CIVIL PROCEDURE

CASES, PROBLEMS, AND EXERCISES

Fourth Edition

CHAPTER 14

[Updated May 2018]

WEST ACADEMIC PUBLISHING

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444 Cedar Street, Suite 700
St. Paul, MN 55101
1-877-888-1330

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Printed in the United States of America

ISBN: 978-1-63490-017-0

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CHAPTER 14

APPEALS—ADDITIONAL MATERIALS

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B. THE TIMING OF AN APPEAL— THE "FINAL DECISION" RULE

INTRODUCTORY PROBLEM

Like law school, United States presidents often look better in hindsight. The past few years have witnessed the birth of a popular movement to place the image of a particular president on the Mount Rushmore national monument. However, the site's physical limitations make it impossible simply to add a face to the monument. The only option is to reshape one of the existing faces into a new image. The obvious candidate for such an "extreme makeover" is Teddy Roosevelt, the least influential of the presidents currently enshrined on Mount Rushmore.

When the federal government refuses to accede to its demands, a group of interested citizens sues the United States for an order requiring the government to replace Roosevelt's face with that of their idol. The government responds by moving to dismiss for failure to join a necessary party. The government argues Roosevelt's descendants are necessary because they would be directly affected by the removal of Roosevelt's face. The government also fears the descendants will sue the United States for damages based on harm to their reputation.

The court rejects these arguments and denies the motion to dismiss. May the government appeal immediately after the motion is denied?

Governing Law: 28 U.S.C. §§ 1291, 1292; Federal Rule 54(b).

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1. THE BASIC RULE

The primary rule governing when a party may appeal a decision from the federal district courts to the courts of appeal is 28 U.S.C. § 1291, which provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

Many states have a similar final decision rule, although it is not necessarily interpreted the same way. Courts and commentators use the term *interlocutory appeal* to refer to an appeal of a decision that does not qualify as "final" under § 1291 or the related state provisions.

The statute is jurisdictional. If a party tries to appeal a non-final decision, and that decision does not fall into one of the exceptions discussed below, the court of appeals lacks subject-matter jurisdiction over the appeal. As with all issues of subject matter jurisdiction, any party may raise the question of whether § 1291 has been satisfied at any time, or the court of appeals may raise the issue of its own accord.

Although § 1291 uses the term "final decision", the standard it establishes is better thought of as a final *judgment* rule. The classic statement interpreting § 1291 is set out in *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945):

> A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

For a judgment to be final under this standard, it must completely dispose of *all* claims in the case. Therefore, a partial summary judgment is not final for purposes of § 1291. Similarly, a summary judgment for defendant on all of plaintiff's claims is not final under § 1291 if a counterclaim or cross-claim remains pending (although this and the prior example may be immediately appealable under one of the exceptions; see Part 2.A). However, notwithstanding the language in *Catlin* about executing on a judgment, a complete victory for defendant on all claims is final and can be appealed, even though there is no judgment to "execute" in the case.

The purpose of § 1291 is to prevent what are often called "piecemeal appeals." An appeal requires the parties to educate a new set of judges about the case. Therefore, for the sake of efficiency it makes sense to limit the total number of appeals. Moreover, allowing an appeal before a case is complete delays and complicates the proceedings in the trial court. The basic approach of § 1291 is accordingly to require the appellant to present the case to the court of appeals as a complete package, allowing the court to focus its attention on all grounds—and *only* those grounds—that might require reversal.

To test your understanding of the *Catlin* rule, make sure you can explain why the following are, or are not, final judgments under § 1291:

- The grant of a motion for a new trial based on the weight of the evidence is not a final judgment.
- The denial of a post-judgment motion for a new trial based on a procedural error is a final judgment.

- The grant or denial of a motion to certify a case as a class action is not a final judgment.
- Dismissal of all claims in a case for lack of subject matter jurisdiction is a final judgment.
- Dismissal of fewer than all claims in a case is not a final judgment, regardless of the reason for dismissal.
- If two cases are consolidated under Federal Rule 42(a), and the court disposes of all claims in one of the original cases, that ruling is not a final judgment. *See Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002).
- If after summary judgment is entered against a party on one claim, that party dismisses all remaining claims, courts are split as to whether the entry of summary judgment is final. *Compare Chrysler Motors Corp. v. Thomas Auto Co., Inc.*, 939 F.2d 538 (8th Cir. 1991) (final judgment) *with Swope v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002) (not appealable where dismissal was without prejudice).

Federal statutes also set strict limits on how quickly a party must lodge an appeal. Under 28 U.S.C. § 2107, a party has only thirty days to appeal from district court to the court of appeals. Like the "final decision" rule, the requirements of § 2107 are jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (appellate court must dismiss an appeal filed too late, even though the district court told appellant it could appeal up until that date).

2. LIMITATIONS ON AND EXCEPTIONS TO THE RULE

Although piecemeal appeals are generally undesirable, there are certain situations in which allowing immediate appeal of a crucial ruling could be highly beneficial. The following exceptions each deal with a different concern. Taken together, do the exceptions cover all the cases in which interlocutory appeal would be desirable?

a. Federal Rule 54(b)

N.A.A.C.P. v. AMERICAN FAMILY MUTUAL INSURANCE CO.

978 F.2d 287 (7th Cir. 1992), *cert. denied* 508 U.S. 907, 113 S.Ct. 2335, 124 L.Ed.2d 247 (1993)

EASTERBROOK, CIRCUIT JUDGE.

Is redlining in the insurance business a form of racial discrimination violating the Fair Housing Act? "Redlining" is charging higher rates or declining to write insurance for people who live in particular areas

(figuratively, sometimes literally, enclosed with red lines on a map). The NAACP, its Milwaukee Branch, and eight of its members contend in this class action that redlining violates the Fair Housing Act, 42 U.S.C. §§ 3601–19, and four other rules of state and federal law when insurers draw their lines around areas that have large or growing minority populations. . . .

The complaint asserts that American Family Mutual Insurance Company engages in redlining in and near Milwaukee. The district judge concluded that two of plaintiffs' five theories are legally insufficient. See Fed.R.Civ.P. 12(b)(6). Following *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419, 423–24 (4th Cir.1984), he held that the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) does not apply to the property and casualty insurance business. And he held that Wisconsin would not recognize a private right of action to enforce the antidiscrimination portions of its insurance code. At the conclusion of his oral ruling, the judge entered a partial final judgment on these two theories under Fed.R.Civ.P. 54(b). . . .

Appellate jurisdiction is the first question. Rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not employ a special meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be final. Unless the court enters judgment on an entire "claim," or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal.

