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Federal Practice and Procedure - Comment - Appealability and Finality in the Third Circuit - Is the United States Supreme Court More Appealing Than the Third Circuit

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FEDERAL PRACTICE AND PROCEDURE—COMMENT—APPEALABILITY AND FINALITY IN THE THIRD CIRCUIT—IS THE UNITED STATES SUPREME COURT MORE APPEALING THAN THE THIRD CIRCUIT?

I. INTRODUCTION

A basic concern of litigants seeking an appeal is at what stage of the proceedings an appeal may be taken. The more complex the litigation, the more often it will be argued that isolated issues or preliminary motions should be heard on appeal prior to the conclusion of the trial. Unrestricted, appeals from preliminary orders would lead to piecemeal review, resulting in overwhelming and unmanageable appellate dockets as well as enhancing the danger of great delay and enormous cost.

Although there is no constitutional right to appeal,[1] several statutes authorize appeals in the federal court system. Section 1291 of the Judicial Code,[2] which reflects the common law,[3] allows appeals from final decisions of the district courts.[4] The United States Court of Appeals for the Third Circuit, however, has proven to be more reluctant than the United States Supreme Court in finding district court orders "final" for purposes of review under section 1291.[5] It is submitted that, in its zeal to protect the circuit from an overcrowded docket and to protect litigants from prohibitive costs and delays in speedy justice by narrowly construing section 1291,[6] the Third Circuit has actually precipitated delays,[7] created the threat of prohibitive costs,[8] and failed to substantially alleviate its own crowded docket.[9] The

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1. *See, e.g.*, Abney v. United States, 431 U.S. 651, 656 (1977); McKane v. Durston, 153 U.S. 684, 687-89 (1894).

2. 28 U.S.C. § 1291 (1976).

3. *See* McLish v. Roff, 141 U.S. 661 (1891). For a discussion of *McLish* and the requirement of finality under the common law, *see* notes 29-30 and accompanying text *infra*. *See also* Bachowski v. Usery, 545 F.2d 363, 367 (3d Cir. 1976).

4. 28 U.S.C. § 1291 (1976). Section 1291 provides: "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States [and of associated territories] except where a direct review may be had in the Supreme Court." *Id.* (emphasis added).

5. *Compare* Hoots v. Pennsylvania, 587 F.2d 1340, 1347 (3d Cir. 1978) *and* Bachowski v. Usery, 545 F.2d 363, 371 (3d Cir. 1976) *with* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) *and* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). In *Bachowski*, the Third Circuit stated that an expansion of finality is not proper "in view of our circuit's disinclination to expand the class of appealable final orders." 545 F.2d at 371.

6. *See* Hoots v. Pennsylvania, 587 F.2d 1340, 1347 (3d Cir. 1978); *id.* at 1357 (Gibbons, J., dissenting); Bachowski v. Usery, 545 F.2d 363, 367-71 (3d Cir. 1976).

7. *See, e.g.*, Hoots v. Pennsylvania, 587 F.2d 1340, 1352-57 (3d Cir. 1978) (Gibbons, J., dissenting); Brace v. O'Neill, 567 F.2d 237, 245-47 (3d Cir. 1977) (Rosenn, J., dissenting).

8. *See* Hackett v. General Host Corp., 455 F.2d 618, 628 (3d Cir.) (Rosenn, J., dissenting), *cert. denied*, 407 U.S. 925 (1972).

9. *See* Brace v. O'Neill, 567 F.2d 237, 240-44 (3d Cir. 1977). One danger sought to be avoided by denying piecemeal review, thereby justifying a restrictive approach to § 1291, is the overcrowding of appellate dockets. *See* Bachowski v. Usery, 545 F.2d 363, 368, 373 (3d Cir. 1976); Hackett v. General Host Corp., 455 F.2d 618, 623 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

impact of the Third Circuit's narrow approach is accentuated by the fact that, since finality is the easiest and clearest basis for appeal, litigants in federal courts most often initially assert section 1291 as the jurisdictional ground for their appeals.[10] This comment's historical review of the finality requirement will suggest that, for purposes of appeal, the courts of appeals should be less restrictive than the Third Circuit has been in defining "final decisions" under section 1291.[11]

Finality is also required for appeals from the highest court of a state to the United States Supreme Court under section 1257 of the Judicial Code.[12] Although the language and scope of sections 1257 and 1291 differ,[13] the language and case law interpreting these sections are often used interchangeably, thus confusing the statutory meaning of a "final decision" under section 1291.[14] This comment will trace the roots of this confusion and discuss its implications in the finality analysis.[15]

Also influencing the courts' definition of final decisions under section 1291 is the method of analysis used in assessing finality. The Third Circuit has developed a restrictive approach in determining whether a final decision has been rendered.[16] In contrast, the Supreme Court has invoked a more practical approach to the issue.[17] This comment will discuss the consequences of this difference and evaluate the analytical soundness of each approach.[18]

In addition to the "final judgment" route, section 1292(a)(1) of the Judicial Code sets forth a second, frequently used avenue of appeal.[19] Under section 1292(a)(1), an appeal may be taken from an interlocutory district court order "granting, continuing, modifying, refusing or dissolving injunc-

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10. *See, e.g.*, Hoots v. Pennsylvania, 587 F.2d 1340, 1346 (3d Cir. 1978); Brace v. O'Neill, 567 F.2d 237, 239 (3d Cir. 1977).

11. *See* notes 27-74 and accompanying text *infra*.

12. 28 U.S.C. § 1257 (1976). For a discussion of the critical distinction between § 1257 and § 1291, *see* notes 75-88 and accompanying text *infra*.

13. *Compare* 28 U.S.C. § 1257 (1976) *with id.* § 1291. Section 1257 provides that the Supreme Court may review certain "[f]inal judgments or decrees rendered by the highest court of a State." *Id.* § 1257. For the text of § 1291, *see* note 4 *supra*.

14. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 478 & n.7 (1975); Cobbledick v. United States, 309 U.S. 323, 324-26 (1940); Hoots v. Pennsylvania, 587 F.2d 1340, 1356 & n.11 (3d Cir. 1978) (Gibbons, J., dissenting); Bachowski v. Usery, 545 F.2d 363, 366 & n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976).

15. *See* notes 75-88 and accompanying text *infra*.

16. *See* Brace v. O'Neill, 567 F.2d 237, 245 (3d Cir. 1977) (Rosenn, J., dissenting). For a discussion of the Third Circuit's technical construction of § 1291 in *Brace*, *see* notes 128-32 & 145-65 and accompanying text *infra*.

17. *See, e.g.*, Abney v. United States, 431 U.S. 651, 658 (1977); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

18. *See* notes 38-74 and accompanying text *infra*.

19. *See* Hoots v. Pennsylvania, 587 F.2d 1340, 1346 (3d Cir. 1978). The *Hoots* court noted that the "jurisdiction of the courts of appeals is normally confined to the review of final orders, 28 U.S.C. § 1291 (1976), or to the classes of interlocutory orders described in 28 U.S.C. § 1292(a) (1976)." *Id.* (footnotes omitted).

tions or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."[20] In contrast to their divergent application of section 1291, both the Supreme Court and the Third Circuit have adopted a restrictive approach in reviewing the use of section 1292(a)(1).[21] In addition, although rarely invoked, other avenues are available for appeals in the federal courts. Because of the equally restrictive approaches taken by the Supreme Court and the Third Circuit with respect to these avenues and with respect to section 1292(a)(1), only a brief overview of their application will be presented.[22]

II. IDENTIFYING A FINAL DECISION UNDER SECTION 1291 OF THE JUDICIAL CODE

A. *Background*

Section 1291 grants jurisdiction to the courts of appeals to review "final decisions of the district courts of the United States."[23] While the finality requirement of section 1291 applies to different substantive areas of the law—including civil[24] and criminal appeals[25]—the threshold question in each case is whether a final decision has been rendered by the district court.[26]

As early as the Judiciary Act of 1789,[27] the federal appellate courts had

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20. 28 U.S.C. § 1292(a)(1) (1976).

21. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978); Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955); Hoots v. Pennsylvania, 587 F.2d 1340, 1348 n.42 (3d Cir. 1978).

