

Clarity as the Last Resort? Why Federal Rule of Appellate Procedure 4 Should and Could Stipulate Which Judgments Are “Final”

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I. INTRODUCTION

In 1992, Kenia Cooper pleaded guilty to conspiracy to import heroin.¹ She was brought to justice, convicted, and sentenced to a few years of imprisonment followed by supervised release.² Kenia carried out her term of imprisonment but, regrettably, violated the terms of her release.³

Cooper appeared before a federal magistrate judge for a supervised release revocation hearing.⁴ On February 13, 1997, the magistrate judge issued a report recommending that Cooper serve a new term in prison.⁵ Instead of objecting pursuant to proposed findings and recommendations, Cooper filed a notice of appeal to challenge the recommended term of imprisonment.⁶ She did that on February 25, 1997.⁷ Meanwhile, the district court adopted the magistrate's report and recommendation that revoked Cooper's supervised release.⁸ The judge sentenced Cooper to further incarceration.⁹ A clerk entered the order on March 5, 1997.¹⁰ Kenia Cooper did not file a notice of appeal following the final decision by the federal judge.¹¹

¹ *United States v. Cooper*, 135 F.3d 960, 961 (5th Cir. 1998).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Generally, United States magistrate judges neither have authority to conduct criminal trials nor issue final judgments against criminal defendants. Federal magistrate judges may, however, review the facts and provide a report and recommendation to the district court judge, who may or may not agree with the magistrate judge's findings prior to issuing a final judgment against a criminal defendant. 28 U.S.C. § 636(a) (2006).

⁶ Under 28 U.S.C. § 636(b), Cooper could have filed an objection to the magistrate judge's proposed findings and recommendations pursuant to § 636(b).

⁷ *Cooper*, 135 F.3d at 961.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The appellate court dismissed Cooper's notice of appeal as premature.¹² Why? The Fifth Circuit's view was that the magistrate judge's report and recommendation were not "final."¹³ The Federal Rule of Appellate Procedure 4 requires a criminal litigant to file a notice of appeal within ten days of the *final* judgment or order.¹⁴ Cooper conceded that her notice of appeal was filed from a non-appealable judgment¹⁵ and, thus, prematurely. The appellate court had to decide whether, despite its prematurity, the appeal could be saved pursuant to Rule 4's "relation forward" provision.¹⁶

The court found that the notice of appeal could not be saved from dismissal.¹⁷ Distinguishing from criminal cases in which notices of appeal were filed *after* the jury verdict but *before* the entry of a final judgment of conviction, the panel drew the conceptual dividing line. That is, unlike Cooper's "materially different situation," the premature notices of appeal in those cases were filed in response to a judge with the final power to render a binding decision in the matter.¹⁸ In contrast, Cooper's decision-maker—the

¹² *Cooper*, 135 F. 3d at 961–62.

¹³ As this Note attempts to show, often determination of "final," pursuant to the final judgment rule, is open to a particular circuit's interpretation. Kenia Cooper's case is one of several examples among the civil and criminal cases combined. Here, the court concluded that Defendant's appeal from the magistrate judge's report and recommendation was premature because only the district court's formal adoption of the recommendation could have been deemed final, and thus, appealable. Cooper's notice of appeal was premature and, in the view of this court, not curable under the "relation forward" provision of Federal Rule of Appellate Procedure 4 (FRAP 4 or Rule 4).

¹⁴ FED. R. APP. P. 4(b). See generally Martineu, *infra* note 53.

¹⁵ *Cooper*, 135 F.3d at 961. Cooper conceded that under *Trufant v. Autocon, Inc.*, 729 F.2d 308, 309 (5th Cir. 1984), a magistrate judge's report was not an appealable judgment and with that her appeal filed prior to the entry of the district court's order was premature.

¹⁶ *Id.* at 961.

¹⁷ Not only the notice of appeal was dismissed, but the dismissal was fatal.

¹⁸ See *Cooper*, 135 F.3d at 962–63:

[T]he recommendation of a magistrate judge is not a final decision and does not in any way dispose of a party's claims Any party may object to the magistrate judge's proposed findings and recommendations, and thereby compel the district court to review the subject of those objections *de novo*. 28 U.S.C. § 636(b)(1)(C) . . . The judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.' *Id.* The judge may receive more evidence on the matter, or recommit the matter to the magistrate judge with instructions. *Id.* In short, 'the magistrate has no authority to make a final and binding disposition.' . . . Only where the appealing party is fully certain of the court's disposition, such that the entry of final judgment is predictably a formality, will appeal be proper.

magistrate judge—wore an advisory hat regarding the criminal cases under § 636(b).¹⁹ Because in those circumstances the magistrate judge's decision was not binding, Cooper's notice of appeal was not authorized under the meaning of § 1291.²⁰

Prematurity itself is not a bar to an appellate review due to the auspices of FRAP 4. What distinguished Kenia Cooper's case was that she filed her notice of appeal *after* the magistrate judge had issued the report and recommendation yet *before* the district court had issued a final judgment adopting the magistrate judge's recommendation.²¹ This alone transformed Cooper's notice of appeal from the status of premature and potentially curable under Rule 4 to invalid and dismissible²²—and in the case of Kenia Cooper of one fatally dismissed.²³ The latter happened because Cooper had not filed any other notice of appeal within ten days of the district court's judgment. Under these circumstances, she permanently lost her right to an appeal of the district court's decision.

Was this approach too technical, especially in the circumstance where the person's freedom was at stake? Perhaps. A number of circuits, however, take such a technical approach seriously—one might conclude too seriously. Kenia Cooper's notice of appeal was dismissed, and it was fatal to appeal as of right. By the time the appellate panel rendered its decision a year after Cooper had filed a notice of appeal following the magistrate court's recommendation, a Rule 4(b) window requiring a filing within ten days had closed.²⁴ Whether or not the trial court erred in any way will remain a mystery and history. Kenia, meanwhile, had to return to prison.²⁵

¹⁹ 28 U.S.C. § 636(b) (2006).

²⁰ 28 U.S.C. § 1291 (2006) (Section 1291).

²¹ *Cooper*, 135 F.3d at 961.

²² "Because a magistrate judge's report and recommendation can never be a final decision, Cooper's appeal therefrom was improper." *Id.* at 963.

²³ *Id.*

²⁴ Arguably, Cooper could have filed another notice of appeal after the district court's order on March 5, 1997, just to ensure a review. As this Note touches upon, situations like these arise often enough to start wondering if the process itself is largely at fault and not the litigants on the receiving end. The bitter irony of this scenario is that unlike not filing an appeal or filing it late, filing notice of appeal early can hardly be viewed as attorney's tardiness. Furthermore, attorneys do not necessarily act unprofessionally by not filing multiple notices of appeal in anticipation of the worst-case scenarios. When the rules of a process are ambiguous, such as in this illustration, maybe the appellate courts ought to take an approach conducive to protection of the parties' rights.

²⁵ A dismissed appeal from a criminal case such as this is not rare. *See, e.g.*, U.S. v. Winn, 948 F.2d 145, 153–54 (5th Cir. 1991); U.S. v. Cronan, 937 F.2d 163, 164 (5th Cir. 1991). Both deal with criminal cases in which notices of appeal were filed after the jury verdict but before the entry of a final judgment of conviction.

Building on the undertones of the preceding story, this Note describes circuits' varied treatment of filing notices of appeal early.²⁶ It shows a split among circuits on the issue of finality, prematurity, and, consequently, Rule 4's provision to relate premature notices of appeal forward. In some cases, a premature notice of appeal does not ripen into a valid notice of appeal upon entry of the final, appealable order or judgment.²⁷ The time an attorney usually learns of a deficiency with the notice of appeal is usually when the deadline for filing a proper notice of appeal has already passed. This happens because appellate courts start reviewing appeals after 30 days, in civil cases, and 10 days, in criminal cases.²⁸ Generally, such deficiency then precludes appellate review. Being late under such circumstances, however, is faux tardiness rather than true unprofessionalism. The result—finality, prematurity, and congruent application of the relevant federal appellate rules that cure the issues stemming from the two become that much more sensitive to all concerned.

Part II of this Note briefly explains the final judgment rule and its historical development, serving to provide a backdrop to much that ensues with the “relation forward” provision of the Federal Rules of Appellate Procedure. Part III reviews a seminal decision of *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,²⁹ in which the U.S. Supreme Court provided a test to help the circuits with the application of Rule 4.³⁰ Application of *FirsTier* and Rule 4 has produced disparate outcomes for appeals that are not readily apparent as ripen. Part IV describes the effects that both *FirsTier*'s test and the Court's reasoning have had on the circuits. By contrasting cases with similar procedural history and facts, yet disparate circuits' analyses and decisions, Part IV attempts to support the proposition in Part V. The latter introduces a summary of negative ramifications on the law and proposes a partial solution: an addition to the text of the Rule. This

²⁶ Although this Note seemingly devotes attention to civil cases, criminal cases are similarly affected by the circuits' split on the issue. The introductory case illustrates this point. Although the time allotted to filing a notice of appeal from a judgment in a criminal case is shorter than that allowed in a civil case, the underlining confusion and consequences to all concerned are analogous to the premature civil cases' appeals.

²⁷ See FED. R. APP. P. 4(a)(2), (b)(2).

²⁸ This sentence refers to Rule 4 of the Federal Rules of Appellate Procedure; it prescribes the deadlines for a timely notice of appeal. “In a civil case . . . the notice of appeal . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.” FED. R. APP. P. 4(a)(1). “In a criminal case, a defendant's notice must be filed in the district court within 10 days” FED. R. APP. P. (4)(b)(1)(A). “When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days” FED. R. APP. P. (4)(b)(1)(B).

²⁹ 498 U.S. 269, 273 (1991).

³⁰ *Id.* at 276; see also *infra* Part III (reviewing *FirsTier*).

addition captures a number of palpable categories of cases that ought to be considered final for operation of the Rule 4(a)(2) and 4(b)(2) “relation forward” provisions in accord with the creators’ intent.

II. THE FINAL JUDGMENT RULE

Generally, federal appellate courts may review only “final decisions.”³¹ The Court expressly rejected efforts to reduce the finality requirement to a case-by-case appealability determination.³² The decision is final when it “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment,”³³ and the court “hand[s] down a judgment couched in language calculated to conclude all claims” before it.³⁴ The final judgment rule³⁵ means that only after final decision has been

³¹ Section 1291 provides that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the same district courts of the United States . . .” (emphasis added). This is not to say, however, that an appellate review before final judgment is never or rarely possible. 28 U.S.C. § 1292, for example, provides a “narrow exception to the normal application of the final judgment rule, [which] has come to be known as *the collateral order doctrine*.” *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (emphasis added); *see also* *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (emphasizing that the collateral order doctrine is only a narrow exception to the final judgment rule). Under this exception “certain types of orders [permitted] to be treated as the equivalent of a final judgment for the purposes of appeal.” FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 12.10 (4th ed., 2005). “That exception is for a ‘small class’ of pre-judgment orders that ‘finally determine claims of right separable from, and collateral to, rights asserted in the action, [and that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.’” *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) (quoting *Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541, 546 (1949)). The Supreme Court delineated the *Cohen* exception’s test of the collateral order doctrine to determine availability of the interlocutory appeals. *Lauro*, 490 U.S. at 498. Under § 1292, such an appeal would be possible if it (1) “conclusively determine[s] the disputed question,” (2) “resolve[s] an important issue completely separate from the merits of the action,” and (3) becomes “effectively unreviewable on appeal from a final judgment.” *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

³² *Digital*, 511 U.S. at 868 (quoting *Carroll v. United States*, 354 U.S. 394, 405 (1957)).