The district judge did not discuss the legal and factual overlap between the two counts being dismissed and the three being retained and did not explain why he viewed them as separate claims. A "claim for relief" seeks redress of a distinct wrong; a distinct legal underpinning differs from a new claim and is not independently appealable. Yet the district judge appears to have equated theories with claims. He observed that because a trial lay more than a year in the future there was ample time to resolve these two legal disputes on appeal so that all theories could be handled during one trial. This suggests that the judge confused Rule 54(b) with 28 U.S.C. § 1292(b), which permits a court to certify the case for discretionary appeal when interlocutory resolution of important issues could advance the final disposition of the litigation. Because of the mismatch between the district court's stated rationale and the scope of Rule 54(b)—and the apparent overlap of the two dismissed counts with the three retained—our jurisdiction is in doubt.

Plaintiffs' complaint begins with 66 paragraphs and then states five "claims," each of which incorporates these paragraphs and asserts one reason why the conduct is wrongful. The Fair Housing Act and the state insurance code are two. The other three: Wisconsin's Fair Housing Act, 42

U.S.C. § 1981 (the right to be free of racial discrimination in making contracts), and 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying real property). Perhaps the judge was led astray by the structure of the complaint. Identifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of "claim for relief" in the federal rules. . . .

One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate. Plaintiffs could not litigate and lose a suit asserting that American Family's redlining violates Title VIII, pursue another asserting that redlining violates § 1981, and then crank up a third asserting that redlining violates § 1982. If these principles—well understood when dealing with the preclusive effects of judgments—define a "claim" for purposes of Rule 54(b), then this appeal must be dismissed.

Language in some of our cases equates "claim" in Rule 54(b) with "claim" for purposes of res judicata, but as we observed in *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1367 (7th Cir.1990), this equivalence cannot accommodate the many cases that permit separate appeals of claims and compulsory counterclaims. It follows that two "claims" may arise out of the same transaction for purposes of Rule 54(b), provided that the facts and theories are sufficiently distinct. Two legal theories sufficiently distinct that they call for proof of substantially different facts may be separate "claims." *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1108–09 (7th Cir.1984).

"Sufficiently" and "substantially" are hedges. Ideally the facts and theories separated for immediate appeal should not overlap with those retained; to the extent they do, the court of appeals is "deciding" claims still pending in the district court, and may have to cover the same ground when the district court acts on the residue. A combination of anticipation with overlap leads to wasteful duplication and increases the likelihood of conflict (or error). In disdaining bright lines and asking how much duplication is too much, we enter the zone of shadings traditionally committed to a district judge's discretion. . . .

Although the district judge in our case confused Rule 54(b) with § 1292(b), we do not believe that he abused his discretion in permitting an immediate appeal. American Family stated, in its memorandum concerning appellate jurisdiction, that "the dismissed Fair Housing Act claim, would, if it were viable, be subject to proof under a disparate impact formula, rather than under the 'intentional racial discrimination' test applicable to all the counts remaining in the district court." . . . We therefore assume that plaintiffs' burden under Title VIII is lighter than their burden under the other legal theories. Different burdens may imply different "claims" even for purposes of preclusion. Resolving the Title VIII issue in plaintiffs' favor implies that the other legal theories will fall away.

If they prevail under Title VIII, they obtain all the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all other theories; either way, there will not be duplicative appellate review. *Stearns* holds that this is enough, if barely, to justify treating a legal theory as a "claim" for purposes of Rule 54(b). . . .

[The court then upheld the lower court's ruling on the Wisconsin state-law claim, but reversed on the Fair Housing Act claim, finding the federal law did cover redlining.]

NOTES AND QUESTIONS

1. Do you understand why the court concluded the Title VIII claim was separate? Didn't that claim arose out of the exact same facts as the others? If so, how can it be separate?

2. *NAACP* sets out one approach to determining whether a particular ruling involves a separate claim for relief. The court in *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000) discusses different tests that courts have employed:

> [V]arious methods to determine what constitutes a "claim for relief" for purposes of Rule 54(b) have percolated amongst the circuits. One approach "focuses upon the possibility of separate recoveries under arguably separate claims." *Samaad v. City of Dallas*, 940 F.2d 925, 931 (5th Cir. 1991). If the alleged claims for relief do not permit more than one possible recovery, then they are not separately enforceable nor appropriate for Rule 54(b) certification. See *Brandt v. Bassett (In re Southeast Banking Corp.)*, 69 F.3d 1539, 1547 (11th Cir. 1995) (concluding that allegations seeking damages against holding company's directors for failing to consider merger possibilities over several years stated one claim because relief could only be recovered once); *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) (Wisdom, J.) ("At a minimum, claims cannot be separate unless separate recovery is possible.").
>
> Another approach "concentrates on the facts underlying the putatively separate claims." *Samaad*, 940 F.2d at 931. If the facts underlying those claims are different, then those claims may be deemed separate for Rule 54(b) purposes. "By the same token, if there is a great deal of factual overlap between the decided and the retained claims they are not separate, and appeal must be deferred till the latter are resolved." *Jack Walters & Sons v. Morton Bldg.*, 737 F.2d 698, 702 (7th Cir. 1984)). A prime basis for the factual approach is "to spare the court of appeals from having to keep relearning the facts of a case on successive appeals." *Id.*
>
> Finally, at least one circuit has expressed that claims are not distinct when they are " 'so closely related that they would fall afoul of the rule against splitting claims if brought separately.' " *Tolson v. United*

States, 235 U.S. App. D.C. 396, 732 F.2d 998, 1001 (D.C. Cir. 1984) (quoting *Local P-171*, 642 F.2d at 1071).

3. Federal Rule 54(b) is usually listed as an "exception" to § 1291. However, it is also possible to conceive of the rule as a procedural ploy to make the case "fit" § 1291. To illustrate, suppose the judge in *N.A.A.C.P.*, immediately before granting the summary judgment, had severed the case under Federal Rule 42(b) into two separate cases—one comprising the two legally insufficient claims, the other comprising the remaining three claims. Is there any doubt the court's grant of summary judgment on the two legally insufficient claims would be a final decision within the meaning of § 1291? In this regard, Federal Rule 54(b) can be thought of as a response to the liberal joinder provisions of the Federal Rules.

4. Determining which claims constitute a distinct claim for relief is only half the battle under Federal Rule 54(b). It is also important for the trial judge to include the specific language called for in that rule when she makes the ruling. Without an express determination that there is no just reason to delay entry of the judgment, a ruling cannot be appealed even if it clearly involves a claim for relief that is separate from the remaining claims.