22. For a discussion of the remaining avenues of appeal, *see* notes 177-215 and accompanying text *infra*.

23. 28 U.S.C. § 1291 (1976). It should be noted that, under the language of § 1291, no distinction is made between criminal and civil appeals. *See id.* The courts, however, have emphasized that the "final decision" requirement is of particular importance in criminal prosecutions. *See* United States v. MacDonald, 435 U.S. 850, 853-54 (1978); Abney v. United States, 431 U.S. 651, 657 (1977); DiBella v. United States, 369 U.S. 121, 126 (1962); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940); United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979). For a discussion of the rationale behind this emphasis, *see* notes 114-27 and accompanying text *infra*.

24. *See, e.g.*, United States Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269 (3d Cir. 1979); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979); Curtiss-Wright Corp. v. General Elec. Co., 597 F.2d 35 (3d Cir. 1979) (per curiam), *vacated and remanded*, 100 S. Ct. 1460 (1980); Hoots v. Pennsylvania, 587 F.2d 1340 (3d Cir. 1978).

25. *See, e.g., In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 804, 806 (3d Cir. 1979) (per curiam); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Empanelled (Colucci), 597 F.2d 851 (3d Cir. 1979).

26. *See, e.g.*, United States v. Fiumara, 605 F.2d 116, 117-18 (3d Cir. 1979); Forsyth v. Kleindienst, 599 F.2d 1203, 1207 (3d Cir. 1979); Hoots v. Pennsylvania, 587 F.2d 1340, 1346 (3d Cir. 1978); Government of the Virgin Islands v. Hamilton, 475 F.2d 529, 530-31 (3d Cir. 1973).

27. Act of Sept. 24, 1789, ch. 20, §§ 21-22, 25, 1 Stat. 83, 83-87 (1789) (current version at 28 U.S.C. §§ 1257, 1291 (1976)). Section 21 provided that "from final decrees in a district court in causes of admiralty and maritime jurisdiction, . . . an appeal shall be allowed to the next circuit court." *Id.* § 21. Section 22 provided that "final decrees and judgments in civil actions in a district court, . . . may be re-examined, and reversed or affirmed in a circuit court . . . upon a

jurisdiction only over final dispositions of the trial courts.[28] The statutory requirement of finality reflected the prior common law[29] which had apparently developed without an explicit rationale.[30] This early finality restriction was expressed by the statute in terms of "final decrees" *and* "final judgments"[31]—language which has been adopted in current provisions.[32] Section 1291, however, is unique in requiring strictly final "decisions".[33]

As acknowledged by the Supreme Court, section 1291 codifies the "firm congressional policy against interlocutory or piecemeal appeals."[34] By forcing the "combin[ation] in one review [of] all the stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results,"[35] the finality requirement precludes the delay and excessive costs

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writ of error." *Id.* § 22. Finally, § 25 provided that "a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." *Id.* § 25. For a discussion of the early development of the finality doctrine, *see* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3906 (1976); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 548-51 (1932).

28. *See* Act of Sept. 24, 1789, ch. 20, §§ 21-22, 25, 1 Stat. 83, 83-87 (1789) (current version at 28 U.S.C. § 1291 (1976)). For an excellent discussion of the development of finality prior to its application in the United States, *see* Crick, *supra* note 27, at 540-48.

29. *See* McLish v. Roff, 141 U.S. 661, 665 (1891). The *McLish* Court, reading a finality requirement into a statute authorizing writs of error to be taken to the Supreme Court, noted that "[a]t common law no writ of error could be brought except on a final judgment." *Id.* Thus, the *McLish* Court observed that the statutory limitation of the appellate jurisdiction of the Supreme Court to final judgments or decrees "was only declaratory of a well settled and ancient rule of English practice" based upon writs of error. *Id.*

30. *See* Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976). *See also* Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 509 (1969); Crick, *supra* note 27, at 549 & n.48; Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 89 (1975); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49, 101-05 (1923). In analyzing the 1789 Judiciary Act, it has been observed that "[w]hy the statute so limited appeals must remain somewhat of a mystery." Crick, *supra*, at 549 n.1.

31. *See* Act of Sept. 24, 1789, ch. 20, §§ 21-22, 25, 1 Stat. 83, 83-87 (1789) (current version at 28 U.S.C. §§ 1257, 1291 (1976)). For the pertinent text of §§ 21-22 and 25, *see* note 27 *supra*.

32. *See* 28 U.S.C. §§ 1257, 1258 (1976). For the pertinent text of § 1257, *see* note 13 *supra*.

33. 28 U.S.C. § 1291 (1976). For a dicussion of this distinction, *see, e.g.*, United States v. MacDonald, 435 U.S. 850, 853 (1978); Abney v. United States, 431 U.S. 651, 656 (1977); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cobbledick v. United States, 309 U.S. 323, 324 (1940); *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 804, 807 (3d Cir. 1979) (per curiam); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1239 (3d Cir. 1979); Bachowski v. Usery, 545 F.2d 363, 366 (3d Cir. 1976); Good Deal Supermarkets, Inc. v. Great Am. Ins. Co., 528 F.2d 710, 712 (3d Cir. 1975); United States v. Estate of Pearce, 498 F.2d 847, 849 (3d Cir. 1974) (en banc). *See also* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.06 (2d ed. 1978); Crick, *supra* note 27, at 852.

34. Abney v. United States, 431 U.S. 651, 656 (1977). *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974). It is likely that the courts would have created rules against piecemeal appeals even absent a congressional mandate to do so. *See* McLish v. Roff, 141 U.S. 661, 665-66 (1891) (policy of avoiding repeated appeals in the same suit is one at the "very foundation of our judicial system"). *See also* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 178 (1955).

35. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The *Cohen* Court further noted that the effect of the finality requirement "is to disallow appeal from any decision which is tentative, informal or incomplete." *Id. See also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

occasioned by unrestricted intermediate appeals.[36] The obstruction of just claims is similarly avoided by prohibiting disruptive separate appeals designed to deliberately harass and create further expense.[37]

Despite the fact that the issue of finality has been extensively litigated[38] and despite the clear articulation in the case law of the modern purposes of, and underlying policy reasons behind, the requirement of finality under section 1291, the courts have been unable to clearly express what constitutes a final decision.[39] The Supreme Court has, however, adopted an analytical approach to deciding whether the finality requirement has been met which utilizes a "practical rather than a technical construction" of section 1291.[40] Enunciating this standard in *Dickinson v. Petroleum Conversion Corp.*,[41] the Court required the balancing of the cost and inconvenience of piecemeal review against the danger of a denial of justice caused by delay.[42]

Applying the *Dickinson* test in *Gillespie v. United States Steel Corp.*,[43] the Supreme Court affirmed the Sixth Circuit's resolution of the merits of plaintiff's several causes of action after all but one of the claims had been

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36. *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

37. *See* Cobbledick v. United States, 309 U.S. 323, 325 (1940). The *Cobbledick* Court reasoned that the finality requirements of § 1291 were supported by the fact that "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice." *Id. See also* Abney v. United States, 431 U.S. 651, 656 (1977).

38. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 n.9 (1974); McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892). As early as 1892, the *McGourkey* Court noted that "[p]robably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from decrees claimed to be interlocutory." 146 U.S. at 544-45. *See also* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

39. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-71 (1974); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892); Bachowski v. Usery, 545 F.2d 363, 368-71 (3d Cir. 1976). *Compare* Hoots v. Pennsylvania, 587 F.2d 1340, 1346-48 (3d Cir. 1978) *with id.* at 1352-57 (Gibbons, J., dissenting).

Perhaps the best summary of the problems encountered in attempting to define finality was offered by Justice Powell who stated: "While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." Eisen v. Carlisle & Jacquelin, 417 U.S. at 170 (footnote omitted). *Compare* Redish, *supra* note 30, at 90-92 *and* Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 295-98 (1966) *with* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 353-67 (1961).

40. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). *See, e.g.*, Abney v. United States, 431 U.S. 651, 658 (1977); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cobbledick v. United States, 309 U.S. 323, 326 (1940).

41. 338 U.S. 507 (1950).

42. *Id.* at 511.