³³ *Id.* at 867 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

³⁴ *Vaughn v. Mobil Oil Exploration & Prod. Se., Inc.*, 891 F.2d 1195, 1197 (5th Cir. 1990).

³⁵ “The Final Judgment Rule” and “Finality Requirement” are used interchangeably. *See, e.g., Richardson-Merrell Inc. v. Koler*, 472 U.S. 424, 439 (1985). “Final Judgment” as used in this Note means a decision, judgment, decree, order or other action that meets the definition of a “final decision” expressed by the Supreme Court in *Catlin*, 324 U.S. at

entered may a party file an appeal.³⁶ This rule applies whether the basis of appeal is error within the judgment or in the application of procedure.³⁷ Filing a notice of appeal³⁸ triggers an appellate review, which should only be filed after the federal district court has resolved all the legal issues.³⁹ In order to understand the importance of the final judgment rule, one may need to know its history and rationale.

A. History of the Federal Final Judgment Rule

Three sections of the Judiciary Act of 1789⁴⁰ gave rise to the final judgment rule. By 1789, the final judgment requirement was a common characteristic of English jurisprudence. The courts of England required that a filing of a writ of error—the principal means to request an appellate review—had been preceded by a disposition of an entire controversy.⁴¹ The drafters of the Judiciary Act borrowed the final judgment rule from the English writ of error procedure.⁴²

The Supreme Court interpreted the Rule over time. In 1830, Justice Story extolled the Judiciary Act for discouraging excessive appeals; he wrote that it was important to the administration of justice to allow appeals only from final judgments because “[i]t would occasion very great delays and

233 (“[O]ne which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”). “Interlocutory order” means any action or non-action that is not a final judgment.

³⁶ FLEMING ET AL., *supra* note 31, at § 12.4.

³⁷ *Id.*

³⁸ “An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.” FED. R. APP. P. 3.

³⁹ “[T]he issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a ‘particular unjustic[e]’ averted . . . by a prompt appellate court decision.” *Digital*, 511 U.S. at 868 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)).

⁴⁰ Judiciary Act of 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73. Three sections of the Act provide for appeals: Section 21 refers to allowing an appeal from a final decree; Sections 22 and 25 are worded in terms of granting jurisdiction to the higher court to review a final decree or judgment of a lower court.

⁴¹ Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 552–53, n.11 (1932).

⁴² See *McLish v. Roff*, 141 U.S. 661, 665 (1891) (“It is true that the Judiciary Act of 1789 limited the appellate jurisdiction of this court to final judgments and decrees in the case specified. This, however, in respect to writs of error, was only declaratory of a well-settled and ancient rule of English practice.”). See generally Crick, *supra* note 41, at 548–53.

oppressive expenses” if cases had been drawn out by successive appeals.⁴³ Chief Justice Marshall noted that the final judgment rule was necessary to prevent “all the delays and expense incident to a repeated revision” of piecemeal appeals of the same legal issue.⁴⁴ Chief Justice Taney similarly wrote that the “object and policy of the acts of Congress in relation to appeals . . . [are to prevent] needlessly burdensome and expensive . . . successive appeals . . . [which] produce great and unreasonable delays”⁴⁵

Additional legislative acts progressively contributed to the final judgment rule’s development. Congress established the federal courts of appeals by passing the Evarts Act a few years later.⁴⁶ Whereas the Judiciary Act’s language referred to appellate review of “judgment or decrees,”⁴⁷ the Evarts Act expressly stipulated jurisdiction over appeals from “final decision[s] in the district court[s].”⁴⁸ The Supreme Court, however, commented in *Ex parte Tiffany* that “[t]he words: ‘final decisions in the district courts’ mean the same thing as ‘final judgments and decrees’ as used in former acts regulating appellate jurisdiction.”⁴⁹

Following the codification of the final judgment rule in § 1291,⁵⁰ the Court developed the present general definition of “final judgment” as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁵¹

The final judgment rule can be broken down into three elements, which essentially clarify and illuminate the nature of the rule. These elements are as follows: (1) the right to an appeal, (2) the timing of the appeal, and (3) the appellate court’s jurisdiction. Specifically, Rules 3 and 4,⁵² as well as § 1291 codify (1) when a person aggrieved by the trial court’s decision has the right to appeal the order or judgment to an appellate court, (2) when the appellate court has the right to review the merits of the order or judgment, and (3) that the aggrieved person must wait until the trial court has decided on the entire

⁴³ *Canter v. Am. Ins. Co.*, 28 U.S. 307, 307 (1830).

⁴⁴ *United States v. Bailey*, 34 U.S. 267, 273 (1835) (“Congress did not intend to expose suitors” to an inconvenience of delays and expenses caused by multiple appeals).

⁴⁵ *Forgay v. Conrad* 47 U.S. 201, 206 (1848).

⁴⁶ Evarts Act, ch. 517, § 2, 26 Stat. 826 (1891). Section 2 provides for the creation of a circuit court of appeals for each federal circuit providing the appellate jurisdiction established by the Act.

⁴⁷ Judiciary Act of 1789, 1 Stat. 73.

⁴⁸ *Id.* § 6.

⁴⁹ 252 U.S. 32 (1919).

⁵⁰ 28 U.S.C. § 1291 (2006).

⁵¹ 324 U.S. at 233. The definition, however, does not clarify “final” well enough as this Note shows.

⁵² FED. R. CIV. P. 3, 4.

claim before the appellate court can take an appeal.⁵³

The Rule also has two corollary issues: (1) an aggrieved party may not appeal an interlocutory order before the end of the case, and (2) the appellate court does not have jurisdiction over an interlocutory appeal.⁵⁴ With that, the final judgment rule seems to exist in a world of categorical values: a party either has or does not have a right to appeal; an appellate court either has mandatory or no jurisdiction over the appeal; the party may only appeal a final order or decree of the trial court.⁵⁵ These absolutes are buttressed by the Rule's history described earlier, as well as its underlining rationale adopted by the judicial branch.

B. *Rationale of the Federal Final Judgment Rule*

There is not one formulation of the final judgment rule's underlining policy. Rather, there are various themes that the courts note. Generally, these themes recognize a need for efficient administration of justice in the federal courts⁵⁶ and the rights of the parties. The Supreme Court addressed the final judgment rule rationale on various occasions. Among many, in *Stringfellow v. Concerned Neighbors in Action*,⁵⁷ for example, the Court noted that the finality requirement of Section 1291 protects a variety of interests necessary to the efficiency of the legal system: pre-trial and pre-final judgment trial appeals are likely to cause disruption, delay, and expense for the litigants, as well as burden appellate courts by requesting immediate consideration of issues that may become moot or irrelevant by the end of trial. The finality requirement protects the strong interest of allowing trial judges to supervise pretrial and trial procedures without undue interference from the appellate court.⁵⁸ Similarly, in *Richardson-Merrell, Inc. v. Koller*,⁵⁹ the Court wrote that the final judgment rule promotes efficient administration of justice and emphasizes the deference that appellate courts must give to the trial judge's decisions concerning the numerous issues of law and fact that arise prior to the final disposition of a case.⁶⁰ When judges explain the policies that buttress the final judgment rule, they often refer to the purpose of achieving a

⁵³ Robert J. Martinue, *Symposium: Reform in the Federal Court System, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 770 (1993).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Digital*, 511 U.S. at 868.

⁵⁷ 480 U.S. 370, 380 (1986).

⁵⁸ *Id.*

⁵⁹ 472 U.S. 424 (1985).

⁶⁰ *Id.* at 436.

balance: needing to preserve the role of the trial process on one hand while supporting effective appellate review and protecting the parties⁶¹ by preventing them from using appeals as delaying tactics.⁶²

One appeal consumes fewer judicial resources than “piecemeal litigation.”⁶³ Yet, it is frequently difficult to identify when the judgment is final. Some judgments may have elements of finality but the Court has found them not appealable. As Part I has prefaced, many judgments might not be final for the purpose of conferring jurisdiction on the federal appellate courts. At the same time, lack of finality in such cases may not be readily apparent to litigants.⁶⁴ Rule 4 contains a provision that cures prematurity of appeals, but it depends on both the litigants’ and appellate courts’ congruent understanding of finality. As Part III explains, despite the “relation forward” provision of Rule 4, dependence on a uniform understanding by all concerned, in reality, participants—appellants and courts—tend to perceive the meaning and operation of the Rule in two opposed ways. While some courts take a pragmatic approach regarding finality doctrine, many courts follow a technical path. What follows describes how “relation forward” emerged from pragmatic finality rationale, and, as such, lends itself best to pragmatic reasoning rather than technical.

III. “RELATION FORWARD” PROVISION OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND PRAGMATIC FINALITY DOCTRINE

Rule 4’s subsections (a)(2) and (b)(2) contain a so-called “relation forward”⁶⁵ provision that envisions protection of a party’s appeal when

⁶¹ 9 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (2d ed. 1992).

⁶² To survey “the true complexity of the factors that have kept the issue of the appellate jurisdiction in a state of constant flux.” *Id.*

⁶³ *Digital*, 511 U.S. at 879.

⁶⁴ The Supreme Court acknowledged this difficulty in *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 150 (1964):

[O]ur cases long have recognized that whether a ruling is ‘final’ within the meaning of [Section] 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.

Id. at 152 (quoting *Cohen*, 337 U.S. at 546).

⁶⁵ *FirsTier*, 498 U.S. at 273, appears to be the first case in which the Court specifically took on this terminology. Black’s Law Dictionary, for example, does not contain “relation forward,” but does define “relation back” as:

[t]he doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time. In federal civil procedure [Fed.

parties file premature notices of appeal. One of the causes of appeal's prematurity is that sometimes it may be unclear when or if the judgment is final. The "relation forward" provision was envisioned to protect a party filing a notice of appeal before entry of the judgment or final order.⁶⁶

A. *The Backdrop to the Rule 4(a)(2) Enactment: "Pragmatic Finality" Approach*

Prior to codification of "relation forward," some appellate courts deemed particular pre-mature notices of appeal effective. Specifically, before 1979, the year when Rule 4(a)(2) was adopted, federal appellate courts had developed a common practice of treating certain notices of appeal as admissible for an appellate review even when such notices had been filed before the final decision—prematurely.⁶⁷ This was referred to as a "pragmatic approach to the question of finality."⁶⁸ The rationale was that such reasoning (1) did not interfere with efficient resolution of every action,⁶⁹ (2) did not expose appellees to prejudice,⁷⁰ and (3) distinguished tenable tardy notices of appeal from late appeals. In short, appellate courts recognized that any other approach to the technical defect of prematurity would have precluded an otherwise proper appeal.

R. Civ. P. 15(c)], an amended pleading may relate back, for purposes of the statute of limitations, to the time when the original pleading was filed.

BLACK'S LAW DICTIONARY 1314 (8th ed. 2004). By a reverse analogy, perhaps, "relation forward" can be defined as a principle necessary in cases in which a post-trial motion may technically destroy the finality of the judgment and by quoting the text from Rule 4(a)(2): "notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(a)(2).