5. Are there any limits on a judge's authority to make, or to refuse to make, the express determination called for by Federal Rule 54(b)? *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980), discusses this issue at length. It indicates the trial judge must consider not only the equities of the individual case, but also the "administrative interests" of the court system. Most significantly, if a technically separate claim for relief nevertheless shares certain factual issues with other claims yet to be adjudicated, the trial judge should usually decline to make the express determination, in order to save the appellate court the possible trouble of reviewing those same issues twice. 446 U.S. at 8.

6. In *Chiles v. Thornburgh* in Chapter 8, Part B, the court allowed immediate appeal of the denial of a motion to intervene as of right. Other circuit courts agree. An older Supreme Court case, *Auto Workers v. Scofield*, 382 U.S. 205 (1965), also suggests, without directly holding, that immediate appeal of such denials is proper. Courts sometimes invoke Federal Rule 54(b) as the basis for this rule. Can you reconstruct the argument concerning how denial of a motion to intervene as of right involves a "separate claim" for purpose of Rule 54(b)?

7. At first glance, it might seem that the main risk posed by Federal Rule 54(b) is a party will appeal too early, either because the issue that was resolved is not a distinct claim for relief, or because the trial judge did not make the express determination. The most likely consequence of an early appeal is merely added expense: the appellate court will dismiss, and make the party wait until later to appeal.

However, a far more serious risk posed by Federal Rule 54(b) is that appeal may occur too *late*. Federal Rule of Appellate Procedure 4(a)(1)(A)

provides a party must generally file notice of an appeal within 30 days of entry of judgment. If a timely notice is not filed, the party cannot appeal. In some Rule 54(b) cases, however, the party may not realize a ruling is a final decision triggering the 30-day window. Compounding the problem is the nature of the express determination the trial judge makes under the Rule. The judge need only say there is no just reason to delay *entry of the judgment*. She need say nothing about appeals.

b. § 1292(a)

Section 1292 represents an attempt to soften the sting of § 1291's final decision rule. Section 1292(a) provides for immediate appeals of certain interlocutory orders. Unless you practice debtor-creditor or maritime law, you are unlikely to encounter the exceptions set out in § 1292(a)(2) and (3). However, many litigators will be affected by § 1291(a)(1). This provision allows immediate appeals of orders involving injunctions. The rationale for the exception is that an injunction by its very nature changes the *status quo ante*, and can in some cases cause significant hardship. The exception also applies when injunctive relief is *denied*. Do you see why?

What does the section mean by an "injunction?" The statute applies both to permanent injunctions granted at the end of a case, and to preliminary injunctions issued at an early stage in the proceedings. However, a grant or denial of a temporary restraining order is not appealable under § 1292(a)(1). A temporary restraining order, or "TRO", is an emergency ruling that one party obtains without notice to the other parties.[1] To obtain a TRO, the moving party must show the situation is so urgent that irreparable harm could occur during the time it would take to notify the other side and schedule a hearing. If granted, the order remains in force only until notice and a hearing can occur, at which time the court may convert the TRO into a preliminary injunction. Therefore, a TRO has a built-in review process—the trial judge herself will revisit the merits at the hearing to convert the TRO into a preliminary injunction. Given that built-in review, there is no need to allow an appeal of the TRO itself to the appellate court. Of course, the judge's later ruling on the preliminary injunction can be appealed under § 1292(a)(1).

[1] Note the terminology in this area differs. Some states refer to all preliminary injunctions as "temporary restraining orders." As used in this discussion, the key difference is whether notice is given to the opposing party.

c. § 1292(b)

UNITED STATES V. BEAR MARINE SERVICES

696 F.2d 1117 (5th Cir. 1983)

RUBIN, CIRCUIT JUDGE:

. . . The United States filed suit against Bear Marine Services (Bear Marine), International Matex Tank Terminals, Inc. (IMTT), and others for the cost of cleaning up an oil spill in the Mississippi River. The complaint alleged that a tug towing an oil-carrying barge laid the tow alongside IMTT's dolphin. When the barge struck the dolphin, a metal beam or object attached to the dolphin punctured one of the barge's oil tanks.

The basis of the government's claim against IMTT is that the spill was caused by its "negligence . . . in maintaining an unauthorized obstruction to navigation, namely a metal beam or object attached to a dolphin in violation of 33 U.S.C. 403." IMTT moved to dismiss the complaint against it for failure to state a claim upon which relief could be granted. One basis for this motion was IMTT's assertion that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1976) (FWPCA), provided the exclusive means for the government to recover the cost of cleaning up oil spills.

The district court denied IMTT's motion. The court held that the FWPCA had not affected the government's right to proceed under fault-based maritime tort doctrines against non-sole cause, non-discharging third parties. The court certified for appeal under 28 U.S.C. § 1292(b), however, its holding that the FWPCA "is not the exclusive means by which the United States may recover oil clean-up costs from 'third parties'." A motions panel of this court granted leave to pursue the interlocutory appeal.

After this appeal had been preliminarily approved, this court decided *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir.1982). *Big Sam* held that the FWPCA does not preclude a fault-based maritime tort action against a sole-cause, non-discharging third party. . . . Therefore, if the government establishes that IMTT was negligent, even if it is shown that this was concurrent with the negligence of some other party and that IMTT was not alone at fault, the government may recover from IMTT. . . .

Thus, our decision in *Big Sam* resolves the primary issue upon which the interlocutory appeal was granted. The parties, nevertheless, contend that there are still issues we could decide. The United States asks us to decide whether maintenance of an unauthorized obstruction to navigation constitutes a per se violation of the federal common law, noting "expressions at the highest level" that such an action may not exist. IMTT,

on the other hand, suggests that we should decide whether the United States may ever assert a cause of action against IMTT under the FWPCA.

The final judgment rule is the hallmark of federal appellate jurisdiction. . . . The foundation of the principle codified by 28 U.S.C. 1291, which permits appeals of only "final decisions," is the avoidance of piecemeal litigation. The policy that cases are ordinarily to be reviewed only once, and then comprehensively, conserves judicial energy and eliminates the delays, harassment, and costs that would be occasioned by a succession of separate interlocutory appeals.

The Judicial Code, however, authorizes appeals from interlocutory orders in exceptional cases such as those in which the potential shortening of litigation warrants such an extraordinary procedure. One such unusual appeal is permitted when a district judge certifies that the order to be appealed "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and that immediate appeal will materially advance the end of the litigation. 28 U.S.C. § 1292(b). Upon receiving this certification, the court of appeals may, in its discretion, permit the appeal.

In this circuit, as in many others, a motion for leave to appeal an interlocutory order is first presented to a motions panel. That panel, prior to the filing of briefs on the merits, makes a preliminary decision to allow or refuse the appeal. Thereafter, the case is briefed and assigned to a panel for disposition on the merits.