43. 379 U.S. 148, 152-53 (1964).

stricken from the complaint by the district court.[44] In finding the order to strike final for purposes of section 1291,[45] the *Gillespie* Court concluded that the Sixth Circuit was correct in determining that the inconvenience and cost of piecemeal review were outweighed by the danger of denying justice by delay.[46] The Court reasoned that, because the Sixth Circuit had already ruled on the issue of whether federal law excluded other means of recovery, as well as on the issue of whether excluded relatives could also recover, the inconvenience and cost of remanding the case to the district court without deciding these issues would be prohibitive.[47] Because the excluded claimants would suffer a delay of "perhaps a number of years" if they had to wait to appeal until the district court had disposed of the remaining claim on its merits, the Court reasoned that a denial of immediate appeal "might work a great injustice."[48] Lastly, although the excluded parties' claims were not formally severable from the plaintiff's claims,[49] the Court acknowledged that, practically, the claims could be viewed as severable.[50]

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44. *Id.* at 158. *See* Gillespie v. United States Steel Corp., 321 F.2d 518 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964). The Sixth Circuit granted plaintiff's appeal from a district court order striking all references pertaining to the doctrine of unseaworthiness, an Ohio wrongful death statute, and an Ohio survival statute from plaintiff's complaint. 321 F.2d at 520. The court of appeals then concluded that plaintiff's right of recovery, as administratrix of the decedent's estate, rested solely on the Jones Act. *Id.* at 530. The Sixth Circuit also dismissed plaintiff's claim for damages resulting from decedent's pain and suffering prior to his death. *Id.* at 523.

The Supreme Court, balancing the "most important competing considerations," found that, under the circumstances, the danger of injustice caused by delaying the appeal until the district court decided the merits of plaintiff's remaining cause of action outweighed the cost and inconvenience of piecemeal review. 379 U.S. at 152-53. The Court also concluded that the issue of decedent's pain and suffering should remain open, rather than allowing the Sixth Circuit to decide this issue on the basis of the pleadings alone. *Id.* at 158.

45. 379 U.S. at 152-54. Plaintiffs petitioned the Sixth Circuit for a writ of mandamus ordering the district court judge to vacate the order to strike. Gillespie v. United States Steel Corp., 321 F.2d 518, 520 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964). Alternatively, petitioners sought an appropriate written statement from the district judge certifying that an immediate appeal was appropriate under 28 U S.C. § 1292(b) (1976). 321 F.2d at 520. The Sixth Circuit denied extraordinary relief after deciding the merits of the case against the petitioners. *Id.* at 532. For a discussion of § 1292(b) and mandamus, *see* notes 195-206 and accompanying text *infra*.

46. 379 U.S. at 153. The *Gillespie* Court did note, however, that the Sixth Circuit's review of the district court's order to strike could be called "piecemeal". *Id.*

47. *Id.* The *Gillespie* Court's practical approach may be described as a review of the decision of the lower court in light of the present position of the parties. *See id.* Applying this analysis to the facts of *Gillespie*, it was obvious, especially under the *Dickinson* balancing test, that once the court of appeals had considered the appealability issue, it would be an extreme waste of time and money, both to the litigants and to the courts, to remand the case to the district court without deciding the merits. *See id.*

48. *Id.*

49. *Id.* The *Gillespie* Court concluded that, had the claims been formally severable, the court's order would be "unquestionably appealable" as to those claims. *Id.*, *citing* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) (order granting part of intervenor's relief and dismissing intervenor's other claims, while retaining jurisdiction over other parties, deemed final).

50. *See* 379 U.S. at 153. The Court noted that the excluded relatives were separate parties in the petition for extraordinary relief. *Id.* As separate parties, the excluded claimants could suffer great hardship if their appeal seeking a determination of the validity of their cause of action was denied. *See id. See also* Gillespie v. United States Steel Corp., 321 F.2d 518, 522

The Third Circuit, however, has maintained that a judicial expansion of the statutory notion of finality will not "serve the goal of speedy justice."[51] According to the Third Circuit, a broad interpretation of finality leads to piecemeal appeals and the resulting costs and inefficiency are dispositive of the issue.[52] Although the Third Circuit has generally avoided the *Dickinson-Gillespie* practical approach to finality, recent dissenting opinions from the court seem to reflect internal disagreement[53] and an inclination on the part of several judges toward a practical test of some sort.[54]

Dissenting in *Hacket v. General Host Corp.*,[55] Judge Rosenn would have found an order denying class action certification appealable because the order "effectively terminate[d] the litigation."[56] Section 1291, he argued,

(6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964). If the Jones Act were to exclude all other remedies, and the excluded relatives were properly dismissed, only the plaintiff could recover damages. 379 U.S. at 150-51. Practically, therefore, the excluded relatives' claims could be viewed as severable and "fundamental to the further conduct of the case." *Id.* at 153, *quoting* United States v. General Motors Corp., 323 U.S. 373, 377 (1945).

51. Hoots v. Pennsylvania, 587 F.2d 1340, 1347 (3d Cir. 1978) (footnote omitted). *See also In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1239 (3d Cir. 1979) (Aldisert, J., dissenting) (denial of motion to quash grand jury subpoena not immediately appealable); Bachowski v. Usery, 545 F.2d 363, 373 (3d Cir. 1976) (order to recount union election ballots not final); Hackett v. General Host Corp., 455 F.2d 618, 624 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) (order denying confirmation of class action not final); Borden v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969) (order compelling plaintiff to answer deposition questions over his relevancy objection not final).

52. *See* Bachowski v. Usery, 545 F.2d 363, 371 (3d Cir. 1976); Borden v. Sylk, 410 F.2d 843, 846 (3d Cir. 1969). In concluding that the Third Circuit should suppress the urge to rule on the merits of such cases, the *Bachowski* court noted:

> The appellate system has become increasingly overburdened and the future would appear to promise no relief from the continuous increase in case loads. Accordingly, it would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piece-meal litigation in every instance of temptation.

545 F.2d at 373. *See generally* M. GREEN, BASIC CIVIL PROCEDURE 231-32 (1972); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3907; Crick, *supra* note 27, at 548-54, 563-65; Redish, *supra* note 30, at 89; Comment, *supra* note 39, at 292-93; Note, *supra* note 39, at 351-53.

53. *See* Hoots v. Pennsylvania, 587 F.2d 1340, 1356-57 (3d Cir. 1978) (Gibbons, J., dissenting); Hackett v. General Host Corp., 455 F.2d 618, 626-31 (3d Cir.), (Rosenn, J., dissenting), *cert. denied*, 407 U.S. 925 (1972).

54. *Compare* United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979) (order denying exclusion of press from sentencing not final) *and* Brace v. O'Neill, 567 F.2d 237, 243 (3d Cir. 1977) (stay order not final absent extraordinary circumstances) *with* Forsyth v. Kleindienst, 599 F.2d 1203, 1207 (3d Cir. 1979) (order denying motion for summary judgment on issue of absolute immunity deemed final) *and* Brace v. O'Neill, 567 F.2d at 245 (Rosenn, J., dissenting) (order dismissing claims without prejudice, irrespective of conflicting court opinions, should be deemed final). This uncertainty, it is submitted, can be attributed to misapplication of the *Dickinson-Gillespie* test. *See* notes 40-50 and accompanying text *supra*.

55. 455 F.2d 618, 626 (3d Cir.) (Rosenn, J., dissenting), *cert. denied*, 407 U.S. 925 (1972).