⁶⁶ "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(a)(2). Criminal convictions' appeals are afforded the same treatment: "[A] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(b)(2). In fact, Rule 4(a)(2) was mapped after Rule 4(b)(2). Notes of Advisory Committee on 1979 amendments, *Note to Subdivision (a)(2)*.

⁶⁷ "Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. *Note to Subdivision (a)(2)*. The proposed [adopted] amended rule would recognize this practice but make an exception in cases in which a post-trial motion has destroyed the finality of the judgment." *See Notes of Advisory Committee on 1979 Amendments [FRAP 4], Note to Subdivision(a)(2)* (corrections added).

⁶⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

⁶⁹ *Id.*

⁷⁰ 2A Fed. Proc. L. Ed. § 3:578.

1. Historical Roots of "Pragmatic Approach"

Legal history does not appear to designate a category that addresses "pragmatic finality." If there were, however, one could find some early cases that evince the Court's leaning toward pragmatic operation of justice—the final judgment rule and related rulemaking being such examples.

The *Forgay v. Conrad* rule is one of the Court's early attempts to smooth out a categorical final judgment rule.⁷¹ In *Forgay v. Conrad*,⁷² the Court had to decide whether the trial court's order reviewed by the appellate court was final. The appellee was an assignee in a bankruptcy case, seeking an appeal from an order that set aside conveyances and directed disputed property to be conveyed to the plaintiff.⁷³

The trial court's decrees decided the title of all the property in dispute. Specifically, there were decrees of the trial court that certain deeds had to be set aside as fraudulent and void; that specified property should have been delivered to the complainant; that one of the defendants should have paid a certain amount of money to the complainant, as well as that the complainant was entitled to profits and notes.⁷⁴ The trial court, however, retained its jurisdiction over some remaining "ministerial" matters: a decree that money was to be paid into Plaintiff's account, a decree that property should have been delivered to a receiver, and a decree that property held in trust should have been delivered to a new trustee appointed by the court.⁷⁵

Chief Justice Taney, writing for a unanimous Court, found the trial court's judgment to have been final despite the remaining "ministerial" matters to be decreed.⁷⁶ Because the finalized decrees had settled the rights of the parties and denial of an immediate appeal would have caused severe harm to the defendants, the Court permitted the appeal even though the trial court's judgment technically was not final.⁷⁷ The Court acknowledged that although the decree from which the assignee appealed technically had not been finalized, "this court [had not] heretofore understood the words 'final decrees' in this strict and technical sense, but [had given] to them a more liberal . . . a *more reasonable* construction, and one more [congruous] to the intention of the legislature."⁷⁸ In fact, an attempt at a more reasonable

⁷¹ 47 U.S. 201 (1848).

⁷² *Id.* at 203.

⁷³ *Id.* at 202.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Forgay*, 47 U.S. at 204. The Court expressly acknowledged that in the opinion.

⁷⁸ *Id.* at 203 (emphasis added). The Court prescribed to apply the decision narrowly—to cases in which property is sold for or conveyed to for the benefit of the

construction led to creation of a number of exceptions to the final judgment rule, some of which have been codified.⁷⁹

2. *Formal Mandate to Choose Pragmatic Approach*

The U.S. Supreme Court formally encouraged the appellate courts to choose a pragmatic approach. In 1953, the Court granted certiorari to a petitioner who had been convicted of a crime and sentenced to imprisonment.⁸⁰ He had filed his notice of appeal the day after sentencing, the judgment, however, was entered three days later.⁸¹ Consequently, the original appeal was dismissed as premature because the petitioner did not refile his notice of appeal.⁸² The Court reversed the appellate court's decision⁸³ holding that the prematurity should have been disregarded as it did not affect substantial rights.⁸⁴ To wit, the Court mandated the fundamental proposition that when there is no prejudice to appellee's substantial rights, an appeal should be heard to protect the appellant's rights.⁸⁵

A few years later, the Court reiterated *Lemke's* recommendation that "the requirement of finality is to be given a 'practical rather than a technical

party or when courts order the immediate payment of money. *Id.* at 204–05.

⁷⁹ Almost all exceptions have been codified. The following list includes generally accepted exceptions to the final judgment rule that have been codified, as well as some generally accepted exceptions that have yet to be codified: (1) certification of an issue for interlocutory review under § 1292; (2) certification by the district court of collateral order reviews under *Cohen's* principle, *supra* note 31, at 547; (3) certification by the district court under FED. R. CIV. P. 54; (4) stay orders, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); (5) exceptional mandamus relief, *Calderon v. U.S. Dist. Court*, 163 F.3d 530, 534–35 (9th Cir. 1998). This list is not exhaustive.

⁸⁰ *Lemke v. United States*, 346 U.S. 325, 326 (1953).

⁸¹ *Id.* at 326

⁸² *Id.* at 325.

⁸³ *Id.* at 326.

⁸⁴ *Id.*

⁸⁵ *See, e.g., Firschau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965) (a civil case that relied on *Lemke*). A notice of appeal filed from a nonfinal order dismissing the plaintiff's complaint was regarded as directed to the subsequent final judgment dismissing the action, thus giving the Court of Appeals jurisdiction to hear the appeal. The district court determined that the action could not have been saved by any amendment of the complaint. The appellate court noted that (1) it maintained a liberal policy of treating informally drawn and improperly labeled documents as sufficient for the purposes of a notice of appeal, and (2) the Supreme Court in *Lemke* had given similar treatment to a notice of appeal filed before entry of the final decision in a criminal proceeding because any defect not affecting substantial rights was to be disregarded. *Id.* at 271.

construction.”⁸⁶ In *Gillespie*, the first issue before the U.S. Supreme Court was to decide whether the appellate court’s finding of proper jurisdiction had been reasonable.⁸⁷ The trial court had struck all parts of the complaint on motion of respondent, including reference to recovery for the benefit of the siblings of the decedent while the mother was alive; Petitioner immediately appealed to the court of appeals.⁸⁸ Petitioner argued that Respondent moved to dismiss the appeal on the ground that the ruling appealed from was not a final order under 28 U.S.C. § 1291.⁸⁹ The appellate court disagreed, and the Court affirmed.⁹⁰ In a 7–2 decision,⁹¹ the Justices conceded that a trial court’s ruling in a case was not fully reviewable under § 1291 where the questions presented were fundamental to the further conduct of the case.⁹² At the same time, however, they acknowledged that finality had a long-standing lack of clarity with marginal cases like *Gillespie*.⁹³

The Court invoked already familiar reasoning of the final judgment rule rationale: the inconvenience and costs of piecemeal review had to be weighed against the danger of denying justice by a delay of the decision.⁹⁴ Upon this reasoning, the Court found that postponing the review

⁸⁶ *Gillespie*, 379 U.S. at 152.

⁸⁷ *Id.* Petitioner’s appeal was concerning a right to damages for wrongful death. The petitioner, administratrix of her son’s estate, brought this action in federal court against the respondent ship owner and employer to recover damages for Gillespie’s death, which was alleged to have occurred when he fell and drowned while working as a seaman on respondent’s ship docked in Ohio. *Id.* at 149–50. She claimed a right to recover for the benefit of herself and of the decedent’s dependent brother and sisters under the Jones Act. *Id.* at 150. The complaint in addition sought damages for Gillespie’s pain and suffering before he died. The district judge, holding that the Jones Act supplied the exclusive remedy, on motion of respondent struck all parts of the complaint which referred to the Ohio statutes or to unseaworthiness, including all reference to recovery for the benefit of the brother and sisters of the decedent, who—respondent had argued—were not beneficiaries entitled to recovery under the Jones Act while their mother was living. *Id.*

⁸⁸ *Id.* at 150–57.

⁸⁹ *Gillespie*, 379 U.S. at 150–57.

⁹⁰ *Id.* at 152.

⁹¹ *Id.* at 167. Two Justices—Harlan and Goldberg—dissented, although only Justice Harlan disagreed with the finding of “finality.” Justice Goldberg dissented in part and only on the merits of the case. *Id.* at 158.

⁹² *Id.* at 153–54.

⁹³ *Id.* at 152.

⁹⁴ *Gillespie*, 379 U.S. at 152. The Court found that the parties’ costs would have been lower if the Court reviewed the appeal then rather than if it had sent the case back with the issues undecided. While their claims were not formally severable to ensure the court’s order to be unquestionably appealable as to them, the Court found that fact an ample reason to view their claims as severable when deciding the issue of finality, particularly because the brother and sisters were separate parties in the petition for extraordinary relief. *Id.* at 153.

of the brother's and sisters' rights, perhaps for a number of years, would have likely worked a substantial injustice on them: the claims for recovery for their benefit were effectively unavailable to them as long as the trial court's order had to remain unchanged.⁹⁵ The Court concluded that delay in adjudication of the defendants' rights would work an injustice upon them.⁹⁶ To wit, the Court applied a pragmatic rather than technical reasoning when concluding on the issue of finality.

The Court's directive in the 1950s and 1960s to be pragmatic regarding finality of judgments and pre-maturity of appeals continued into the 1970s and 1980s. Specifically, the circuits that followed this mandate generally employed the "prejudice to appellee" test when resolving the issue of finality and thus jurisdiction over the appeals.

Some examples of the pragmatic approach application include cases concerning motions to dismiss,⁹⁷ for which Rule 54(b)⁹⁸ generally requires certification to allow an appellate review.⁹⁹ In *Tilden*, a summary judgment

⁹⁵ *Id.* at 153.

⁹⁶ *Id.*

⁹⁷ *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973); *Tilden Fin. Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604 (3d Cir. 1979); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980) (consistent with the Fifth Circuit in *Jetco*, the Ninth Circuit chose a practical rather than technical construction to the final judgment rule by finding no prejudice to the appellee or conflicts with the rule's rationale effects).

⁹⁸ FED. R. CIV. P. 54(b), titled *Judgment on Multiple Claims or Involving Multiple Parties*, states that

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

⁹⁹ That is not to mislead anyone into thinking that appellate courts never chose a technical approach to finality by refusing to give retroactive effect to a premature notice of appeal from a judgment that did not dispose of all claims or parties, despite a subsequent Rule 54(b) certification. *See, e.g., Kirtland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1168 (5th Cir. 1978) (holding that the plaintiff's premature notice of appeal conferred no jurisdiction upon the Court of Appeals because it had been filed from the non-final judgment and without prior Rule 54(b) certification); *Oak Constr. Co. v. Huron Cement Co.*, 475 F.2d 1220, 1221 (6th Cir. 1973) (finding that a judgment did not dispose of all claims before a district court and no certification under Rule 54(b) was originally entered thereby allowing no appellate review due to a premature notice of appeal). The prematurity of appeals under Rule 54(b) technical blemishes, however, were not fatal to the appeals and appellants were allowed to re-file an appeal.

left a third-party complaint unresolved.¹⁰⁰ The district court entered a Rule 54(b) certification only after a notice of appeal had already been filed, albeit prematurely.¹⁰¹ The court of appeals accepted jurisdiction over the appeal. The court reasoned that because generally appellate courts permit a subsequent entry of final judgment under § 1291 to validate a premature appeal, a subsequent Rule 54(b) certification, which also creates a final order under § 1291, should similarly validate a premature appeal.¹⁰² The appellate court noted that the opposing party would not be prejudiced by such a holding.¹⁰³

Similarly, the Fifth Circuit employed a pragmatic approach to finality. In *Jetco*, the district court had granted one defendant's motion to dismiss prompting a plaintiff to file a notice of appeal before the issuance of a final order.¹⁰⁴ That type of action, however, required Rule 54(b) certification.¹⁰⁵ Several months later, the trial judge granted the plaintiff and other defendants a stipulated judgment and dismissed the action.¹⁰⁶ No notice of appeal was filed following the stipulated judgment.