The merits panel has the benefit of full briefs and frequently, as in this case, oral argument. It also has the opportunity to consider events that took place after the motions panel preliminarily allowed the appeal. With this perspective, the merits panel may conclude that the initial decision to hear the appeal was, or was later rendered, improvident. If the merits panel reaches that conclusion, it must vacate the earlier order granting leave to appeal and must remand the case to the district court. . . .

Prior to our decision in *Big Sam*, it was unclear whether the FWPCA provided the exclusive remedy for the claim against IMTT in the present case. Now, it is clear that the FWPCA does not. Therefore, nothing that we can do will prevent a trial of the negligence claim in this case. At the very least, both parties agree that the complaint states a cause of action against IMTT sounding in fault-based maritime tort.

We decline to address the additional theories of liability. We do not sit to decide moot questions, or to issue advisory opinions. The appropriate time to consider these theories is at trial, in the context of the actual proof of the case.

The United States suggests that considerable time of the court and counsel have been invested in considering this appeal. That is no reason

for the court to dissipate further energies on the appeal or to decide questions that may prove to be hypothetical. Moreover, it is evident the trial will be short, and nothing we might do is likely to abbreviate it significantly. Action by this court will not, therefore, materially advance the ultimate termination of this litigation. For these reasons, we VACATE the order granting leave to appeal and REMAND to the district court for further proceedings.

NOTES AND QUESTIONS

1. Although Federal Rule 54(b) and § 1292(b) both turn on the willingness of the trial judge to allow immediate appeal, the two exceptions are in no way redundant. List all of the differences between the grounds for, and procedures governing, the two provisions.

2. *Controlling*. An issue is "controlling" within the meaning of § 1292(b) if resolution of that issue is very likely to affect the outcome of one or more claims in the case. *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996); *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002). Would an order denying a motion to submit the dispute to arbitration be a "controlling" issue? *See Faber v. Menard, Inc.*, 267 F.Supp.2d 961 (N.D. Iowa 2003), *rev'd on other grounds* 367 F.3d 1048 (8th Cir. 2004).

3. *Question of law*. The issue of whether a ruling involves a question of law has proven surprisingly problematic. Of course, a ruling that is based in whole or in part on an evaluation of the evidence does not involve a question of law. *Christy v. Pennsylvania Turnpike Comm.*, 912 F.Supp. 148 (E.D. Pa. 1996) (ruling on summary judgment motion); *Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97 (S.D.N.Y. 1995). Similarly, the trial judge's exercise of discretion cannot be appealed under § 1292(b). *White v. Nix*, 43 F.3d 374 (8th Cir. 1994). But in other cases, determining whether something is a question of law is more difficult. In *Faber*, discussed in the prior note, the court held that whether a contract clause requiring arbitration is "unconscionable" was a question of law. Do you agree?

4. *Substantial ground for difference of opinion*. If the law on a given issue is well settled, appeal under § 1292(b) is unavailable. Ironically, this means § 1292(b) cannot be used when the trial judge makes a blatant mistake applying governing law.

5. *Materially advance termination*. The final factor is often the most difficult to satisfy. Many rulings of law meet the other parts of the test, but flounder on this last requirement. The main case is one example of a situation where allowing an appeal would not advance termination of the litigation. Another is *Piazza v. Major League Baseball*, 836 F.Supp. 269 (1993), where a baseball player brought antitrust and other claims against Major League Baseball. The trial court denied defendant's motion to dismiss the antitrust claim. At first glance, it might seem that immediate appeal of this ruling would advance termination, for if the trial court was wrong, there would be no need

to litigate the factually complicated antitrust claim. However, the court found that because the antitrust issue was factually intertwined with other issues that would have to be tried anyway, immediate appeal would not really speed up the case.

6. Unlike Federal Rule 54(b), the entry of an order qualifying for immediate appeal does not commence the running of the thirty-day period to appeal. The losing party may, at its choice, either seek certification under § 1292(b) or wait to appeal until after a final judgment.

d. Federal Rule 23(f)

Federal Rule 23(f) allows for an immediate appeal of any district court order granting or refusing class action certification. Such orders are crucial, and often prove to be as important as the merits of the case itself. However, it is difficult to appeal these non-final orders under the other exceptions discussed in this section. Rule 23(f) was added in 1998 to allow for immediate appeals of certification rulings. Note that appeal is not a matter of right, but is up to the discretion of the court of appeals.

The Advisory Committee notes to Rule 23(f) indicate the Rule was "adopted under the power conferred by 28 U.S.C. § 1292(e)." That statute gives the Supreme Court the authority to enact rules allowing for interlocutory appeals not otherwise provided by statute. Does the reliance on § 1292(e) mean Rule 23(f) would be analyzed differently than the other Federal Rules for purposes of the *Erie* doctrine in Chapter 5? § 1292(e) also specifies that any rules enacted under that section must be "in accordance with" the Rules Enabling Act, 28 U.S.C. § 2072 (the source of authority for the other Federal Rules). At least one court has relied on that reference to hold that § 1292(e) is subject to at least some of the Rules Enabling Act's limits. *Chrysler Financial Corp. v. Powe*, 312 F.3d 1241 (11th Cir. 2002).

e. Mandamus and Prohibition

The writs of mandamus and prohibition allow a party to challenge the acts of a government official in court. Technically, mandamus orders the official to do something, while prohibition orders the official *not* to do something. However, the distinction between the two is often a matter of semantics. For example, if a judge refuses to grant a party's motion to amend her complaint, the party might seek a mandamus ordering the judge to allow amendment, or a prohibition preventing the judge from proceeding any further with the case without the amendment.

Although the writs of mandamus and prohibition are not limited to challenges to trial judge decisions, they can in certain cases provide a safety valve from the final judgment rule. Mandamus and prohibition actually involve a new, separate action brought against the official. Because it is a new action rather than an appeal, a mandamus or prohibition case falls outside the restrictions of the final judgment rule of 28 U.S.C. § 1291.

Potentially, then, the writs could prove to be a useful way to challenge a wide array of interlocutory rulings.

However, at least in federal court, mandamus and prohibition are rarely a useful substitute for appeal. Mandamus and prohibition are "extraordinary writs." To obtain relief, the party must usually demonstrate the judge has abdicated her jurisdictional duties. Merely showing error is not enough, even if the error is fairly obvious. Nor can mandamus or prohibition be used to challenge decisions falling within the discretion of the trial judge.