56. 455 F.2d at 628 (Rosenn, J., dissenting). Alternatively the dissent would have deemed the order final under the collateral order doctrine because the issue of class certification was separable from the merits of the case and the denial of review might cause the loss of an important right. *See id.* at 627 (Rosenn, J., dissenting). The dissent noted, however, that, because denying class certification may effectively decide the merits of the case by ending the litigation, a practical approach to finality would be more appropriate than the collateral order doctrine. *See id.* at 629 (Rosenn, J., dissenting). For a discussion of the collateral order doctrine, *see* notes 89-113 and accompanying text *infra*. *See also* Coppers & Lybrand v. Livesay, 437 U.S. 463, 467-69 (1978) (collateral order doctrine inapplicable to order denying class certification).

requires a *Dickinson-Gillespie* balancing of the consequences of allowing or disallowing the appeal.[57] It is submitted that, having considered the collateral nature of the class certification order and the collateral order doctrine separately from the *Dickinson-Gillespie* balancing approach,[58] Judge Rosenn enunciated a "pure" section 1291 balancing approach for cases beyond the ambit of the collateral order doctrine.[59]

Similarly, in his dissenting opinion in *Hoots v. Pennsylvania*,[60] Judge Gibbons would have deemed final the district court's denial of the state's motion for approval of its school reorganization plan.[61] Rather than using a "pure" *Dickinson-Gillespie* balancing approach, Judge Gibbons argued that, in effect, the district court's order insurmountably obstructed appropriate

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57. 455 F.2d at 629 (Rosenn, J., dissenting). Although the Supreme Court recently held, in Coopers & Lybrand v. Livesay, 437 U.S. 463, 464-65 (1978), that a denial of class action certification is *not* a final decision under § 1291, Judge Rosenn's opinion is noteworthy in that it illustrates an attempted application of the *Dickinson-Gillespie* balancing test. *See* 455 F.2d at 628-31 (Rosenn, J., dissenting). Judge Rosenn's finding of finality can be seen as resting on two alternative grounds: 1) the "death knell" doctrine which was explicitly repudiated with respect to class certification orders in *Coopers & Lybrand*; and 2) the *Dickinson-Gillespie* balancing test. *See id.* (stating that under "either the *Dickinson-Gillespie* doctrine or under [the death knell doctrine,] plaintiff has properly brought her appeal before this court").

According to the *Coopers & Lybrand* Court, the "death knell" doctrine assumed "that without the incentive of a possible group recovery, the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." 437 U.S. at 469-70. Due to this sounding of the "death knell" of the litigation, the doctrine had held such orders final. *See id.* at 469. It is submitted that the *Coopers & Lybrand* Court, in limiting *Gillespie* to its facts, did not overrule the *Dickinson-Gillespie* balancing test. *See id.* at 477 n.30. Consequently, although Judge Rosenn's finding of finality was subsequently discredited, it is suggested that his alternative balancing approach remains viable.

Arguably, Judge Rosenn's reasoning in *Hackett* was that the "death knell" doctrine itself satisfied the *Dickinson-Gillespie* balancing test in that the cost and inconvenience of piecemeal review outweighed the danger of a denial of justice due to the effective termination of the litigation. *See* 455 F.2d at 630 (Rosenn, J., dissenting) (simplifying the "death knell" doctrine to the issue of whether the single claim seeks enough money to continue the case is "far removed from the original balancing of the inconvenience of piecemeal litigation"). Again, although his conclusion as to the class certification order does not survive *Coopers & Lybrand*, it is important to note that Judge Rosenn's balancing approach has not been explicitly overruled. *See* Coopers & Lybrand v. Livesay, 437 U.S. at 477 & n.30. For a discussion of the viability of the *Dickinson-Gillespie* test in light of *Coopers & Lybrand*, *see* notes 69-74 and accompanying text *infra*. For a discussion of the "death knell" doctrine, *see generally* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3912.

58. *See* 455 F.2d at 627-29 (Rosenn, J., dissenting).

59. *See id.* at 628-31 (Rosenn, J., dissenting). For a discussion of the virtue of a pure § 1291 analysis, *see* notes 68-74 and accompanying text *infra*.

60. 587 F.2d 1340, 1351 (3d Cir. 1978) (Gibbons, J., dissenting).

61. *Id.* at 1352 (Gibbons, J., dissenting). The district court had denied approval of the plan because of a lack of evidence of broad community support, the failure of the community to devise its own plan, the effect of busing non-white children into unfamiliar grounds, the traffic problems emanating from busing, and loss of community control. *Id.* Denial of the plan prolonged the de jure segregation which had been found to have existed five years before the present appeal. *See* Hoots v. Pennsylvania, 359 F. Supp. 807, 824 (W.D.Pa. 1973), *aff'd*, 587 F.2d 1340 (3d Cir. 1978). Plaintiffs had brought suit seven years before the present appeal was taken. 587 F.2d at 1352 (Gibbons, J., dissenting).

relief[62] and would result in further, unreasonable delay.[63] Although Judge Gibbons did not invoke the *Dickinson-Gillespie* balancing test,[64] he apparently did utilize a practical approach, emphasizing the cost and inconvenience caused by delay of the litigation[65] and asking whether the order "has the effect of denying all relief for a violation of a constitutional right."[66]

While arguably based upon legitimate concerns of judicial policy, it is submitted that the Third Circuit's stance against expanding finality does not begin to clarify or define which decisions are final under section 1291 and, consequently, it is of little help to the lower courts.[67] In order to provide a clear and workable standard of finality, it is suggested that the Third Circuit should adopt the *Dickinson-Gillespie* balancing test in order to decide whether a district court's order is final.[68] By using such a "pure" section 1291 balancing approach,[69] the Third Circuit would conform with the apparent mandate of the Supreme Court.[70]

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62. 587 F.2d at 1354 (Gibbons, J., dissenting). Judge Gibbons contended that, not only had seven years passed since suit was brought, thus denying many plaintiffs meaningful relief for their children, but also, by relieving the state of its obligation to present a plan for desegregation, the trial court's order had effectively precluded relief. *See id.* at 1352-55 & n.7 (Gibbons, J., dissenting) (defendant state agencies, rather than "victims," have the technical and financial resources to desegregate school district).

63. *See id.* at 1355 (Gibbons, J., dissenting). Judge Gibbons observed that, even if plaintiffs could devise an acceptable plan, it would take at least two more years of litigation before the plan could be approved. *Id.*

64. *See id.* at 1351-57 (Gibbons, J., dissenting). For a discussion of the *Dickinson-Gillespie* balancing test, *see* notes 40-50 and accompanying text *supra*.

65. *See* 587 F.2d at 1352, 1355-57 (Gibbons, J., dissenting).

66. *Id.* at 1352 (Gibbons, J., dissenting). Similarly, according to the dissent, orders resulting in irremediable injury caused by stays for indefinite periods of time would be deemed final, and appealable, under § 1291. *Id.* at 1356 (Gibbons, J., dissenting).

67. *See* Hoots v. Pennsylvania, 587 F.2d at 1347; Bachowski v. Usery, 545 F.2d 363, 371 (3d Cir. 1976). The *Bachowski* court concluded that an expansion of finality is not proper "in view of our circuit's disinclination to expand the class of appealable final orders." 545 F.2d at 373.

68. *See* Hackett v. General Host Corp., 455 F.2d at 629 (Rosenn, J., dissenting). *See also* Gillespie v. United States Steel Corp., 379 U.S. at 152-54.

69. It should be noted that the "pure" § 1291 balancing approach is distinct from the collateral order doctrine. *See* notes 58-59 and accompanying text *supra*. For a discussion of the collateral order doctrine with respect to § 1291 analysis, *see* notes 89-101 and accompanying text *infra*.

70. *Compare* Gillespie v. United States Steel Corp., 379 U.S. at 152-54 *with* Bachowski v. Usery, 545 F.2d 363, 370-71 (3d Cir. 1976). In *Bachowski*, the Third Circuit justified its decision to forego the *Dickinson-Gillespie* balancing approach by noting the lack of clear guidance from the Supreme Court on matters of appealability. 545 F.2d at 370. The *Bachowski* court observed that *Gillespie* has been interpreted restrictively. *Id.*, *citing* United States v. Estate of Pearce, 498 F.2d 847 (3d Cir. 1974); Bradley v. Milliken, 468 F.2d 902 (6th Cir. 1972), *rev'd on other grounds*, 418 U.S. 717 (1974); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3913, at 534-35 (1976); Redish, *supra* note 30, at 120-21. The *Bachowski* court, however, could not cite a Supreme Court case limiting *Gillespie*. *See* 545 F.2d at 370 n.44.

Although the Supreme Court has subsequently limited *Gillespie* to its "unique facts," it cannot be said to have abandoned the balancing test approach. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978). Significantly, the "unique facts" of *Gillespie* centered upon the fact that the substantive issues had already been decided by the court of appeals, which mitigated against the cost and inconvenience of piecemeal review. *See id.* *See also* note 47 and accompanying text *supra*. Certainly, more guidance concerning appealability survives from this apparent application of the balancing test than the particular decision that, after the

The *Dickinson-Gillespie* balancing approach, devised in light of section 1291's purpose of avoiding piecemeal review,[71] can hardly be said to have been designed to negate the finality requirement or to sanction uncontrolled piecemeal review.[72] Furthermore, in light of the fact that the danger of piecemeal review has never been considered to be an absolute barrier to granting an appeal,[73] it would seem that appeals from orders where the danger of denying justice as a result of delay outweighs the cost and inconvenience of piecemeal review should be permitted as a matter of fairness to litigants.[74] Since the concept of justice necessitates a fair and timely opportunity for litigants to settle disputes, appeals from orders endangering this opportunity must be considered.