Appellee-defendant requested that the court of appeals dismiss the plaintiff's premature appeal.¹⁰⁷ To that end, the Fifth Circuit reasoned that consideration of the two orders together was not prejudicial to the appellee and concluded that under those circumstances, a single trial court's order in which the district court would have merely recited the substance of the earlier two orders was a gratuitous formality.¹⁰⁸ The Fifth Circuit noted that "[m]indful of the Supreme Court's command that practical, not technical, considerations [were] to govern the application of principles of finality . . . we decline appellee's invitation to exalt form over substance by dismissing this appeal."¹⁰⁹

¹⁰⁰ *Tilden*, 596 F.2d at 606.

¹⁰¹ *Id.*

¹⁰² *Id.* at 607.

¹⁰³ *Id.*

¹⁰⁴ *Jetco*, 473 F.2d at 1231.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1231.

¹⁰⁹ *Id.* (citations omitted). Note, however, the Fifth Circuit has since curtailed this "expansive view of appellate jurisdiction." *Cooper v. United States*, 135 F.3d 960, 963 (5th Cir. 1998). The U.S. Supreme Court "made plain that a premature notice of appeal operates as a valid one 'only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment.'" *Cooper*, 135 F.3d at 963 (quoting *FirsTier*, 498 U.S. at 276). "That rule is incompatible with this circuit's previous theory that a premature notice of appeal is valid wherever no post-judgment or post-trial motions have been filed . . . [t]o the extent that our prior cases allowed appeal of non-

Illustrative of the same approach is the Third Circuit's finding in a different context—unresolved attorney fees.¹¹⁰ The defendant filed a notice of appeal from an order granting recovery to the plaintiff; the order left out the question of attorney's fees.¹¹¹ Although the notice of appeal had been filed prematurely, the Third Circuit found jurisdiction over the appeal despite a subsequent trial court order to award the plaintiff attorney's fees.¹¹² Although that order was technically the final one, the appellate court held that in the absence of a showing of prejudice to the appellee, the premature appeal taken from a non-final order was to be regarded as an appeal from the final order.¹¹³

At the same time, some circuits remained technical. For instance, just three years after its choosing substance over form in *Jetco*, the Fifth Circuit leaped to a technical approach. In *Cole v. Tuttle*, the appellate court dismissed an appeal for lack of jurisdiction because the plaintiff's premature notices of appeal from two interlocutory orders did not give the court of appeals jurisdiction to review an earlier order that had not been specified in these notices of appeal. The Ninth Circuit had an analogous view concerning premature appeals.¹¹⁴ In *Rabin v. Cohen*, the appellate court found a notice of appeal from a non-final order null when the appeals to which the notices related were dismissed without retroactive validation by a new final judgment taken later.¹¹⁵

This was the judicial climate when Congress approved Rule 4(a)(2) in

final decisions, they are no longer good law in the wake of *FirsTier*." *Id.* Another example in the context of motions to dismiss is *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980) (Recognizing that the notice of appeal was premature, the Ninth Circuit chose to give a practical rather than technical construction to the final judgment rule.)

¹¹⁰ *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977). The plaintiff was an engineer employed by a naval shipyard. He sued the federal government for discrimination under the Equal Employment Opportunity Act of 1972. The district court entered an order awarding him retroactive promotion, back pay, and interest but not the attorney's fees, which had also been sought in the complaint. The government appealed from this order, and subsequently the court issued a second order awarding counsel fees and expenses to the plaintiff. *Id.* at 920–21.

¹¹¹ *Id.* at 921.

¹¹² *Id.* at 922–23.

¹¹³ *Id.* at 922.

¹¹⁴ 540 F.2d 206, 207 (5th Cir. 1976); *see also Calmaquip Eng'g W. Hemisphere Corp. v. W. Coast Carriers, Ltd.*, 650 F.2d 633 (5th Cir. 1981). Taken here in a different context, yet as an example under the same principle, this case shows how far the technical approach took the courts. In *Calmaquip*, the court applied strict mechanical compliance with the requirement of Rule 58 that the judgment be set forth on a separate document in order to be appealable. *Id.* at 635–36.

¹¹⁵ 570 F.2d 864 (9th Cir. 1978).

1979. Appellate courts continued to use both pragmatic and technical approaches until the U.S. Supreme Court interpreted the Rule in *FirsTier* in 1991.

B. *FirsTier's Interpretation of Rule 4(a)(2) and Introduction of the "Reasonableness" Test*

Twelve years after the Rule's adoption, the Court responded to the circuits' disparate views of finality. In *FirsTier*, a seminal decision in this context, the Court devised a test intended to aid the circuits when deciding the cases on the margins. There, the Court found that the court of appeals had erred in a threshold determination that a notice of appeal filed from a bench ruling could only be effective if the bench ruling itself was a final decision. The Court held that Rule 4(a)(2) permits a notice of appeal filed from certain non-final decisions to serve as an effective notice for a subsequently entered final judgment.¹¹⁶

In *FirsTier*, insured party *FirsTier* brought action against insurer, Investor's Mortgage Insurance Co. (IMI), seeking damages for IMI's alleged breach of contract and breach of its good faith and fair dealing. IMI moved for summary judgment. During the motion's hearing, on January 26, 1989, "the District Court [judge] announced from the bench that [the court] was granting IMI's motion. The judge stated that *FirsTier's* eight policies [with IMI] had been secured . . . through fraud or bad faith and [consequently] were void."¹¹⁷ Among other statements, the judge said that "in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong . . . it could be righted by the Circuit."¹¹⁸ The district court then requested that IMI submit proposed findings of fact and suggested conclusions of law to support the oral ruling.¹¹⁹ The judge instructed that *FirsTier*, if it cared to do so, had five days to file with the court any objections or suggestions to IMI's proposed findings.¹²⁰ At the end, the judge also clarified that the ruling extinguished both *FirsTier's* claims for breach of contract and its claim for breach of the duty of good faith and fair dealing.¹²¹

On February 9, 1989, *FirsTier* filed its notice of appeal identifying the January 26 bench ruling as the decision from which it was appealing.¹²² Within less than a month, on March 3, 1989, the district court

¹¹⁶ *FirsTier*, 498 U.S. at 274.

¹¹⁷ *Id.* at 270-71.

¹¹⁸ *Id.* at 271.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 270-71.

¹²² *FirsTier*, 498 U.S. at 272.

issued its findings of fact and conclusions of law, ruling for IMI; the trial court also entered judgment as required by Rule 58.¹²³ *FirsTier* did not follow up with another notice of appeal.¹²⁴

The Tenth Circuit dismissed the appeal on the ground that the January 26 decision was not final under § 1291. The Court noted that the Tenth Circuit had not addressed the issue of *FirsTier*'s notice of appeal under the auspices of Rule 4(a)(2): specifically, the point that the notice could have been dated forward—i.e., March 3—to the date of the final judgment.¹²⁵ Effectively, the Tenth Circuit refused to recognize that the notice of appeal was not premature under the “relation forward” provision Rule 4(a)(2).

The Supreme Court disagreed with the Tenth Circuit's analysis.¹²⁶ The Court's response was two-fold: a thorough discussion of Rule 4(a)(2) and an introduction of a reasonableness test to help the circuits with application of the Rule. Starting the discussion from a point specific to the case before it, the Court arrived at a broader answer. The specific question was whether the dismissed for prematurity notice of appeal dated February 8, was an order fatal to the appeal. While answering that question, the Court recounted the purpose and application of Rule 4(a)(2). Noting that the Rule had been intended to codify the appellate courts' general practice of effectuating certain premature notices of appeal, the Court distinguished premature appeals from a late notice of appeal and acknowledged that premature appeals do not prejudice the appellees.¹²⁷ The Court essentially based analysis on its own mandate in *Lemke* and *Gillespie*¹²⁸ by stating the old adage that “the technical defect of prematurity . . . should not be allowed to extinguish an otherwise proper appeal.”¹²⁹ The Court answered the specific question by finding that the prematurity of the appeal was not fatal because the notice of appeal dated February 8 ripened when the March 3 final decree was entered.¹³⁰

¹²³ *Id.* Rule 58 is referring to a Federal Rule of Civil Procedure, requiring “[e]very judgment . . . must be set [forth] in a separate document.”

¹²⁴ Federal Rule of Appellate Procedure 4(a)(1)(A) requires an appellant to file its notice of appeal “within 30 days after the judgment or order appealed from is entered.” See also 28 U.S.C. § 2107 (2006) (stating in subsection (a) that “[e]xcept as otherwise provided in . . . section [2107], no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.”

¹²⁵ *FirsTier*, 498 U.S. at 272.

¹²⁶ *Id.* at 277–78.

¹²⁷ *Id.* at 273.

¹²⁸ See *supra* Part III.A.2 for a description of these cases.

¹²⁹ *FirsTier*, 498 U.S. at 273.

¹³⁰ *Id.* at 272.

The Court did not only reject the Respondent's argument¹³¹ that the bench oral statement was not final, but also explained how the courts ought to understand and use Rule 4(a)(2) in action. Addressing the issue of lacking finality of the bench decision, the Court found it unnecessary to resolve the question of whether the bench ruling was final. To that end, the Court concluded that by virtue of Rule 4(a)(2) "certain *nonfinal decisions* [could] serve as an effective notice from a subsequently entered final judgment."¹³²

The Court proceeded to explain how the creators of Rule 4(a)(2) intended for it to operate. Unlike a narrow interpretation of Rule 4(a)(2) at core of the IMI's argument,¹³³ the Court construed the Rule, to use an analogy, as providing an incubator for premature appeals, which would lie in queue, awaiting final judgment and ripening the day after the trial court would file a formal final judgment.¹³⁴ With that, the Court explained, the issue of whether a bench ruling in *FirsTier* had not been "final" under Section 1291 was almost superfluous under Rule 4(a)(2); the latter allowed certain premature notices of appeal to be saved from a dismissal by allowing them await their turn and serve as an effective notice of appeal despite prematurity.¹³⁵ The Court relied on the Rule's rationale, which was "intended to protect the unskilled litigant who files a notice of appeal from a decision that [the litigant] reasonably but mistakenly believes to be a final judgment,

¹³¹ IMI argued that the relation forward provision of Rule 4 (a)(2) was to be understood as rescuing a premature notice of appeal only when such notice was filed after the announcement of a decision that was "final" within the meaning of 28 U.S.C. § 1291. *Id.* (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)), IMI contended that "final" was to mean a decision that (1) ended the litigation on the merits and (2) was the one the judge clearly declared as final. *Id.* at 273–74. IMI applied the definition to the facts and argued that "the judge did not clearly intend to terminate the litigation on the merits[:]" the judge merely stated "legal conclusions about the case . . . [and] his intention to set forth his rationale in a more detailed and disciplined fashion at a later date." *Id.* at 274. Moreover, the judge did not explicitly exclude the possibility that he would not change his mind in the interim. *Id.*

¹³² *Id.* (emphasis added). In *FirsTier*, the Court defined "decision" using the situation at hand to illustrate what had been intended by the creators of Rule 4(a)(2). *Id.* at 274 n.4.