Nevertheless, there is one issue where mandamus is frequently used in the federal system to bring an interlocutory appeal. As discussed in Chapter 12, Part A (electronic materials), in certain cases in federal court the parties have a constitutional right to a jury trial. In part because of these constitutional concerns, a party can use mandamus to challenge a decision by the trial judge to deny a jury trial. A decision to *grant* a jury trial, by contrast, violates no one's constitutional rights, and cannot be appealed by mandamus.

f. The Collateral Order Doctrine

The statutes and Federal Rules discussed to this point allow a variety of important interlocutory decisions to be appealed immediately, rather than after a final judgment. Taken together, these exceptions help to avoid many of the situations in which the final judgment rule imposes serious hardship on the losing party. However, they do not provide a solution for all the problem cases. The subject of this section—the "collateral order" doctrine—represents the courts' attempt to fill in one of the gaps.

MOHAWK INDUSTRIES, INC. V. CARPENTER

558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009)

JUSTICE SOTOMAYOR delivered the opinion of the Court. . . .

I

In 2007, respondent Norman Carpenter, a former shift supervisor at a Mohawk manufacturing facility, filed suit in the United States District Court for the Northern District of Georgia, alleging that Mohawk had terminated him in violation of 42 U.S.C. § 1985(2) and various Georgia laws. According to Carpenter's complaint, his termination came after he informed a member of Mohawk's human resources department in an e-mail that the company was employing undocumented immigrants. At the time, unbeknownst to Carpenter, Mohawk stood accused in a pending class-action lawsuit [the Williams case] of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers in violation of federal and state racketeering laws. Company officials directed

Carpenter to meet with the company's retained counsel in the Williams case, and counsel allegedly pressured Carpenter to recant his statements. When he refused, Carpenter alleges, Mohawk fired him under false pretenses. . . .

[In discovery,] Carpenter filed a motion to compel Mohawk to produce information concerning his meeting with retained counsel and the company's termination decision. Mohawk maintained that the requested information was protected by the attorney-client privilege. The District Court agreed that the privilege applied to the requested information, but it granted Carpenter's motion to compel disclosure after concluding that Mohawk had implicitly waived the privilege . . . [by using the information] in the Williams case. The court declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). . . .

Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh Circuit. The Court of Appeals dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1291, holding that the District Court's ruling did not qualify as an immediately appealable collateral order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). . . . The Court of Appeals also rejected Mohawk's mandamus petition, finding no "clear usurpation of power or abuse of discretion" by the District Court. We granted certiorari to resolve a conflict among the Circuits concerning the availability of collateral appeals in the attorney-client privilege context.

II

A

By statute, Courts of Appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. A "final decisio[n]" is typically one "by which a district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). This Court, however, "has long given" § 1291 a "practical rather than a technical construction." *Cohen*, 337 U.S., at 546, 69 S.Ct. 1221. As we held in *Cohen*, the statute encompasses not only judgments that "terminate an action," but also a "small class" of collateral rulings that, although they do not end the litigation, are appropriately deemed "final." "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S., at 42, 115 S.Ct. 1203.

In applying *Cohen*'s collateral order doctrine, we have stressed that it must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114

S.Ct. 1992, 128 L.Ed.2d 842 (1994); *see also* *Will v. Hallock*, 546 U.S. 345, 350, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006). Our admonition reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals, we have recognized, undermines "efficient judicial administration" and encroaches upon the prerogatives of district court judges, who play a "special role" in managing ongoing litigation.

The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes. This requirement finds expression in two of the three traditional *Cohen* conditions. The second condition insists upon "important questions separate from the merits." *Swint*, 514 U.S., at 42, 115 S.Ct. 1203. More significantly, "the third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equipment*, 511 U.S., at 878–879, 114 S.Ct. 1992. That a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed." Id., at 872, 114 S.Ct. 1992. Instead, the decisive consideration is whether delaying review until the entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." *Will*, 546 U.S., at 352–353, 126 S.Ct. 952.

In making this determination, we do not engage in an "individualized jurisdictional inquiry." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). Rather, our focus is on "the entire category to which a claim belongs." *Digital Equipment*, 511 U.S., at 868, 114 S.Ct. 1992. As long as the class of claims, taken as a whole, can be adequately vindicated by other means, "the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted," does not provide a basis for jurisdiction under § 1291. *Ibid*.

B

In the present case, the Court of Appeals concluded that the District Court's privilege-waiver order satisfied the first two conditions of the collateral order doctrine—conclusiveness and separateness—but not the third—effective unreviewability. Because we agree with the Court of Appeals that collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege, we do not decide whether the other Cohen requirements are met.

Mohawk does not dispute that "we have generally denied review of pretrial discovery orders." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377, 101 S.Ct. 669 (1981). Mohawk contends, however, that rulings implicating the attorney-client privilege differ in kind from run-of-the-mill

discovery orders because of the important institutional interests at stake. According to Mohawk, the right to maintain attorney-client confidences—the *sine qua non* of a meaningful attorney-client relationship—is "irreparably destroyed absent immediate appeal" of adverse privilege rulings.

We readily acknowledge the importance of the attorney-client privilege, which "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). By assuring confidentiality, the privilege encourages clients to make "full and frank" disclosures to their attorneys, who are then better able to provide candid advice and effective representation. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). This, in turn, serves "broader public interests in the observance of law and administration of justice." *Ibid*.

The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system. In *Digital Equipment*, we rejected an assertion that collateral order review was necessary to promote "the public policy favoring voluntary resolution of disputes." 511 U.S., at 881, 114 S.Ct. 1992. "It defies common sense," we explained, "to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor." *Ibid*.

We reach a similar conclusion here. In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Dismissing such relief as inadequate, Mohawk emphasizes that the attorney-client privilege does not merely "prohibi[t] use of protected information at trial"; it provides a "right not to disclose the privileged information in the first place." Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the ex ante incentives for full and frank consultations between clients and counsel.

One reason for the lack of a discernible chill is that, in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal. Whether or not immediate collateral order appeals are available, clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege's crime-fraud exception. . . . The breadth of the privilege and the narrowness of its exceptions will thus tend to exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied.

Moreover, were attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). . . . Second, in extraordinary circumstances—i.e., when a disclosure order "amount[s] to a judicial usurpation of power or a clear abuse of discretion," or otherwise works a manifest injustice-a party may petition the court of appeals for a writ of mandamus. *Cheney v. United States Dist. Court*, 542 U.S. 367, 390, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). While these discretionary review mechanisms do not provide relief in every case, they serve as useful "safety valve[s]" for promptly correcting serious errors.

Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions. District courts have a range of sanctions from which to choose, including "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action," "prohibiting the disobedient party from supporting or opposing designated claims or defenses," or "striking pleadings in whole or in part." Fed. Rule Civ. Proc. 37(b)(2)(i)–(iii). Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment.

These established mechanisms for appellate review not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship. Mohawk is no doubt right that an order to disclose privileged material may, in some situations, have implications beyond the case at hand. But the same can be

said about many categories of pretrial discovery orders for which collateral order appeals are unavailable. As with these other orders, rulings adverse to the privilege vary in their significance; some may be momentous, but others are more mundane. Section 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney-client privilege rulings. Moreover, protective orders are available to limit the spillover effects of disclosing sensitive information. That a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are "only imperfectly reparable" does not justify making all such orders immediately appealable as of right under § 1291.

In short, the limited benefits of applying "the blunt, categorical instrument of § 1291 collateral order appeal" to privilege-related disclosure orders simply cannot justify the likely institutional costs. *Digital Equipment* at 883, 114 S.Ct. 1992. Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals. . . .

Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

. . . We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine . . . . In taking this path, the Court needlessly perpetuates a judicial policy that we for many years have criticized and struggled to limit. . . .

"Finality as a condition of review is an historic characteristic of federal appellate procedure" that was incorporated in the first Judiciary Act and that Congress itself has "departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 309 U.S. 323, 324–325, 60 S.Ct. 540, 84 L.Ed. 783 (1940). Until 1949, this Court's view of the appellate jurisdiction statute reflected this principle and the statute's text. *Cohen* changed all that when it announced that a "small class" of collateral orders that do not meet the statutory definition of finality nonetheless may be immediately appealable if they satisfy certain criteria that show they are "too important to be denied review." 337 U.S., at 546, 69 S.Ct. 1221.

Cohen and the early decisions applying it allowed § 1291 appeals of interlocutory orders concerning the posting of a bond, the attachment of a vessel in admiralty, and the imposition of notice costs in a class action. As the Court's opinion notes, later decisions sought to narrow *Cohen* lest its exception to § 1291 " 'swallow' " the final judgment rule. The Court has adhered to that narrowing approach, principally by raising the bar on what types of interests are "important enough" to justify collateral order appeals.

See, e.g., Digital Equipment, at 878–879, 114 S.Ct. 1992 (noting that appealability under *Cohen* turns on a "judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement," and that an interest "qualifies as 'important' in *Cohen*'s sense" if it is "weightier than the societal interests advanced by the ordinary operation of final judgment principles"). As we recognized last Term, however, our attempts to contain the *Cohen* doctrine have not all been successful or persuasive. . . .

NOTES AND QUESTIONS

1. The collateral order doctrine applies only to "important" issues. What issues are important? According to one court of appeals, determining whether something is important involves balancing the harm to the appellant that would be caused by delaying appeal and the efficiency costs of allowing appeal. *United States v. Philip Morris, Inc.*, 314 F.3d 612 (D.C. Cir. 2003). *Mohawk* suggests the same. Isn't that comparing apples to oranges?

2. Why does the exception apply only to "collateral" orders; *i.e.*, orders that do not involve the merits? What would be the consequences of allowing immediate appeal of orders that touched on the merits of the case?

3. The most difficult part of the test to satisfy is the "effectively unreviewable" requirement. Do you understand why the ruling in *Mohawk* failed this prong? Won't *every* ruling fail this requirement? Is there ever a situation where a court of appeals, waiting until after final judgment, cannot "undo" the harm done by an erroneous ruling at trial? At the very least, can't the court of appeals grant a new trial?

Now consider the situation in *Cohen*, the Supreme Court case mentioned in *Mohawk* that established the collateral order doctrine. In that case, the issue was whether a plaintiff in a shareholders derivative action had to file a bond. The bond would be used to compensate defendant if the case proved frivolous. The trial court held that no bond was required, and defendant tried to appeal. The Supreme Court held that the ruling was immediately appealable. If defendant had to wait until after final judgment to appeal, it would suffer the very harm—frivolous litigation—the bond was intended to deter. Once the defendant had litigated the frivolous suit, nothing the court of appeals could do would fix the problem. A new trial would only make matters worse.

In general, then, one class of cases where the "effectively unreviewable" prong will be met is where the harm caused is the *trial itself*. Relying on this logic, courts often allow collateral order appeals when defendant claims she is immune from suit under the Eleventh Amendment or some other doctrine. *See, e.g., Nanda v. Board of Trustees of University of Illinois*, 303 F.3d 817 (7th Cir. 2002). To the extent the immunity is a freedom from being sued at all (as opposed to an exemption from having to pay damages; see *Will v. Hallock*, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006)), forcing a defendant whose claim of immunity has been rejected to delay its appeal until after a final

judgment would deprive that defendant of the main benefit of the immunity. Recent decisions have expanded the exception to "qualified" immunity, where protection turns on a finding that the defendant acted in good faith. *See, e.g., International Action Center v. United States*, 365 F.3d 20 (D.C. Cir. 2004); *Coleman v. Parkman*, 349 F.3d 534 (8th Cir. 2003). However, denial of a motion to dismiss based on *forum non conveniens* is not effectively unreviewable. *In re Ford Motor Co.*, 344 F.3d 648 (7th Cir. 2003).

4. Consider again the situation in *Mohawk*. Is it really an adequate answer to allow a new trial, but prohibit the other side from using the information, or the fruits thereof, at the trial? Does the other side really need to *introduce* the evidence at trial? What about the fact that the party now knows the fact exists, and may therefore plan its discovery to bring out that fact in some other way?

5. As *Mohawk* points out, 28 U.S.C. §§ 1292(e) and 2072(e) give the Supreme Court the explicit authority to enact rules, within limits, to govern when a case may be appealed. However, the collateral order doctrine was not created under this delegated power, but instead evolved in case law. Is this rulemaking power a reason to limit the collateral order doctrine? Is the doctrine really an "exception" to § 1291? Can you make an argument that the rule is simply an interpretation of the word "final" in § 1291?

6. What happens to the district court action when a party files an appeal under the collateral order doctrine? In *City of New York v. Beretta U.S.A. Corp.*, 234 F.R.D. 46 (E.D.N.Y. 2006), the court held that filing an appeal will ordinarily divest the district court of jurisdiction over the action during such time as the appeal is pending. However, if the district court certifies the appeal is frivolous, it can retain jurisdiction.

PROBLEMS

1. P sues D for breach of contract. The court enters judgment for P for $50,000. However, because D refuses to pay, P will need to obtain a garnishment order from the trial court to seize D's bank account. May D appeal now, or must it wait until after the garnishment order?