The attempt to define a "final decision" under section 1291 suffers not only from differences in approach toward appealability[75] but also from analytical imprecision. Part of this confusion has resulted from the failure of both the Supreme Court and the Third Circuit to distinguish section 1291 from section 1257 of the Judicial Code which grants federal appellate jurisdiction over state Supreme Court decisions.[76] Under section 1257, the United States Supreme Court may review certain "[f]inal *judgments* or *de-*

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fact, an order may be considered appealable because the court of appeals has already decided the merits of the case. If this were not so, then the *Dickinson-Gillespie* test would be rendered meaningless in terms of its initial purpose of avoiding the danger of piecemeal review by requiring the courts of appeal to decide first whether an appeal should be permitted and then, if the appeal is taken, whether petitioners should prevail on the merits. Furthermore, the *Coopers & Lybrand* Court technically found only that *Gillespie* did not support appealability as a matter of right and did not restrict use of the *Gillespie* approach in arguing for appealability. *See* 437 U.S. at 477 n.30.

The Third Circuit has, after *Coopers & Lybrand*, emphasized the need for a practical construction of § 1291. *See* Forsyth v. Kleindienst, 599 F.2d 1203, 1207 (3d Cir. 1979) (citing the *Coopers & Lybrand* test for the collateral order exception). Albeit a collateral order case, *Forsyth* at least implicitly recognized that the Supreme Court has not abandoned a practical test in determining finality under § 1291. *Id.* Moreover, *Dickinson*, in which the cost and inconvenience versus delay balancing test was first enunciated, has never been explicitly repudiated. To the contrary, the *Coopers & Lybrand* Court arguably upheld the balancing test implicitly by recognizing that an appeal should be taken, as in *Gillespie*, where "none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue[s] undecided." 437 U.S. at 477 n.30. It is submitted that, in light of the continued viability of the balancing test, the *Bachowski* court should have distinguished between the balancing test and the collateral order doctrine and determined whether application of the balancing test resulted in appealability. *See* 545 F.2d at 370.

71. *See* Gillespie v. United States Steel Corp., 379 U.S. at 152-53.

72. *See id.* at 153.

73. *See, e.g., id.*; Brace v. O'Neill, 567 F.2d 237, 239 & n.5 (3d Cir. 1977); Bachowski v. Usery, 545 F.2d 363, 367 (3d Cir. 1976).

74. *See, e.g.*, Gillespie v. United States Steel Corp., 379 U.S. at 152-54; Dickinson v. Petroleum Conversion Corp., 338 U.S. at 510-12.

75. For a discussion of the disagreement that has resulted from the Third Circuit's use of a restrictive approach to finality under § 1291, *see* notes 51-66 and accompanying text *supra*.

76. *See generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-05 (1975) (Rehnquist, J., dissenting). The requirement of a final judgment in order for the United States Supreme Court to have jurisdiction over a state Supreme Court decision had its statutory origin in the Judiciary Act of 1789. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3908. For a discussion of the Judiciary Act of 1789, *see* notes 27-31 and accompanying text *supra*.

crees rendered by the highest court of a State."[77] Dissimilarly, section 1291 authorizes review of "final *decisions*" from lower federal courts.[78] Besides failing to acknowledge this difference in language,[79] the courts have also failed to distinguish the differences in the postures of such appeals.[80]

Appeals under section 1291 do not affect federal-state relations, as do those under section 1257,[81] and are regulated simply to effect "efficient administration."[82] Federal review of state decisions, however, must not only discourage piecemeal review, but must also ensure comity and avoid intrusion into local matters which the states are capable of resolving themselves.[83] Unnecessary infringement upon the state courts by the federal courts would disrupt both "the smooth working of our federal system,"[84] and the state systems as well.[85]

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77. 28 U.S.C. § 1257 (1976) (emphasis supplied).

78. *Id.* § 1291 (emphasis supplied). For the text of § 1291, *see* note 4 *supra.*

79. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940); United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979); Bachowski v. Usery, 545 F.2d 363, 368-71 (3d Cir. 1976). *But see* United States v. MacDonald, 435 U.S. 850, 853-55 (1978); Abney v. United States, 431 U.S. 651, 657-59 (1977). Yet even in *MacDonald* and *Abney*, where a possible distinction was noted, the Court continued to refer to final judgments and the final judgment rule in regard to § 1291 finality. *See* United States v. MacDonald, 435 U.S. at 853-55; Abney v. United States, 431 U.S. at 657-59.

80. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502 (1975) (Rehnquist, J., dissenting). *See, e.g.*, National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977) (per curiam); Abney v. United States, 431 U.S. 651, 660 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. at 478 & n.7; Hoots v. Pennsylvania, 587 F.2d at 1356 & n.11 (Gibbons, J., dissenting); Bachowski v. Usery, 545 F.2d 363, 366 n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976). It has been suggested that the analyses used in cases decided under §§ 1291 and 1257 should not be used indiscriminately unless simply mentioned with regard to the historical purposes and rationale behind the requirement of finality. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. at 502-05 (Rehnquist, J., dissenting). With respect to the Third Circuit, it is submitted that the *Bachowski* court's failure to differentiate between §§ 1291 and 1257 not only tainted that court's lengthy summation of the history and purpose of § 1291, but also arguably formed an incorrect basis for the Third Circuit's later reliance upon *Bachowski* in declining to expand § 1291. *See* Bachowski v. Usery, 545 F.2d at 367-71. *See also* Hoots v. Pennsylvania, 587 F.2d at 1347 & nn.35 & 36; *In re* W.F. Breuss, Inc., 586 F.2d 983, 990 n.17 (3d Cir. 1978) (Adams, J., dissenting); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543 & nn.9-10 (3d Cir. 1977).

81. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3908. Because cases brought under § 1291 are brought from a federal district court to a federal court of appeals, they do not involve such issues as independent and adequate state grounds, comity, or other relevant concerns uniquely related to our system of federalism and the coexistence of federal and state courts. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-05 (1975) (Rehnquist, J., dissenting). For the pertinent language of § 1257, *see* note 13 *supra.*

82. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 505 (1975) (Rehnquist, J., dissenting).

83. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 792-93 (1969); Cleary v. Bolger, 371 U.S. 392, 400-01 (1963); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

84. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

85. *See id. See also* Younger v. Harris, 401 U.S. 37, 42-45 (1971). Although *Younger* did not deal with § 1257 in addressing the narrow issue of whether a state criminal prosecution should be enjoined, the Court's language pertaining to the importance of a smooth working state and federal system is highly relevant. The *Younger* court stated:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that

In light of the absence of federal-state tension in section 1291 appeals, it is submitted that section 1291 need not be as strictly construed as section 1257. In rigidly construing section 1291 by confusing sections 1291 and 1257,[86] and in using cases applying section 1257 to support decisions concerning section 1291 appeals,[87] the courts risk denying more appeals than are necessary to achieve the purposes of section 1291. This is so because courts may refuse to take an appeal under section 1291, not only due to the danger of piecemeal review, but also, unwittingly, due to reasons relating to comity, state rights, and federalism which are involved in section 1257 decisions. It is therefore submitted that the first step toward a clear and consistent approach to finality under section 1291 is a separate analysis of the two jurisdictional statutes and a discontinuance of the use of section 1257 cases to support decisions applying section 1291.[88]

B. *The Collateral Order Doctrine: Finality in a Different Form*

Orders, "final in [their] nature as to . . . matter[s] distinct from the general subject of litigation and affecting only the parties to the particular controversy"[89] have generally been found to satisfy the section 1291 finality requirement.[90] The seminal case for allowing appeals of orders collateral to

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> the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clear way to describe it, is referred to by many as "Our Federalism" . . . . The concept does not mean blind deference to "States' Rights" . . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

86. *See* note 79-80 and accompanying text *supra.*

87. *See* Bachowski v. Usery, 545 F.2d 363, 366 n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976).