¹³³ To support its interpretation of Rule 4(a)(2), see *supra* note 123, IMI relied on Rule 1(b) of FRAP that "provides that the appellate rules 'shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.'" *Id.* at 274. IMI used the general provision to argue that Rule 4(a)(2)'s construction curing premature notices of appeal from non-final decisions would be overbroad because it would ignore 28 U.S.C. § 1291's finality requirement, thereby conflicting with Rule 1(b)'s guidance. *Id.* at 274–75.

¹³⁴ *FirsTier*, 498 U.S. at 275.

¹³⁵ *Id.*

while failing to file [another] notice of appeal from the actual final judgment.”¹³⁶

The Court summarized the discussion by stating the following:

In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment. In these instances, a litigant’s confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal.¹³⁷

The Court, thus, arrived at a broader answer, by delineating contours of the Rule’s influence, which reached beyond a narrow analysis suggested by IMI.

In an almost unanimous decision,¹³⁸ the Court held, and thereby devised a test, that a premature notice of appeal is valid (1) if the litigant could reasonably believe that the decision is final and (2) when permitting a notice of appeal to become effective would not catch the appellee by surprise.

Applying the newly devised test to the facts of *FirsTier*, the Court illustrated how the Rule 4(a)(2) had been intended to operate. The Court held that the district court’s January 26 bench ruling was a “decision” for purposes of Rule 4(a)(2).¹³⁹ With that, even if it had not been “final” under Section 1291, the bench ruling announced a decision purporting to conclude the review of the merits of the case.¹⁴⁰ This was, in the words of the Court, equivalent to the judge’s immediate order to the clerk to enter the judgment on the docket, which under that scenario would have been unequivocally “final” under Section 1291.¹⁴¹ Under such circumstances, *FirsTier*’s belief in the finality of the January 26 bench ruling was *reasonable*, elevating the

¹³⁶ *Id.* at 276. Here, the Court stipulated immediately apparent contours of “reasonable belief” by stating that Rule 4(a)(2) does not permit “a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment.” *Id.*

¹³⁷ *Id.*

¹³⁸ Justice Kennedy concurred with other Justices but added an even broader interpretation of Rule 4(a)(2); he suggested that the Rule applies “as well to the announcement of an ‘order,’ and [to] some orders [that] are appealable even though they do not possess attributes of finality.” *Id.* at 278 (Kennedy, J., concurring). The Court’s opinion focused only on the meaning of “decision.” *Id.* at 274 n.4 (majority opinion).

¹³⁹ *Id.* at 277.

¹⁴⁰ *FirsTier*, 498 U.S. at 277.

¹⁴¹ *Id.*

premature notice of February 8 to the status of an effective notice of appeal from the judgment entered on March 3.¹⁴²

Why was *FirsTier*'s belief "reasonable"? In the words of the Court, "FirstTier's confusion as to the status of the litigation at the time it filed its notice of appeal was understandable . . . *FirsTier* clearly sought . . . to appeal from the judgment that in fact was entered on March 3."¹⁴³ Because Rule 4(a)(2) related *FirsTier*'s notice of appeal forward, it was still valid and timely at the time the court of appeals dismissed it as premature and declared it fatal. The Court held that *FirsTier*'s premature notice of appeal filed on February 8 should have been treated as an effective notice of appeal from the judgment that was entered on March 3.¹⁴⁴

FirsTier left the appellate courts and litigants with what seemed to be a functional and a clear test. The appellate courts were to evaluate finality objectively by answering three questions: (1) whether a litigant could have reasonably believed a district court's decision to have been finalized, (2) whether any confusion about finality in the context of the remaining issues before the court could have been understandable, and (3) whether no unfairness to appellee would result from proceeding with the appeal. Like many objective tests, however, this test's application has also been a struggle evident from a disparate treatment of the issue of prematurity—specifically, when it should ripen and when it is fatal to some notices of appeal.

IV. HOW "RELATION FORWARD" FARED AFTER *FIRSTIER*

A survey¹⁴⁵ of the circuits' application of the test helps to demonstrate the preceding summary of *FirsTier*'s effect. Specifically, one of the main causes of the discordant test application post-*FirsTier* appears to hinge on the finding of reasonableness in the litigant's belief of finality.¹⁴⁶ The situation is such that similar procedural circumstances may result in either a fatally dismissed or a Rule 4's "relation forward"-rehabilitated appellate review.

¹⁴² *Id.*

¹⁴³ *Id.* Here, the Court added that "no unfairness to IMI result[ed] from allowing the appeal to go forward."

¹⁴⁴ *Id.* at 277–78. The Court held that the court of appeals erred in dismissing *FirsTier*'s appeal, reversed the judgment, and remanded for further proceedings consistent with the Court's opinion.

¹⁴⁵ See, e.g., 2A Fed. Proc., L. Ed. § 3:578.

¹⁴⁶ This part of the Note attempts to group decisions by similarities in facts and procedural history to support this conclusion. Although to satisfactorily yield this conclusion, the case survey below addresses the most common scenarios and is not meant to be exhaustive. There are likely to be more categories in addition to the ones that I acknowledge in this part. The argument, however, will be reserved for a separate section that follows the categorizations of Part IV. See *infra* Part V.

The basis of this dichotomy appears to be the familiar divide: pragmatic¹⁴⁷ versus technical.

A. *The Struggle Continues: “Pragmatic” Versus “Technical” Approaches to “Relation Forward”*

The following sections attempt to summarize common procedural steps and types of cases at the end of which a litigant filed a notice of appeal. Depending on the circuit, an appellate court either dismisses or takes a pragmatic approach when applying Rule 4(a)(2) under the Court’s interpretation of the Rule in *FirsTier*. It is apparent that despite *FirsTier*’s recommendation, appellate courts continue to operate against a familiar backdrop by taking either a technical or a practical approach when deciding to review an appeal.

Some courts maintain that “the judicial process is not a game of skill in which one misstep by counsel may be decisive to the outcome.”¹⁴⁸ These courts refuse to see the role of the Federal Rules of Appellate Procedure as merely securing speedy and inexpensive justice for every action.¹⁴⁹ Rather, such appellate courts find jurisdiction over premature appeals as long as an appealable order is subsequently entered and an appellee is not prejudiced by the appellant’s lack of compliance with procedural technicalities.¹⁵⁰

Yet, there are some circuits that continue to view adherence to appellate procedure to be essential even when it is merely technical. These courts have refused to validate premature notices of appeal retroactively even in cases, as shown below, where pragmatic courts would have likely proceeded with an appellate review. “Technical” courts do not only find the notices defective but also ignore any subsequent actions by the trial court that may cure the defect. With that, a litigant may expect two outcomes: (1) a necessity to file a new notice of appeal from the final judgment, or (2) an appellate court’s refusal, ending the action without an appellate review.¹⁵¹ The following are common categories that illuminate persevering varied analysis and resultant

¹⁴⁷ Pragmatic approach is also referred to as a practical approach.

¹⁴⁸ Daniel A. Klein, Annotation, *When Will Premature Notice of Appeal Be Retroactively Validated in Federal Civil Case?*, 76 A.L.R. Fed. 199, 204 (2009) [hereinafter Klein].

¹⁴⁹ *Jackson v. Tenn. Valley Auth.*, 595 F.2d 1120, 1121 (6th Cir. 1979) (citing *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (“The Rules themselves provide that they are to be construed ‘to secure the just, speedy, and inexpensive determination of every action.’”)).

¹⁵⁰ This would be the approach prescribed by *FirsTier*. See *supra* Part III.

¹⁵¹ Where the cause of dismissal was on technical procedural grounds, the courts declined to validate the notices of appeal; however, that did not bar a new, valid appeal. See Klein, *supra* note 148, at 204.

dichotomy in outcomes when circuits decide the issue of whether an appeal can proceed.

B. *Identifiable Categories of Cases*

1. *When the Judgment or Order Appealed from Disposed of the Case Except for the Issue of the Amount of Attorney's Fees*

This category of premature notices of appeal arises when the judgment that is being appealed from has been finalized with the exception of the issue of attorney's fees. Generally, there would be a separate order concerning attorney's fees that a judge files shortly after the decision from which a litigant decides to file an appeal. One tendency, pre- and post-*FirsTier*, has been to deem a subsequent judgment concerning attorney's fees appealable even where the disposition of attorney's fees was held to be part of the merits of the case.¹⁵² Here, appellate courts generally hold that the second decision retroactively validates the premature notice of appeal, thus activating Rule 4(a)(2) "relation forward" protection.¹⁵³

Not all circuits, however, deem a decision with an unresolved issue of attorney's fees immediately appealable. The Eighth Circuit, for example, is likely to dismiss a notice of appeal or require a new one to be filed where an order leaves unresolved the attorney fees' amount to be awarded to a party.¹⁵⁴ In *Carter*, the district court found that the submitted statements

¹⁵² *Id.* at 205; *see, e.g.*, *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977) (holding the defendant's premature notice of appeal from a decision that had not resolved the issue of attorney's fees gave the Court of Appeals jurisdiction where a subsequent order awarded the plaintiff attorney's fees); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 636 (3d Cir. 1982) (same); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980) (The trial court entered an order in favor of the plaintiff and indicated that by a separate order to follow, it would grant the plaintiff equitable relief designed to remedy the fraudulent conveyances; the court entered a second order awarding attorney's fees to the plaintiff; the defendants filed a notice of appeal only with respect to the first order. Although the appeals court found that neither of the orders was final standing alone and neither one had been certified under Fed. R. Civ. P. Rule 54(b), the court found that together they created a final appealable decision.).

¹⁵³ Klein, *supra* note 148, at 205.

¹⁵⁴ *Carter v. Ashland, Inc.*, 450 F.3d 795, 797 (8th Cir. 2006); *see also Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1003 n.2 (8th Cir. 2004) (holding that an order explicitly reserving the determination of the amount of attorney's fees and pre-judgment interest did not become final until the district court later issued an order fixing the amounts); *Dieser v. Cont'l Cas. Co.*, 440 F.3d 920, 924 (8th Cir. 2006) (holding that Rule 4(a)(2) did not save a notice of appeal filed from district court orders which left unresolved, among other things, the amount of attorney's fees and which called for further submissions from the parties to determine those amounts, as those orders could not reasonably be believed to be final).

were fraudulent.¹⁵⁵ In a written order, the district court dismissed the complaint with prejudice as a sanction for Carter's fraud on the court.¹⁵⁶ The court then decreed that the defendants should recover their costs and attorney's fees as a further sanction.¹⁵⁷ The defendants then moved for specified attorney's fees and costs.¹⁵⁸ Before, however, the court had decided the dollar amount of this additional sanction, Carter filed a notice of appeal from the dismissal order.¹⁵⁹

The Eighth Circuit held that Carter prematurely filed notice of appeal.¹⁶⁰ It was not subject to Rule 4(a)(2) protection because the sanction order had not resolved the amount of attorney fees, and thus, Carter could not reasonably believe that the trial judge concluded their review.¹⁶¹

It appears that the Eighth Circuit determines finality and Rule 4(a)(2) applicability through an additional dimension of decision-making. Both the *Carter* and *Dieser* panels impliedly deemed attorney's fees to be an integral part of a sanction order and not a mere technicality of a remaining calculation. Given the context, the award of the fees in of itself could be deemed a penalty in addition to stipulated penalty amounts, thus, being essential to the sanction order itself. On the other hand, the appellant could have reasonably thought that the decision to award the attorney's fees was to be appealed and not the amount. Thus, the Eighth Circuit considers procedural as well as substantive aspects when deciding to activate Rule 4(a)(2) and accept a notice of appeal. Although *FirsTier* did not provide a perimeter of reasonableness, the underlining aim of the holding, however, strongly encouraged utilizing Rule 4(a)(2) as long as an appealable order is subsequently entered and the appellee is not prejudiced by the appellant's decision to appeal when he or she did.¹⁶²

2. Another Category of Appealable Orders: A Notice of Appeal Filed While All that Remains Is a Calculation of Interest and Costs Other than Attorney Fees

Disparity of treatment concerning the issue of unresolved attorney fees and the effect of finality on determinations of prematurity is similar to interest and cost computations. This category addresses situations in which a

¹⁵⁵ *Carter*, 450 F.3d at 796.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 797.

