 73-78.
unit because the procedural unit is fragmented by the partial appeal.\textsuperscript{104}

Third, the extent of consolidation should have no effect on the appealability of partial orders. A limited consolidation permits the litigation of similar issues, thus securing the benefits of consolidation without encountering the complexities that might arise from trying dissimilar issues together.\textsuperscript{105} The common issues for which the actions were consolidated, however, should be capable of parallel treatment.\textsuperscript{106} Treating partial orders within a limited consolidation as final would defeat the purpose for which the actions were consolidated. Furthermore, fairness and economy are weighed by the district court before any consolidation is ordered.\textsuperscript{107}

This certification approach is consistent with the purpose of the Federal Rules of Civil Procedure, which state that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."\textsuperscript{108} While the justness of the certification requirement cannot be assumed in every case, the fairness issues are weighed prior to consolidation and again in a certification determination, thus providing dissatisfied parties ample opportunity to assert their cause.\textsuperscript{109}

\textbf{CONCLUSION}

The courts of appeals lack jurisdiction to hear a partial appeal from a judgment in a consolidated action that completely resolves fewer than all of the original actions, absent 54(b) certification or the use of some other appellate procedure. This finding is compelled by the language of Rule 54(b), and by the policies underlying the final judgment rule, the Federal Rules of Civil Procedure, and the general federal policy of avoiding piecemeal litigation.

\textit{Marianne Fogarty}

\textsuperscript{104} One court has stated:

An appeal prior to the conclusion of the entire action could well frustrate the purpose for which the cases were originally consolidated. Not only could it complicate matters in the district court but it also could cause an unnecessary duplication of efforts in the appellate court.\textit{Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984); see also State ex rel. Pacific Intermountain Express, Inc. v. District Court, 387 P.2d 550, 553 (Wyo. 1963) ("[T]here may be certain individual advantages to the separate determination of matters but these do not outweigh the step that was purportedly taken for the best administration of justice in consolidating the litigation."); see supra notes 32-38 and accompanying text.}

\textsuperscript{105} See Comment, supra note 10, at 377; supra notes 32-40.

\textsuperscript{106} See Comment, supra note 10, at 377.

\textsuperscript{107} See supra notes 33-40 and accompanying text.


\textsuperscript{109} Litigants have the opportunity to put their special interests before the court in the consolidation and certification decisions. See Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980); supra notes 33-38, 75-82 and accompanying text. Ultimately, a litigant can also have the appellate court review consolidation and certification decisions for abuse of trial court discretion. See supra notes 41-43, 87-89 and accompanying text. In this manner the rights of the litigants are amply protected.