88. *See, e.g.*, Abney v. United States, 431 U.S. 651, 660 (1977); Hoots v. Pennsylvania, 587 F.2d at 1356 & n.11 (Gibbons, J., dissenting); Bachowski v. Usery, 545 F.2d 363, 366 n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976).

89. United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926). *See also* Arnold v. Guimarin & Co., 263 U.S. 427, 432-33, 434 (1923) (finality denied where court of appeals decided amount due plaintiff but remanded for further proceedings concerning the claims of intervening creditors); Collins v. Miller, 252 U.S. 364, 370-71 (1920) (district court order denying habeas corpus relief as to one charge, but ordering further hearings on other charges, lacks finality and completeness); Williams v. Morgan, 111 U.S. 684, 699 (1884) (decree from court of appeals which ordered foreclosure and fixed compensation is final as to that matter).

90. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); United States v. MacDonald, 435 U.S. 850, 854 (1978); Abney v. United States, 431 U.S. 651, 657-59 (1977). It is unclear whether the Court intended the collateral order doctrine to be an *exception* to § 1291 since it has suggested that collateral orders are *in fact* final under § 1291. *See* Coopers & Lybrand v. Livesay, 437 U.S. at 468; United States v. MacDonald, 435 U.S. at 854; Abney v. United States, 431 U.S. at 657-59 (1979); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-72 (1974); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949).

It is also unclear whether the collateral order doctrine simply falls within the *Dickinson-Gillespie* balancing approach in light of the great danger of injustice caused by waiting until final disposition of the entire case before allowing appeal of collateral orders. For a discussion of the *Dickinson-Gllespie* balancing approach, *see* notes 40-50 and accompanying text *supra.*

the general controversy is *Cohen v. Beneficial Industrial Loan Corp.*[91] In *Cohen*, the Supreme Court, one year before deciding *Dickinson*,[92] construed finality liberally by applying a "practical rather than a technical construction to section 1291."[93] The United States District Court for the District of New Jersey, sitting in diversity, had denied defendant's motion to require plaintiff to post security as required under New Jersey law.[94] Although noting that similar cases may arise infrequently,[95] the *Cohen* Court allowed the appeal, holding that the order denying security was appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[96]

In *Abney v. United States*,[97] the Supreme Court clearly set forth the requirements for determing whether an order is collateral, and therefore appealable, under *Cohen*.[98] First, the district court's order must be found to have "conclusively determine[d] the disputed question."[99] Second, the court of appeals must determine that the district court's "decision was not simply a 'step toward final disposition of the merits of the case [which

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91. 337 U.S. 541 (1949).

92. For a discussion of *Dickinson*, *see* notes 41-42 and accompanying text *supra*.

93. 337 U.S. at 548.

94. *Id.* at 543-44. Plaintiff had brought a stockholder's derivative action alleging mismanagement and fraud. *Id.* at 543.

95. *Id.* at 546. The Cohen Court noted:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, 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.

Id.

96. *Id.* at 546-47. The *Cohen* Court did, however, attempt to limit the sweep of its decision:

> [W]e do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.

Id. at 547.

97. 431 U.S. 651 (1977). The *Abney* Court concluded that "a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds" was final under *Cohen*. *Id.* at 659.

98. *Id.* at 658. *See* notes 99-101 and accompanying text *infra*.

99. 431 U.S. at 658. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978), *citing* United States v. MacDonald, 435 U.S. 850, 855 (1978). The order must "in no sense . . . leave the matter 'open, unfinished or inconclusive.' " 431 U.S. at 658, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546.

Finding the disputed order collateral and, therefore, appealable, the *Abney* Court reasoned:

> In the first place there can be no doubt that [pretrial orders denying motions to dismiss an indictment on double jeopardy grounds] constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim, There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied.

431 U.S. at 659. *See also* United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979); Rodgers v. United States Steel Corp., 508 F.2d 152, 169 (3d Cir. 1975).

would] be merged in final judgment'; rather, it [must have] resolved an issue completely collateral to the cause of action asserted."[100] Finally, the court of appeals must determine that the district court's decision "involved an important right which would be 'lost, probably irreparably,' if the review had to await final judgment."[101]

In *United States v. MacDonald*,[102] the Supreme Court recently addressed the problem of applying the collateral order doctrine to criminal cases.[103] Utilizing the *Cohen* test as expressed in *Abney*,[104] the *MacDonald* Court concluded that a pretrial order denying defendant's motion to dismiss an indictment on the ground that his right to a speedy trial had been violated is not appealable.[105] The *MacDonald* Court emphasized that "the rule

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100. 431 U.S. at 658, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. The *Abney* Court decided that the order denying dismissal of defendant's indictment was purely collateral:

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence. . . . [T]he matters embraced in the trial court's pretrial order . . . will not "affect, or . . . be affected by, decision of the merits of this case."

431 U.S. at 659-60, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546 (footnote and citations omitted).

101. 431 U.S. at 658, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. As to this final element, the *Abney* Court reasoned that "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." 431 U.S. at 661. The Court concluded that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660.

102. 435 U.S. 850 (1978).

103. *Id.* at 853. The *MacDonald* Court recognized the frequency with which the issue of appealability of pretrial orders in a criminal case had been decided by the Court. *See id., citing* Abney v. United States, 431 U.S. 651 (1977); DiBella v. United States, 369 U.S. 121 (1962); Parr v. United States, 351 U.S. 513 (1956); Cobbledick v. United States, 309 U.S. 323 (1940). The Supreme Court, in criminal cases, has "twice departed from the general prohibition against piecemeal appellate review." *See* United States v. MacDonald, 435 U.S. at 854, *citing* Abney v. United States, 431 U.S. 651 (1977); Stack v. Boyle, 342 U.S. 1 (1951). In *Stack*, the Court concluded that an order denying a motion to reduce bail was appeable under the collateral order doctrine. 342 U.S. at 6. For a discussion of *Abney*, *See* notes 97-101 and accompanying text *supra*.

104. For a discussion of the *Cohen-Abney* test, *see* notes 91-101 and accompanying text *supra*.

105. 435 U.S. at 857. The Court reasoned that, because speedy trial claims are effectively asserted after trial and involve facts which are developed at trial, denial of a motion to dismiss on speedy trial grounds does not represent a complete, formal, and final rejection of defendant's claim. *Id.* at 858. The Court also reasoned that, because the question of prejudice to the defense in a speedy trial claim is not divorced from the events at trial, the district court's order denying a motion to dismiss on speedy trial grounds was not collateral to the principal issue at trial—*i.e.*, whether the defendant is innocent or guilty. *Id.* at 859. Finally, the Court noted that an order denying dismissal of criminal charges on speedy trial grounds does not involve an important right which would probably be irreparably lost if an appeal may not be taken before final disposition because the speedy trial defense involves a right already lost before trial, rather than a loss occurring at trial. *Id.* at 860-61.

of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.' "[106]

The *Cohen* case had been decided by the Third Circuit prior to the Supreme Court's affirmance of that decision.[107] In contrast to its current approach to appealability under section 1291,[108] the Third Circuit had defined finality broadly in *Cohen* and granted the appeal.[109]

Since *Cohen*, however, the Third Circuit's application of the collateral order doctrine has not been uniform.[110] In several cases, the court has declared that the doctrine should be construed narrowly.[111] In other cases, however, the court has applied a practical and, consequently, broader construction of the collateral order rule.[112] The difference in approach is apparently not attributable to the severity of the impact which the decision will have on the party seeking the appeal.[113]

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106. *Id.* at 853-54, *quoting* Cobbledick v. United States, 309 U.S. 323, 325 (1940). The *Cobbledick* Court remarked:

> An accused is entitled to scrupulous observance of constitutional safeguards. . . . Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.