¹⁶¹ *Carter*, 450 F.3d at 797.

¹⁶² *FirsTier*, 498 U.S. at 276.

trial court grants relief but does not include the calculation of damages until a subsequent order. The litigants file a notice of appeal after the judge announces the decision regarding the relief, but before the judge issues a subsequent order, which finalizes the valuation of the relief. As with the attorney's fees, the answer to the questions of whether and when the litigant's notice of appeal ripens to allow the appellate review depends upon which appellate court hears the case.

The Eighth Circuit, for example, takes a similar position with interest and sanction amounts calculation as it does with attorney's fees: it does not find jurisdiction over a notice of appeal filed prior to the subsequent order calculating damages. For example, in *Dieser*, an employee-participant sued his former employer under Employee Retirement Income Security Act (ERISA) seeking disability benefits.¹⁶³ The judge entered an order granting summary judgment to the participant and awarding benefits, and entered a second order awarding statutory penalties, attorney fees, and costs to the participant.¹⁶⁴ The former employer appealed the summary judgment before the court finalized the costs and interest calculations.¹⁶⁵ The appellant did not file an additional notice of appeal following the determination of the total amount.¹⁶⁶

The Eighth Circuit dismissed the appeal.¹⁶⁷ A few notable details from the court's reasoning are as follows: (1) the court raised the issue of jurisdiction *sua sponte*;¹⁶⁸ (2) the panel further referred to what appears to be a bright-line rule in the circuit: a judgment awarding damages but neither deciding the amount of the damages nor fixing the extent of the liability is not a final decision within the meaning of Section 1291;¹⁶⁹ (3) the court emphasized that the pre-final order decision "did not purport to dispose of all issues in the case . . . on its face" because it had expressly stipulated that the amount of pre-judgment interest was yet to be determined; thus, the pre-final order could not reasonably be believed to be final within the meaning of Section 1291;¹⁷⁰ (4) the appellate court distinguished this case from one in which a determination of specific amounts would be ministerial and thus a

¹⁶³ *Dieser*, 440 F.3d at 922; *see also* *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 717–18 (8th Cir. 1999) (holding that an order awarding sanctions but reserving determination of the amount of sanctions was not appealable until the subsequent entry of an order fixing the amount of sanctions).

¹⁶⁴ *Dieser*, 440 F.3d at 922.

¹⁶⁵ *Id.* at 922–24.

¹⁶⁶ *Id.* at 924.

¹⁶⁷ *Id.* at 927.

¹⁶⁸ *Id.* at 923.

¹⁶⁹ *Id.* (citing *Maristuen v. Nat'l States Ins. Co.*, 57 F.3d 673, 678 (8th Cir. 1995)).

¹⁷⁰ *Dieser*, 440 F.3d at 924. Recall that Section 1291 confers jurisdiction on the courts of appeals, but only over "final decisions of the district courts."

sheer technicality;¹⁷¹ (5) the court concluded that the prematurely filed notice of appeal could not be saved by the Rule 4 “relation forward” provision because it was not reasonable for the litigant to conclude that the open-ended decision was final.¹⁷²

The Ninth Circuit occupies the same position on similar procedural and substantive facts.¹⁷³ In *Jack Raley*, the district court judge entered summary judgment in favor of the appellee bankruptcy trustee.¹⁷⁴ The appellants filed a notice of appeal.¹⁷⁵ Six weeks later, the district court entered judgment in favor of the trustee-appellee in the amount of the payments, in addition to pre-judgment interest, which had not been mentioned in its initial order.¹⁷⁶ The appellants did not file a new notice of appeal.¹⁷⁷

The Ninth Circuit’s appellate court found the notice of appeal to be premature but had to decide whether it would survive under *FirsTier*’s test.¹⁷⁸ First, the panel referred to *FirsTier* as a narrow exception.¹⁷⁹ It distinguished the premature notice of appeal under review from cases in which all that remains is the clerk’s ministerial task of entering a judgment.¹⁸⁰ It found that the appellant had rushed to file the notice of appeal

¹⁷¹ *Id.* at 924 n.3 (citing *St. Mary’s Health Ctr. v. Bowen*, 821 F.2d 493, 498 (8th Cir. 1987)).

¹⁷² *Id.* at 926–27.

¹⁷³ *See, e.g., In re Jack Raley Constr., Inc.*, 17 F.3d 291, 294 (9th Cir. 1994). The facts summary is as follows: A party that owed money to a debtor paid directly to appellant employee benefit plans, thereby satisfying the debtor’s pre-petition obligation to appellant. *Id.* at 293. The appellee, a Chapter 7 bankruptcy trustee, brought an adversary proceeding in the United States Bankruptcy Court to recover alleged improper post-petition transfers. *Id.* The appellant moved to remove to the District court for the Northern District of California. *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 293–94.

¹⁷⁷ *Id.* at 293.

¹⁷⁸ *Id.* at 294.

¹⁷⁹ *In re Jack Raley*, 17 F.3d at 294.

¹⁸⁰ *Id.* “The premature notice here was not valid because the matter of pre-judgment interest was not decided . . . long after the notice of appeal had been filed. Making this decision was more than a ministerial act to be performed by the Clerk of Court and routinely executed by the judge, it required adjudication of a contested issue not raised or resolved in [the order being appealed from by the appellant]”. The court explained why the pre-final summary judgment was unequivocally incomplete:

Clearly, the parties did not and do not agree on the propriety of pre-judgment interest in this case. On appeal, the Fund argues that the issue was waived by the trustee and that ERISA, which it contends is the non-bankruptcy law governing this case, does not provide for pre-judgment interest. Alternatively, it argues that even if the award of pre-judgment interest was proper, the court erred in calculating the rate

because the judge had not finished adjudicating the amount of interest.¹⁸¹ That is to say that the appellant could not have reasonably deemed the summary judgment as completing litigation on the issue. The appellate court's reasoning was similar to that of the Eighth Circuit when concluding that the appellant could not have reasonably believed that the order without final interest calculations was final.¹⁸² In conclusion, the appellate court in *Jack Raley* found that the premature notice of appeal did not ripen and dismissed the appeal.¹⁸³

In contrast to the Eighth and Ninth Circuits, on the same facts, the Fourth Circuit is likely to save a notice of appeal. One of the cases helps to briefly illustrate the point.¹⁸⁴ International Paper filed a request for arbitration before the International Court of Arbitration (ICA) in Geneva.¹⁸⁵ The ICA's arbitrators ruled in favor of appellee Schwabedissen after they found that International Paper had not formed a contract to be able to collect damages against Schwabedissen.¹⁸⁶ The arbitrators also assessed costs against International Paper, but the latter did not comply with the arbitration order, which prompted Schwabedissen to seek enforcement in the U.S. district court.¹⁸⁷ The district court granted Schwabedissen's motion to enforce the

of interest because the district court used the rate applicable on October 1, 1992, rather than the rate existing immediately before its summary judgment order.

Id. at 294.

¹⁸¹ *Id.* at 293.

¹⁸² *Id.* When determining "reasonableness," the appellate court added a factor seen earlier in *FirsTier's* dicta—the extent of a litigant's experience with the appellate procedure. *Id.* at 294. Quoting *FirsTier*, the appellate court stated the following:

'Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he [or she] reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.' *FirsTier*, 498 U.S. at 276. We are unwilling to conclude that the Appellants were lulled into the reasonable but mistaken belief that their August 13 notice of appeal was efficacious. They could not rely on the teachings of *FirsTier* under circumstances in which they challenged the proposed award of pre-judgment interest. Theirs was not a casual objection to the proposed order of judgment proffered by the trustee. Appellants requested the opportunity to brief and orally argue their objection to a matter they knew was not contained in the July 23 order.

Id. at 294 (correction in original).

¹⁸³ *Id.* at 295.

¹⁸⁴ *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).

¹⁸⁵ *Id.* at 415.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

arbitral award and denied International Paper's motion for leave to amend. The latter appealed.¹⁸⁸ The district court subsequently entered a final order assessing the interest amount.

In a footnote, the court of appeals disposed of appellee Schwabedissen's argument that the appeal was premature.¹⁸⁹ Relying on *FirsTier*, the appellate court disagreed with the lack of jurisdiction defense, noting that an order enforcing the arbitral award was presumed final despite the pending post-judgment interest calculations.¹⁹⁰ To wit, on similar procedural facts, the Fourth Circuit would disagree with the Eighth and Ninth Circuits on the issue of appellate jurisdiction.

3. *The Last*¹⁹¹ *Category: Where a Notice of Appeal Is Filed from an Order Dismissing All Claims with Some Counterclaims Remaining*

This grouping includes a number of similar, in principle, situations: The defendants answer with counterclaims; then one of the parties secures a summary judgment, leaving only one side's claims for adjudication, or the court partially dismisses some claims. The aggrieved party files a notice of appeal. Subsequently, the court completes all litigation while the aggrieved party does not file additional notices of appeal. Whether or not an appellate

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 415 n.1.

¹⁹⁰ *Int'l Paper*, 17 F.3d at 415 n.1. "The contention is meritless," stated the opinion. *Id.* (Quoting *FirsTier*, 498 U.S. at 276, the court wrote: "[w]hen a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment,' then 'a notice of appeal from a nonfinal decision . . . operate[s] as a notice of appeal from the final judgment.'" (emphasis added)).

¹⁹¹ The categories of cases under review in this Part are not exhaustive but are the most susceptible to grouping due to having a common factual and procedural pattern. One notable group of cases that is similar to the theme of this Part's review, but is excluded, consists of appeals from partial judgments that are followed by complete and final judgments. Such premature notices of appeal have generally been filed from judgments or orders disposing of fewer than all parties or claims in a case. Pursuant to FED. R. CIV. P. 54(b), such decisions do not terminate an action, but the court may direct the entry of a final judgment as to fewer than all of the claims or parties. The court must make an express determination that there is no equitable reason for delay and expressly direct the entry of judgment. The issue of curability of prematurity arises if the judgment or order appealed from prior to the final order disposing of all claims was not processed in accordance with Rule 54(b). Subsequent to such premature an appeal is the final termination of the entire litigation or a *nunc pro tunc* Rule 54(b) certification by the district court. Klein, *supra* note 148, at 205. The circuits have generally concurred that termination of the litigation then retroactively validates the notice of appeal; there is, however, disagreement as to the effectiveness of *nunc pro tunc* Rule 54(b) certifications. *Id.* § 2[a]. Some circuits would validate such notices of appeal, whereas other circuits would not. *Id.* § 5[a], [b].

court finds jurisdiction over an appeal depends on upon the circuit in which the appeal is filed.