2. P sues D1 and D2 for negligence. The trial judge grants D1's motion to dismiss the case against it for lack of personal jurisdiction. Is dismissal of the case against D1 a final judgment under 28 U.S.C. § 1291?

3. P sues D, his neighbor, in federal court. P's complaint contains two counts. In Count One, P seeks recovery for a window that D broke with an errant baseball. Count Two seeks recovery for nuisance, based on D's annoying habit of playing her stereo at loud levels during the middle of the night. P seeks damages under Count One, and both damages and an injunction under Count Two. The trial court grants partial summary judgment to P on the broken window claim. May D appeal immediately?

4. Same as Problem 3, except that the court grants partial summary judgment for P on the question of nuisance instead of the broken window, and

awards damages to P. However, the court does not decide whether to issue the injunction.

5. Same as Problem 3, except that the court grants partial summary judgment for P on the question of nuisance instead of the broken window, and grants an injunction. However, the court does not decide what P's damages are for the nuisance.

6. P sues D for unfair competition. During discovery, P asks D to disclose its customer list. D argues the list is a trade secret, and asks the court for a protective order against disclosure of the list. The court agrees with D and grants the protective order. May P appeal this ruling immediately?

7. Same as Problem 6, except that the court orders D to disclose the list.

8. P sues D, an internet service provider, for negligence and breach of contract based on D's transmission of a computer virus to P. The court enters judgment as a matter of law for D on the negligence claim, finding D's acts were not unreasonable as a matter of law. Other courts, dealing with similar facts, have reached the opposite conclusion. Recognizing this difference in views, the trial judge certifies the ruling as ripe for interlocutory appeal, and the court of appeals agrees to hear the case. Did the courts act properly?

D. UNITED STATES SUPREME COURT REVIEW

So far, this Chapter has focused almost exclusively on appeals from the federal district courts to the courts of appeal. The next (and final) step in the federal appeals process, of course, is the United States Supreme Court. Because of its special role in the United States federal system, Supreme Court review is governed by its own statutes, and in some respects its own principles.

A case can reach the Supreme Court by three different routes, depending on the parties and issues. As the highest federal court, the Supreme Court reviews lower federal court decisions. However, unlike the other federal courts, the Supreme Court also has the authority to review cases heard in the *state* court systems.[2] Review of state cases raises issues of federalism, some of which are addressed in Part 2 of this section. Finally, in certain rare cases the Supreme Court actually serves as a *trial* court. *See, e.g., New Hampshire v. Maine*, set out in Chapter 13, Part G (electronic materials), which involves a suit between two states.

As a technical matter, the United States Supreme Court hears very few true appeals. Instead, review of both federal court of appeals decisions and state court decisions is initiated by a writ of *certiorari*. See 28 U.S.C.

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[2] The writ of *habeas corpus* admittedly gives lower federal courts the power to review state judicial proceedings that result in imprisonment or other confinement. Like the writs of mandamus and prohibition, however, the federal court in these cases is not technically involved in an "appeal." Because the writ applies mainly in criminal cases, and involves a number of significant restrictions, study of *habeas corpus* is best deferred to an upper level course in Criminal Procedure or Federal Courts.

§§ 1254 and 1257. The main distinction between appeals and *certiorari* is that the latter is entirely discretionary, giving the Supreme Court the ability to pick and choose the cases it will decide. Congress has over the years narrowed the cases in which a party may actually appeal to the Supreme Court. Today, the only direct appeals occur under 28 U.S.C. § 1253, which provides for direct appeal of a case that must be heard by a three-judge panel. In these rare cases involving a three-judge panel, the party appeals directly from the district court to the Supreme Court, bypassing the courts of appeal.

1. SUPREME COURT REVIEW OF THE FEDERAL COURTS OF APPEAL

Review of cases in the federal courts of appeal is governed by 28 U.S.C. § 1254. The most important distinction between that section and § 1291 is that § 1254 has no final judgment requirement. Therefore, a party can seek *certiorari* for any decision by the court of appeals as soon as it occurs. However, because appellate proceedings are resolved in a fairly short time window, and because the Supreme Court has the discretion whether to grant *certiorari*, review of interlocutory rulings of a federal court of appeals are rare.

Section 1254(2) allows the appellate court to certify questions of law to the Supreme Court. Such certification could be useful in a case where the law is unclear. The Supreme Court may, if it chooses, issue a ruling clarifying the issue for the appellate court, or it may take the entire case from the court of appeals.

2. SUPREME COURT REVIEW OF STATE HIGH COURTS

Section 1257 governs appeals from the state courts. Unlike § 1254, § 1257 *does* have a final judgment rule. Thus, a party cannot seek *certiorari* from the Supreme Court for a state case until the highest state court that can rule on the matter has completed the case. The definition of a "final" judgment under §§ 1257 and 1291 is essentially the same. However, most of the exceptions discussed in section B.2 of this Chapter do not apply under § 1257. The only exception that does apply is the "collateral order" doctrine. In fact, the collateral order doctrine was developed primarily under § 1257. As with the definition of "final", precedent involving the collateral order doctrine is deemed equally valid for appeals under § 1291 and review of state-court opinions under § 1257.[3]

[3] The Supreme Court's *Mohawk* opinion, set out in Part B of this Chapter, may change this. One reason the Court gave for its narrow reading of the collateral order doctrine is that the Supreme Court could enact Federal Rules to deal with the issue. However, that rulemaking power—set out in 28 U.S.C. §§ 1292(e) and 2072(c)—only applies to appeals under § 1291 (from the district courts to the courts of appeal), not under § 1257 (from the state's high court to the

The Supreme Court can only hear rulings of "the highest court of a State in which a decision could be had." Typically, this will be the state's supreme court. However, if a particular case cannot be appealed to the state supreme court because of a procedural issue, the United States Supreme Court can review decisions of the lower state courts.

Perhaps the most important limitation imposed by § 1257, however, is that Supreme Court review is confined to issues of *federal* or *constitutional* law. The Supreme Court cannot review a state court's rulings on *state* law, even if the litigants are of diverse citizenship.[4] This limitation reflects a somewhat unusual—and often forgotten—feature of the United States Supreme Court. The United States Supreme Court is not truly a supreme court. Instead, it is a supreme *federal* court, bound by the jurisdictional limitations of Article III of the United States Constitution. The Supreme Court of Canada, by contrast, is a real supreme court, capable of reviewing all legal issues regardless of their source.

This feature of § 1257 raises a number of intriguing problems. Most of these are beyond the scope of a basic Civil Procedure course. However, one important issue—the "adequate and independent state ground" doctrine—arises with sufficient frequency that it warrants mention here. The doctrine has played a major role in defining the Supreme Court's perception of its proper function.