309 U.S. at 325-26 (citation omitted).

107. *See* Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948), *aff'd sub nom.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

108. For a discussion of the Third Circuit's present approach to "pure" § 1291 cases, *see* notes 51-66 and accompanying text *supra.*

109. *See* Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 49 (3d Cir. 1948), *aff'd sub nom. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Third Circuit noted that "[a] 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding [for] . . . there may be one or more final decisions on particular phases of the litigation." 170 F.2d at 49, *quoting* Rubert Hermanos, Inc. v. Puerto Rico, 118 F.2d 752, 757 (1st Cir. 1941), *rev'd on other grounds*, 315 U.S. 637 (1942). Thus, the Third Circuit concluded that "[t]he words 'final decisions,' like the equivalent 'final judgments and decrees' in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction." 170 F.2d at 49 (citations omitted). For a discussion of the facts of *Cohen*, *see* notes 91-96 and accompanying text *supra.*

110. *See* notes 111-27 and accompanying text *infra.*

111. *See, e.g.*, United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979); Bachowski v. Usery, 545 F.2d 363, 371 (3d Cir. 1976); Rodgers v. United States Steel Corp., 508 F.2d 152, 159 (3d Cir. 1975); Samuel v. University of Pittsburgh, 506 F.2d 355, 358-60 (3d Cir. 1974); Hackett v. General Host Corp., 455 F.2d at 621; Borden v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969).

112. *See, e.g.*, Forsyth v. Kleindienst, 599 F.2d 1203, 1207-08 (3d Cir. 1979); *In re* Grand Jury Proceedings (U.S. Steel-Clairton Works), 525 F.2d 151, 155-56 (3d Cir. 1975); Hattersley v. Bollt, 512 F.2d 209, 215 n.16 (3d Cir. 1975); Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 49 (3d Cir. 1948), *aff'd sub nom.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

113. *Compare* Forsyth v. Kleindienst, 599 F.2d 1203, 1207 (3d Cir. 1979) (collateral order doctrine satisfied by order denying defendants' motion for summary judgment on issues of absolute and qualified immunity) *with* Samuel v. University of Pittsburgh, 506 F.2d 355, 360 (3d Cir. 1974) (collateral order doctrine not satisfied by order decertifying plaintiff class).

Although having suggested that the finality doctrine should apply with equal force in civil and criminal cases,[114] the Third Circuit has recently applied the rule of finality with "particular force" in a criminal prosecution.[115] In *United States v. Fiumara*,[116] the Third Circuit concluded that a district court's refusal to ban the public and the press from the defendant's sentencing was not a final order under the *Cohen* exception.[117] Publicity, the court reasoned, would not necessarily deny the defendant the right to a fair trial[118] and the defendant had failed to show, pursuant to *Abney*, that "an important right . . . would be lost . . . if review had to await final judgment."[119]

Similarly, in *In re Grand Jury Proceedings (FMC Corp.)*,[120] albeit without citation to *Cohen*, the Third Circuit declared that an order concerning the suppression of evidence is nonappealable because it is "merely a step in the criminal prosecution."[121] Although, in the grand jury context, there exists a narrow exception to finality for "orders denying motions for the re-

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114. *See* Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 49 (3d Cir. 1948), *aff'd sub nom.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In *Smith*, the Third Circuit cited the Supreme Court's decision in Cobbledick v. United States, 309 U.S. 323 (1940), and stated that although the Cobbledick opinion "deals with a criminal appeal, the principle set out therein is equally applicable to civil causes." 170 F.2d at 49. Arguably, however, the civil and criminal analyses were to apply interchangeably only with regard to the development of, and rationale behind, the final decision requirement. *See id.*

115. United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979), *quoting* United States v. MacDonald, 435 U.S. at 853-54. *See also* Cobbledick v. United States, 309 U.S. 323, 325 (1940). For an overview of the history of criminal appeals, *see* Abney v. United States, 431 U.S. at 656-57.

116. 605 F.2d 116 (3d Cir. 1979).

117. *Id.* at 117.

118. *Id.* Defendant contended that the sentencing, if made public, would jeopardize his right to a fair trial in a case pending in a neighboring district. *Id.*

119. *Id.* at 118, *citing* Abney v. United States, 431 U.S. at 658. The *Fiumara* court concluded that the defendant had no constitutional right to a secret trial and that the right to a fair trial in a subsequent case could be protected by "the usual remedies of voir dire, change of venue, continuance, and the like." 605 F.2d at 118. Reasoning that finality should be strictly construed where such other remedies are available, the court held that the collateral order doctrine should not be invoked. *Id.*

The *Fiumara* court also found the defendant's attempt to obtain review under the appellate court's mandamus power to be inappropriate, reasoning that mandamus should not be used to review interlocutory orders except in the rarest of circumstances. *See id.* For a discussion of the restrictions upon the use of mandamus, *see* notes 200-06 and accompanying text *infra*.

120. 604 F.2d 804 (3d Cir. 1979) (per curiam).

121. *Id.* at 807, *citing* DiBella v. United States, 369 U.S. 121 (1962). *But see In re* Grand Jury Empanelled (Colucci), 597 F.2d 851, 854-55 (3d Cir. 1979) (order quashing grand jury subpoena duces tecum held appealable under post-*DiBella* amendments to the Criminal Appeals Act). For a discussion of the Criminal Appeals Act, *see* notes 124-27 and accompanying text *infra*. Under the *Abney* analysis, the order in *FMC* appeared to be a step toward a final decision on the merits so the order would not be deemed to be collateral. *See* 604 F.2d at 807; note 100 and accompanying text *supra*. When the grand jury proceedings were resumed, the *FMC* court found that the defendant's motion for the return of certain documents was, in essence, tied to a possible future criminal prosecution. *See* 604 F.2d at 807.

turn of property,"[122] the *FMC* court concluded that appellant's motion resulted in what was essentially a nonappealable order concerning the suppression of evidence.[123]

Other recent Third Circuit decisions have found orders appealable under the Criminal Appeals Act,[124] holding only alternatively that the appeal was proper under the section 1291 finality provision.[125] Because the Criminal Appeals Act is to be liberally construed,[126] however, this unexplained alternative grant of appeal under section 1291 does little to indicate what must be established to satisfy the possibly less expansive statute.[127]

C. *Illustrating The Third Circuit's Approach to Section 1291*

The Third Circuit's decision in *Brace v. O'Neill*[128] illustrated the continual problems it will face whenever the pure section 1291 balancing test is not applied[129] and whenever the pure balancing test is not distinguished from the collateral order doctrine.[130] In failing to apply the proper tests

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122. 604 F.2d at 807.

123. *Id.* FMC had produced several documents in response to a grand jury's subpoena. *Id.* at 806. Claiming that the government had improperly sought the documents, FMC moved for an order requiring the return of the documents. *See id.* at 806-07. The Third Circuit deemed the motion to be one for the suppression of evidence because the essential character of the district court's proceedings left open the possibility that FMC might be subject to further criminal prosecution. *Id.* at 807.

124. 18 U.S.C. § 3731 (1976). For the text of § 3731, *see* note 126 *infra*.

125. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1226 (3d Cir. 1979); *In re* Grand Jury Empanelled (Colucci), 597 F.2d 851, 855, 857-58 (3d Cir. 1979).

126. 18 U.S.C. § 3731 (1976). Section 3731 provides in pertinent part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. . . .
>
> The *provisions of this section shall be liberally construed* to effectuate its purposes.

Id. (emphasis added).

127. So, too, granting an appeal under § 1291 without a proper analysis does little to clarify what constitutes a final decision. For a discussion of the problems that courts have encountered in defining "final decisions" under § 1291, *see* notes 38-39 and accompanying text *supra*.

128. 567 F.2d 237 (3d Cir. 1977).

129. The *Brace* majority failed to apply the *Dickinson-Gillespie* balancing test. For a discussion of the pure § 1291 balancing test, *see* notes 40-50 & 68-70 and accompanying text *supra*.

130. *See* 567 F.2d at 239 n.5, 243. Although frequent references were made to *Cohen*, neither the majority nor the dissent discussed *Cohen* in terms of finality criteria. *Compare id.* at 242-43 *with id.* at 249-50 (Rosenn, J., dissenting). Similarly, *Abney*, decided three months earlier, was not cited. The majority did, however, conclude that "the proceedings below remain[ed] 'open,' 'unfinished,' and 'inconclusive.' " *Id.* at 242, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. Because this language parallels the first criterion of *Abney*, it could be argued that the majority was applying a collateral order test. For a discussion of the first criterion of the *Abney* test, *see* note 99 and accompanying text *supra*. Nevertheless, because the majority never indicated that it was applying a collateral order test, it would appear that the majority cited *Cohen* for the purpose of applying a practical approach to finality under § 1291. *See* 567 F.2d at 242-43. The end result, therefore, was the creation of an impure analysis under § 1291 tainted by the use of collateral order considerations. *See id.*

under section 1291, the *Brace* majority, although announcing its intention to apply a practical approach,[131] actually applied a restrictive approach to determining finality under section 1291.[132]

In *Brace*, the United States District Court for the Eastern District of Pennsylvania consolidated the plaintiff's sex discrimination action with a similar suit brought by the United States Department of Justice,[133] severing the plaintiff's allegation of specific harassment.[134] Plaintiff appealed the district court's dismissal without prejudice[135] of her non-severed claims pending a final decision of the consolidated case.[136] She also appealed the district court's order entering judgment for the defendants as to her severed claim.[137]

A series of district court pronouncements made it unclear whether the court had retained jurisdiction over, or dismissed, the plaintiff's non-severed claims.[138] Having specifically retained jurisdiction over the consolidated cases[139] and having granted interim relief,[140] the district court decided the plaintiff's individual claim of harassment in favor of the defendants.[141] In its

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131. *See* 567 F.2d at 243.