For example, the Second,¹⁹² Fourth,¹⁹³ Seventh,¹⁹⁴ Ninth,¹⁹⁵ and D.C.¹⁹⁶ Circuits would find appellate jurisdiction over such a notice of appeal, whereas the Eighth Circuit¹⁹⁷ would be likely to dismiss.

For an example of the former view, consider *Outlaw*, in which the trial court ordered a summary judgment after the defendants removed the action on diversity grounds.¹⁹⁸ The plaintiff appealed¹⁹⁹ before the remaining claims against one of the defendants were resolved and a final judgment was entered.²⁰⁰ The D.C. Circuit held that notice of appeal was valid under Rule 4 (a)(2) and *FirsTier*.²⁰¹

Here, again, the Eighth Circuit maintains a different view on prematurity. In *Special Weapons*, the trial court entered summary judgment, and the

¹⁹² See, e.g., *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 172 (2d Cir. 2002). When the district court entered its final judgment before the appeal was heard and the appellees were not prejudiced by the appellants' failure to file a second notice of appeal, a premature notice of appeal was valid with respect to those claims disposed of by the district court's partial judgment.

¹⁹³ See, e.g., *In re Bryson*, 406 F.3d 284, 289 (4th Cir. 2005). A premature notice of appeal was filed after the district court had ordered disposing of the appellant's claims to property that had been forfeited in a criminal proceeding. The court did not enter its final order of forfeiture accounting for other third-party claims to the property. Despite the notice's prematurity, it was effective because the district court had issued a final determination disposing of the remaining claims before the appellate court considered the case on the merits.

¹⁹⁴ See, e.g., *Garwood Packaging Inc. v. Allen & Co.*, 378 F.3d 698, 700-01 (7th Cir. 2004) (holding that the notice of appeal, which was filed before the court dismissed the claims against the other defendants, but after the district court entered summary judgment as to one defendant, would have become effective when those claims were dismissed).

¹⁹⁵ See, e.g., *TCI Group Life Ins. Co. v. Knoebber*, 244 F.3d 691, 695 n.1 (9th Cir. 2001). In *TCI*, two cross-defendants' motions for relief *vis-à-vis* another cross-defendant were denied; the former parties filed a notice of appeal. Meanwhile, the plaintiffs' case against both cross-defendants was finalized; no new notice of appeal was filed. The appellate court found the notice of appeal valid. See also *Fadem v. United States*, 42 F.3d 533, 534-35 (9th Cir. 1994) (finding a notice of appeal against a partial judgment valid upon entry of the final order adjudicating all consolidated cases).

¹⁹⁶ See, e.g., *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 157-62 (D.C. Cir. 2005).

¹⁹⁷ See, e.g., *Miller v. Special Weapons LLC*, 369 F.3d 1033, 1035 (8th Cir. 2004).

¹⁹⁸ *Outlaw*, 412 F.3d 156, 158-59.

¹⁹⁹ *Id.* at 158.

²⁰⁰ *Id.* at 158-59.

²⁰¹ *Id.* at 158-62.

notice of appeal was filed pending a counterclaim.²⁰² The court held that a premature notice of appeal was not safe under the auspices of Rule 4(a)(2) because the appellant could not have reasonably thought that the summary judgment was the end of litigation on the merits.²⁰³ The appellate court found, in part, that the problem with the appeal was not that “the district court had failed to issue its final order on the summary judgment that it announced but rather . . . that there was an unresolved claim pending in the district court” when the appellant filed the notice of appeal.²⁰⁴

The foregone categories—attorney fees, awards of costs and interests calculations, and unresolved counterclaims—are representative of the recurrent fact patterns and precedent in various circuits. Albeit not an all-inclusive or 360-degree view of the current incongruities,²⁰⁵ this disparity

²⁰² *Special Weapons*, 369 F.3d at 1033–34.

²⁰³ *Id.* at 1035.

²⁰⁴ *Id.* The court wrote:

We are aware that a number of other circuits have adopted some variation of the doctrine of ‘cumulative finality,’ under which a prematurely filed appeal is not dismissed if the district court finally resolves the case prior to final resolution of the case by the court of appeals . . . But no Eighth Circuit case of which we are aware has ever adopted this approach . . . and others have limited it to cases that would have been suitable for interlocutory appeal anyway . . . We are persuaded that such experiments with ‘pragmatic’ application of the final judgment rule are unwise[.]

Id.

²⁰⁵ As has been mentioned before, this is not an exhaustive list of categories that one can find. The introductory part of this Note reflects the reach of the split—appeals from the criminal cases are negatively affecting rights not only in a civil arena. In addition to the criminal appeals from magistrate judges’ reports and recommendations, other general fact patterns emerge. These can be grouped under what the court may consider as remaining substantive issues; if the court happens to sit in a circuit that equates substantive issues with whether a case in first instance can be deemed final. If the court does, then a premature appeal is likely to be dismissed. These so-called substantively essential issues may include some of the following: (1) assessment of costs and (2) adoption of magistrate judge reports and Recommendations in both criminal and civil cases. *See, e.g., Cooper*, 135 F.3d at 962–63 (5th Cir. 1998) (illustrating the Fifth Circuit’s view where the notice of appeal is presumed both premature and non-curable when the notice of appeal is filed as against the magistrate judge’s report and recommendation on sentencing before the district court adopts that report and recommendation); *see also Serine v. Peterson*, 989 F.2d 371, 372 (9th Cir. 1993) (taking the Eighth Circuit’s position by holding that a notice of appeal from a magistrate’s report and recommendation did not ripen when the district court adopted the report and ruled on the case).

In the realm of the substantive versus ministerial lies a contrasting position that even substantive issues could survive the shortcoming of being in the appellate process prematurely. *See, e.g., Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 584–85 (3d Cir.

impinges on a significant number of appeals; that is to say, the circuits' split affects many parties—clients and their attorneys, the relationship between the two, and judges.

V. WHY THE CIRCUITS' SPLIT IS A PROBLEM AND A POSSIBLE SOLUTION

Gillespie's assertion, which follows *Lemke's* recommendation, that “the requirement of finality is to be given a ‘practical rather than a technical construction’”²⁰⁶ has not fared well even in light of *FirsTier*. Rule 4’s “provision forward” has become yet another procedural hurdle for the parties and the courts to jump over rather than a barrier between litigators and the finality rule’s sharp edges. *FirsTier* emerged to offer a solution to a long-lived problem: It has helped to reinforce what can be seen as a more liberal, pragmatic approach that some circuits had already followed.

Regrettably, while *FirsTier's* command has had that positive effect, it has not helped to patch the split among the circuits; some circuits misunderstood *FirsTier's* construction of “relation forward” to be a narrow exception.²⁰⁷ The Fifth Circuit curtailed its liberal view and made “relation forward” into an exception rather than the rule. Some circuits, perhaps out of convenience or a sense of stability, misconstrued the *FirsTier* “reasonableness” test to fit with the existing technical approach. A couple of the circuits seem to have devised an additional test through which notices of appeal are assessed. There are also at least two Circuits, that generally rely on *FirsTier*, but that have had a couple of instances where the *FirsTier* test was not applied to appeals from the sanctions order, even though the *FirsTier's* guidance squarely applied.²⁰⁸

1999). (curing the notice of appeal when faced with an interim premature notice of appeal from a bankruptcy case where the first court order in the case had denied an allocation plan, but where a subsequent order approved a different plan, and the appeal was as against the first order); *see also* *Pods, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1363–65 (Fed. Cir. 2007) (holding that a notice of appeal that had been filed after a jury verdict but before a trial court order, which increased damages pursuant to a post-trial motions, was related forward under FRAP 4.)

²⁰⁶ *Gillespie*, 379 U.S. at 152; *Lemke*, 346 U.S. at 325.

²⁰⁷ *See, e.g., Cooper*, 135 F.3d at 963. Following *FirsTier*, the Fifth Circuit has curtailed a “broader view of appellate jurisdiction.” *Id.* In the words of the appellate court, the Supreme Court “made plain that a premature notice of appeal operates as a valid one ‘only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment.’” *Id.* (quoting *FirsTier*, 498 U.S. at 276). “That rule is incompatible with this circuit’s previous theory that a premature notice of appeal is valid wherever no post-judgment or post-trial motions . . . have been filed . . . [t]o the extent that our prior cases allowed appeal of non-final decisions, they are no longer good law in the wake of *FirsTier*.” *Id.* at 963.

²⁰⁸ *See e.g., Cato v. City of Fresno*, 220 F.3d 1073, 1074–75 (9th Cir. 2000)

A. *What Is, and Why Is It a Problem?*

To date, *FirsTier*'s intent to clarify the meaning and operation of Rule 4(a)(2) has created contradictory results. To start, Part IV attempted to gather the circuits' decisions under one umbrella, so to speak, by categorizing cases with similar procedural and substantive facts. One theme is readily apparent: The circuits have adopted or interpreted the *FirsTier* reasonableness test inconsistently. With that, perhaps, the issue is with the test.²⁰⁹

Reasonableness requires an objective view of the facts. Application of *FirsTier*'s test necessitates a hybrid of judgment calls to give it the effect it seeks, and these judgment calls are inherently conflicted. An attorney's perception of when litigation is completed and when a notice of appeal should be filed given the time constraints may naturally differ from that of a panel of appellate judges. Counsel has to ensure a timely appeal for a client, whereas an appellate court, among many things, may be concerned with its interfering with the trial court's adjudication. Hence, it could be that the test is inherently confusing (and is apparently a misnomer) resultant in a split. Alternatively, the answer might lie in history.

Several appellate courts continue to reason through the prism of the doctrine that preceded *FirsTier*—the pragmatic finality doctrine. Perhaps, because *FirsTier*'s reasonableness test is a relatively new invention in the final judgment rule's jurisprudence, it has been difficult for it to penetrate the bastions of old habits. The old habits die hard—as the Romans used to say,

(omitting a citation to *FirsTier* and finding that the premature notice of appeal was valid under the cumulative finality doctrine); *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120–21 (8th Cir. 1997) (finding, without *FirsTier*, that the premature notice of appeal was effective pursuant to Rule 4(a)(2), albeit the notice of appeal stemmed from a sanctions order that contained no sanctions amount).

²⁰⁹ This view has been expressed by Peter Afrasiabi, J.D., an appellate practitioner, who suggested an alternative test or framework of analysis. Dr. Afrasiabi writes:

To some extent, it appears that the reasonableness issue with which the courts of appeals have grappled may be defined along different fault lines: whether, as to the issue resolved in the order, anything further remains vis-à-vis that issue beyond the ministerial act of an entry of judgment. . . . If substantive work remains, as when assessing interest or costs in cases in which substantive decisions need to be made (such as the amount of the interest, the amount of the costs, and the like) in order to finalize that issue, then a premature notice of appeal will not relate forward and preserve appellate review. In such cases, substantive work remains to be done, rather than simply performing a ministerial act of entering a judgment. If, however, there is no substantive issue for court attention remaining vis-à-vis the dismissed defendant other than an ultimate entry of judgment as in the case of an order dismissing one of two defendants from a case, then a premature notice of appeal will suffice.