HERB V. PITCAIRN, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945). After suffering serious injuries in a railroad accident, plaintiff sued his employer under the Federal Employers' Liability Act. Plaintiff sued in an Illinois City Court. One of the core issues in the case was whether federal law allowed recovery. While the case was pending, the Illinois Supreme Court ruled City Courts could not hear cases brought by railroad employees under federal law. Plaintiff then sought and obtained an order of the City Court transferring venue to Circuit Court, which clearly had jurisdiction to hear these claims. Defendant, however, argued the City Court was completely powerless to hear the case, and so the order transferring venue was invalid. The Illinois Supreme Court agreed with defendant, holding that under state law, plaintiff's case was not currently pending in any state court. Because the statute of limitations had run on his claim, plaintiff sought *certiorari* from the United States Supreme Court. The Supreme Court refused to hear the case:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest

United States Supreme Court). Therefore, it is conceivable that the Court could allow itself to hear collateral order appeals from state court that it might not allow the courts of appeal to hear when brought from district courts, or vice versa.

[4] Note that this restriction is contained only in § 1257, not in § 1254. Thus, when the Supreme Court reviews a decision of a lower federal court, it can hear all questions properly before that lower court, including questions of state law.

on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. If the Illinois court means to hold that the city courts could not adjudge, transfer, or begin these cases and that no case is pending in its courts at the present time, it is manifest that no view we might express of the federal Act would require its courts to proceed to the trial of these actions.

MICHIGAN V. LONG

463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)

JUSTICE O'CONNOR delivered the opinion of the Court.

. . . David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in . . . decisions of this Court. We also examine Long's argument that the decision below rests upon an adequate and independent state ground, and we decide in favor of our jurisdiction. . . .

Before reaching the merits, we must consider Long's argument that we are without jurisdiction to decide this case because the decision below rests on an adequate and independent state ground. The court below referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law.[3] Long argues that the Michigan courts have provided greater protection from searches and seizures under the state constitution than is afforded under the Fourth Amendment, and the references to the state constitution therefore establish an adequate and independent ground for the decision below. . . .

Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute

[3] On the first occasion, the court merely cited in a footnote both the state and federal constitutions. On the second occasion, at the conclusion of the opinion, the court stated: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution."

adequate and independent state grounds,[4] we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. In other instances, we have vacated or continued a case in order to obtain clarification about the nature of a state court decision. In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. . . .

This ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. Moreover, none of the various methods of disposition that we have employed thus far recommends itself as the preferred method that we should apply to the exclusion of others, and we therefore determine that it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary. . . .

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court

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[4] For example, we have long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. Also, if, in our view, the state court " 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner that it did,' " then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) Finally, "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917).

has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *National Tea Co.*, supra, 309 U.S., at 557.

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.*, at 126. Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations to the state constitution, the court below relied exclusively on its understanding of . . . federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. Indeed, the court declared that the search in this case was unconstitutional because "[t]he Court of Appeals erroneously applied the principles of *Terry v. Ohio* . . . to the search of the interior of the vehicle in this case." The references to the state constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law. Even if we

accept that the Michigan constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.

Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf solely because of a mere possibility that an adequate and independent ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground.

[The Court then held that the search was illegal under the Fourth Amendment.]

[The concurring opinion of JUSTICE BLACKMUN, and the dissenting opinions of JUSTICE BRENNAN (joined by MARSHALL) and JUSTICE STEVENS are omitted.]

NOTES AND QUESTIONS

1. Conceptually, there are two types of adequate and independent state grounds, *substantive* and *procedural*. A case involves a substantive ground when the ruling is based on two claims or defenses—one state, the other federal or constitutional. A procedural state ground, by contrast, exists when some question of state procedural law prevents the state court from reaching a federal or constitutional issue. What type of state ground was involved in *Herb*? In *Long*?

2. The test set out by the Court in *Long* explores whether the state ground is truly "independent" of the federal ground. If you were a state supreme court judge writing an opinion after *Long*, is there anything you could do to "insulate" your decision from being reviewed by the Supreme Court?

3. There are also a few decisions involving whether a state ground is "adequate." *See, e.g., Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) (failure to satisfy state contemporaneous objection rule did not prevent Supreme Court from reviewing illegality of search). These cases typically involve "procedural" state grounds. Reviewing state grounds for adequacy may have fallen into disfavor, as in recent years it has become increasingly difficult for a party to obtain review by arguing that a state procedural ground is inadequate.

4. Is there something problematic about the Court's test in *Long*? Even if the state court relied heavily on federal precedent, isn't the state constitutional ground still technically entirely a question of state law?

5. Suppose a state supreme court is dealing with a case involving an illegal search. The court finds the search is constitutional under the fourth amendment to the United States Constitution, but violates the analogous state constitutional provision. However, the court's reasoning with respect to the state ground is nothing more than a bare-bones conclusion. Moreover, the

opinion does not contain any language stating that the state grounds are independent from the United States constitutional grounds. Why will the Supreme Court not review the case, even though it lacks the "clear statement" called for by *Long*?

PROBLEMS

1. P sues D in federal court, alleging three claims. The trial judge dismisses the complaint for failure to state a claim, and P appeals. The appellate court summarily affirms the dismissal with respect to claim one, but schedules a hearing to hear arguments concerning the other two claims. May P appeal to the United States Supreme Court now, or must she wait until the appellate court has ruled on all three claims?

2. P sues D in a state court in State Alpha. In his answer, D argues that because he has no minimum contacts with Alpha, it would violate the United States Constitution for an Alpha court to exercise personal jurisdiction over him. Unlike the Federal Rules, however, the Alpha Rules of Procedure require a party to raise personal jurisdiction in a pre-answer motion, or the defense is lost. The trial judge therefore refuses to consider D's personal jurisdiction argument. The case goes to trial, and judgment is entered for P. D appeals on the personal jurisdiction grounds, but the state's high court affirms the trial judge's ruling based on the Alpha procedure rule. Will the United States Supreme hear the case?

3. Same as Problem 2, except that D properly raises the personal jurisdiction defense. The trial judge, however, denies D's motion to dismiss. The case goes to trial, and judgment is entered for P. D appeals. The Alpha Supreme Court affirms the trial judge's rulings on jurisdiction, but reverses the judgment for P, finding P's complaint failed to state a claim because it omitted a vital element. The Alpha Supreme Court remands the case to the trial judge with orders to dismiss for failure to state a claim. However, because the statute of limitations has not yet run on P's claim, P could amend the complaint and refile the action. D seeks review of the state Supreme Court judgment. May the United States Supreme Court hear the case?