Peter R. Afrasiabi, *The Growing Circuit Split over Whether Premature Notices of Appeal Preserve Appellate Review*, 55 FED. LAW. 42, 46 (2008).

“habit is a second nature.” Historically, the pragmatic finality doctrine had claimed its own place in the decision-making of many appellate courts long before *FirsTier* attempted to help diffuse the mounting confusion with the Rule 4 application; even the appellate courts within the circuits varied in which law or doctrine they chose to rely on when rendering the decisions concerning prematurity of a notice.

The advisory committee’s intention when enacting Rule 4’s “relation forward” was to codify a common practice of treating premature notices of appeal as admissible for an appellate review.²¹⁰ The common practice was called the pragmatic finality doctrine.²¹¹ When evaluating what has transpired since the Rule 4’s “relation forward” codification, one might say that the Rule merely carved a piece out of the wall that makes up the pragmatic finality doctrine; maybe the Rule was a codification of just one way the pragmatic doctrine had allowed for an appeal to ripen. With that, it is possible that the pragmatic doctrine can swallow the use of the exception whenever judges choose to exercise their discretion. This could explain why some appellate courts do not even mention Rule 4(a)(2) and its ally *FirsTier*²¹² when refusing or allowing appellate jurisdiction.

What is the problem that needs to be solved? There is more than one problem but they share a common underlying theme: The early bird may remain hungry or get poisoned. As it stands now, the split on the issue of prematurity and ripeness of appeals, causes, at worst, a loss of a right to appeal and, at best, a few other disturbing and long-lasting effects. The overall problem is that the litigants and their counsel are left to fend for themselves with sticks and stones because Rule 4(a)(2) is not the bullet-proof vest its creators might have envisioned it to be. One of the practitioners’ guides cautions:

Whenever possible, it is advisable for counsel to protect the appeal by filing a new, timely notice of appeal after the District court judgment becomes definitely final. In the event that the Court of Appeals rejects the first,

²¹⁰ *Notes of Advisory Committee on 1979 Amendments [FRAP 4], Note to Subdivision(a)(2)* (“Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective.”). “The proposed [adopted] amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment.” *Id.* (corrections added).

²¹¹ *Brown Shoe*, 370 U.S. at 306.

²¹² *See, e.g.,* Cato, 220 F.3d at 1074–75 (described *supra* note 208); Hill, 123 F.3d at 1120–21 (same); *see also* Holden v. Hagopian, 978 F.2d 1115 (9th Cir. 1992) (finding premature notice of appeal valid under pragmatic finality doctrine without mentioning Rule 4(a)(2) or *FirsTier*).

premature notice of appeal, this precaution may save time and expense, and may sometimes be the only way to secure the right to appeal at all.²¹³

A few alarming effects that are readily apparent can be summarized as follows: Premature notices (1) can be fatal to an appeal; (2) can become a legal basis for a malpractice suit; (3) strain counsel-client relationships and probably destroy all long-term prospects with the client; (4) unjustifiably punish lawyers for some of the inherent qualities that many of them either have or aspire to have—being reasonably risk-averse, prompt, and proactive advocates for their clients. All of these effects are self-explanatory and have as a common source the split of the circuits' opinions.

The immediate concern is with the first and second effects. In this context, if counsel does not assume a sufficiently paranoid attitude, someone like Kenia Cooper²¹⁴ may not only incur pecuniary and proprietary losses, but also lose her or his freedom and a right to question a trial judge.²¹⁵ Also, if counsel does not check and re-check the docket, he or she may face a suit from a client who could succeed in a malpractice case against an overly proactive and, under these circumstances, justifiably confused attorney.

What does not solve the problem in the long-run? An expectation that counsel will always be able to catch the final order and re-file notice of appeal in a timely manner, especially in criminal cases, where the window for a filing is only ten days.

B. A Possible Solution: An Addition to Rule 4

The foregoing point concerning practical, short-term advice to re-file a notice of appeal following the final judgment is not meant to be critical of commentators and litigators. The practitioners have no choice but to fend for their clients while the courts or legislatures, or both, attempt to clarify and resolve the issue under instant review. There is most likely no a panacea-type solution to the issue of disparate application of Rule 4's "relation forward" provision. After all, the honorable Supreme Court provided what seemed like clear guidance in *FirsTier*—the guidance that has been embraced by some of the circuits, and the one that has fared successfully against the backdrop of the Final Judgment Rule's rationale. This guidance, however, has not helped

²¹³ Klein, *supra* note 148, § 2[b]; *see also* Afrasiabi, *supra* note 209, at 47 (cautioning practitioners to "make sure [that they] file another notice of appeal (in a timely manner[]) . . . after the entry of the final order or judgment so that [they] do not find [themselves] on the receiving end of a motion to dismiss or a court of appeals' request for briefing on jurisdiction").

²¹⁴ *See supra* Introduction.

²¹⁵ Kenia Cooper lost her appeal because the Fifth Circuit relied on the pragmatic approach to finality and misconstrued *FirsTier* as narrowing that approach.

to eliminate disparate understanding of FRAP 4 across all circuits.

Perhaps, in addition to *FirsTier*'s reasoning and in light of the amount of precedent under Rule 4's "relation forward" provisions, the advisory committee would consider promulgating an addition to Rule 4. The rule should include scenarios that stem from cases with recurrent factual or procedural patterns thereby creating a categorical order for appellate courts to follow. Specifically, the new rule could be a subsection in both Rule 4(a)(2) and Rule 4(b)(2) under the name "Orders or Decisions that Are Considered Final for the Purpose of Relating Forward."²¹⁶ The rule can be broken down into three categories prefaced by the text as follows:

For the purpose of curing a premature notice of appeal the following types of decisions or orders announced and/or entered are to be deemed ripe for an appeal on the date of court's announcement or the entry of the judgment or order completing litigation:

(a) an announced from the bench or entered decision or order that leaves open only the calculation of attorney fees or costs or both—including remaining cost assessments by the district court reviewing magistrate judge reports and recommendations;

(b) an announced from the bench or entered decision or order that leaves open only the calculation of the amount of interest—including remaining cost assessments by the district court reviewing magistrate judge reports and recommendations;

(c) an announced from the bench or entered decision or order that has dismissed all claims but where the counter-claims remain under review.²¹⁷

The rule in Section 4(b)(2) should also stipulate that notices of appeals following a magistrate judge report and recommendations in criminal cases prior to the district court's final opinion would not be curable.

How would this rule fare with the cases reviewed in Part IV? Of the cases reviewed in Part IV, the appellate courts dismissed the appeals, to some extent, by applying what appears to be their own test: The circuits sorted out the pre-final decisions or orders notices of appeal into two groups—a valid notice of appeal or not a valid notice of appeal—by asking a question of whether the issues that remain in the case when the court announces its pre-final decision or order are ministerial. If the answer is positive, then the

²¹⁶ Or, "for the Purposes of 4(b)(2)."

²¹⁷ This sub-part of the rule would not be relevant to Rule 4(b)(2), which concerns criminal appeals.

appeal is related forward under Rule 4 and the prematurity of the appeal cured.²¹⁸

The proposed rule essentially renders application of the ministerial-or-not test or any other test unnecessary, at least with these three categories of cases (four—counting an additional clarification to 4(b)(2)). Where the parties appeal before an upcoming decision or order to merely award costs—attorney’s fees and interest—the underlying decision to compensate a winning party in that way is the substantive part of the decision as to an aggrieved party. It would be what *FirsTier* would call “reasonable” for the aggrieved party to deem their case lost on the merits. Appellee would not be unfairly prejudiced because such appeal would not likely be coming as a surprise. Hence, the notice of appeal should be valid and related forward to the date when the court enters the judgment with the calculation of the actual amounts.

Motivated by the foregoing principle, it is also reasonable to consider an order or decision that dismisses all claims but the counterclaims as practically final; the substantive part of the litigation, from an aggrieved party’s point of view, is essentially completed. The aggrieved party disagrees with the decision and files an appeal. The courts may take a long time to adjudicate counterclaims: These are considered separate claims. At the same time, an appeal would not come as surprise to an appellee. Although the nature of the category described in the sub-part of the proposed rule is different from that in (a) and (b)—that is, remaining counterclaims are not ministerial, but are irrelevant to the appellant—the principle in (c) is analogous to (a) and (b). The decree or order pending the counterclaims is final as to the rights of the appellant. Such an appeal should be curable under Rule 4.

Although this suggestion may appear categorical, it does not contradict *FirsTier*’s command to evaluate finality objectively. As discussed, the questions that *FirsTier* prescribed to pose as part of the reasonableness test were: (1) whether a litigant could have reasonably believed a district court’s decision was finalized; (2) whether any confusion in the context of the remaining issues before the court could have been understandable; and (3) whether no unfairness to appellee would result from proceeding with the appeal.

By adopting the proposed addition to Rule 4, the court’s concerns with points one through three can be quickly resolved. For example, how would the first category—attorney fees—fare? This categorization of instances fits

²¹⁸ See, e.g., *Cooper*, 135 F.3d at 963 (“Only where the appealing party is fully certain of the Court’s disposition, such that entry of final judgment is *predictably a formality*, will appeal be proper.”) (emphasis added); see also Afrasiabi, *supra* note 209 (noting *Cooper*’s approach and explaining that this could be *FirsTier*’s reasonableness test analyzed through a different angle).

squarely with *FirsTier*: (1) the litigant should reasonably believe that when a district court announces award of attorney fees to the winning party, the aggrieved party's merits of the case have been adjudicated: There, all that remains is the fee amount calculation and no room for persuading the court to change the opinion on the issue of *what* remedy to award; (2) by enacting the proposed addition to the Rule, this question will become irrelevant; (3) the only unfairness that can likely result is appellee's losing an appeal, but that would be a subjective view of fairness, not the one contemplated by the question. Finally, the losing party's choosing not to pursue an appeal would then be a surprise, rather than a notification of the appeal.

VI. CONCLUSION

It is unlikely that there is a single solution to the complex web of issues stemming from the finality doctrine. Rule 4 and *FirsTier*, which interpreted the rule, have not been able to standardize the circuits' treatment of prematurity. As this Note shows in Part IV, the circuits have not changed their approach to finality. Some courts have held that a premature notice of appeal from a non-final order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice. Other courts have strictly construed the statutory language and have held that FRAP 4(a)(2) and (b)(2) saves a premature notice of appeal only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. Some others would find jurisdiction where a premature notice of appeal is filed after a final judgment is announced but before it is entered. Yet, some courts have even interpreted *FirsTier* as a narrow exception to the pragmatic approach.

At the same time, a number of precedents have formed into recognizable categories allowing for a partial solution. The proposed addition to Rule 4 may not be panacea to all notices of appeal; nonetheless, it addresses a fair share of issues with premature appeals, some of which courts dismiss without a possibility of cure. It is a necessary warning to any practitioner to dot all *i*'s and cross all *t*'s in this context by re-filing the notice of appeal. The reality is such that when a court enters a real final judgment, a practitioner can easily miss the event or even deem refiling unnecessary by relying on Rule 4. While only a partial solution, the proposed addition to Rule 4 can assure protection of litigants' rights of appeal in numerous circumstances and thus fewer headaches to lawyers and their clients, as well as to judges.