132. *See id.* at 245 (Rosenn, J., dissenting).

133. *Id.* at 240. Plaintiff had charged the Philadelphia Police Department with four counts of sex discrimination. *Id.*

134. *Id.* Counts I, II and IV of plaintiff's complaint alleged broad charges of sex discrimination. *Id.* Count III alleged specific harassment due to defendants' retaliatory conduct in response to plaintiff's charges. *Id.* Plaintiff neither consented nor objected to consolidation. *Id.*

135. *See id.* at 238-43. A "dismissal without prejudice" preserves "the right of the complainant to sue again on the same cause of action [and] [t]he effect of the words 'without prejudice' is to prevent the decree of dismissal from operating as a bar to a subsequent suit." BLACK'S LAW DICTIONARY 421 (5th ed. 1979). Dismissal with prejudice has been defined as "[a]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause . . . [being] res judiciata as to every matter litigated." *Id.*

136. 567 F.2d at 238-40. On June 4, 1976, the district court ordered that "[a]ll claims raised by Plaintiff, Penelope Brace in Counts I, II and IV of her complaint alleging discriminatory employment practices based on sex *are dismissed without prejudice pending final decision* in the related [Government civil suit]." *Id.* at 241, *quoting* Brace v. O'Neill, No. 74-339, slip op. at 1 (E.D. Pa. June 4, 1976) (emphasis in original).

137. 567 F.2d at 238, 243-44. The district court had ordered that "[o]n all remaining Counts . . . [j]udgment is to be entered in favor of the defendants against the plaintiff." *Id.* at 238, *quoting* Brace v. O'Neill, No. 74-339, slip op. at 1 (E.D. Pa. June 4, 1976).

138. *See* 567 F.2d at 240-44.

139. *Id.* at 240. On March 5, 1976, the district court ordered that it would

> *retai*[n] *jurisdiction in this matter for all purposes.* The issues not addressed by this Order, including the issues of back pay, interest and other emoluments of office, if any, are deferred until twenty-four months from the date of this Order or until the results of the aforementioned study are presented to the Court, whichever is shorter.

Id. (emphasis by the Third Circuit), *quoting* Brace v. O'Neill, Nos. 74-400, 74-339, slip op. at 1 (E.D. Pa. Mar. 5, 1976) (Footnote omitted). *See* note 140 *infra*.

140. 567 F.2d at 240. Although the district court ordered a further study of the matter, it also ordered interim relief, including the hiring and promotion of competent female police officers. *Id.* The trial judge also ordered defendants to report within twenty-four months on the progress of these employees. *Id.*

141. *Id.* at 241. The district court's ruling was part of a memorandum opinion and order filed on June 4, 1976. *See id.* For the text of the relevant portions of the court's order on this date, *see* notes 136 & 137 *supra*.

memorandum opinion accompanying this decision, the court confirmed its earlier order in which it had retained jurisdiction over the consolidated suits.[142] In this same opinion and order, however, the court ordered the dismissal of the plaintiff's non-severed claims without prejudice, pending adjudication of the government's case.[143] The district court subsequently entered a civil judgment in favor of the defendants in accordance with the "seemingly 'final' " memorandum opinion and order.[144]

Examining the district court's opinion and orders arising out of the disposition of plaintiff's claim,[145] the court of appeals concluded that "the district court intended to *retain* jurisdiction over [plaintiff's non-severed, general charges], and not to dismiss those counts."[146] The Third Circuit was persuaded that the proceedings below remained " 'open,' 'unfinished,' and 'inconclusive,' "[147] because the opportunity to submit evidence remained open[148] and because consolidation had been, in part, for the purpose of

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142. 567 F.2d at 241. The district court noted that, because the relief sought by the plaintiff and the Government was substantially identical, its March 5th order retaining jurisdiction controlled. *Id.* Accordingly, the court concluded that its decision as to the plaintiff's "claim" would be delayed pending receipt of all the data from the Government's action. *Id.*, *quoting* Brace v. O'Neill, No. 74-339, slip op. at 3-4 (E.D. Pa. June 4, 1976). It is unclear whether the district court was referring to the plaintiff's non-severed claims and/or the plaintiff's individual claim of harassment. *See* 567 F.2d at 241. The district court did, however, summarize its opinion as follows:

> [T]he issues raised by plaintiff founded upon alleged discriminatory employment practices [Counts I, II, and IV] are substantially identical to the ones that prevail in [the Government's case]. For the reasons noted heretofore, we believe that *our decision on this issue should be held in abeyance pending our disposition of* [*the Government's case*].

Id., *quoting* Brace v. O'Neill, No. 74-339, slip op. at 7 (E.D. Pa. June 4, 1976) (footnote and citations omitted) (emphasis by the Third Circuit).

143. 567 F.2d at 241. For the text of this order, *see* note 136 *supra*.

144. 567 F.2d at 241. The *Brace* court ordered judgment for defendants without specifying which claim or claims the plaintiff had lost. *See id.*

145. *See id.* at 242. In interpreting the June 4th order, the majority relied on the district court's June 4th opinion. *Id.* at 242 n.25a. It reasoned that such reliance was necessary since the order itself was ambiguous in dismissing plaintiff's non-severed claims without prejudice but conditioning the dismissal on a final decision in the government's case. *Id.* For the text of the June 4th order, *see* notes 136 & 137 *supra*.

146. 567 F.2d at 242.

147. *Id.*, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. The dissent contended that court-imposed delays might adversely affect the plaintiff's rights if not deprive her of them. 567 F.2d at 247 (Rosenn, J., dissenting). The majority, however, dismissed the "danger of denying justice by delay," concluding that

> the mere prospect of delay cannot create appellate jurisdiction where no appropriate appealable district court order has been entered. We, too, are aware of the "danger of denying justice by delay," . . . but we are also cognizant that there are comparable if not greater dangers present were we to exercise appellate jurisdiction over nonappealable orders entered in live and continuing controversies. . . .

Id. at 243 n.27a, *quoting* Gillespie v. United States Steel Corp., 379 U.S. at 153.

148. 567 F.2d at 242. The *Brace* majority noted that "the district court provided that *all* parties may offer evidence on all claims (except Brace's [individual] retaliation claim) after the conclusion of the City's study." *Id.* (emphasis in original) (footnote omitted).

adjudication.[149] Furthermore, the non-severed claims were so similar that, according to the *Brace* court, a consistent disposition must have been intended.[150] Lastly, a decision on all questions of liability and damages as to the non-severed claims had been postponed for the taking of additional evidence.[151]

Turning to the plaintiff's individual claim of harassment, the court remarked that the district court's finding for the defendants constituted a dismissal with prejudice.[152] Nevertheless, the court interpreted the dismissal as a stay, maintaining that the order was not final for purposes of appeal.[153] The *Brace* court reasoned that, because the class which the plaintiff sought to represent had been the beneficiary of at least four district court orders for relief since the instant appeal was taken,[154] the plaintiff's case was ongoing.[155] The court further noted that the district court's retention of jurisdiction for the taking of additional evidence indicated that plaintiff's individual claim was not "suspended" or "comatose."[156]

Despite the majority's claim to have applied a practical approach to finality,[157] Judge Rosenn, dissenting, concluded that the court had "erroneously given the requirement of finality a technical rather than a practical effect."[158] Judge Rosenn first asserted that, because the district court had

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149. *Id.*

150. *Id.* In particular, the *Brace* Court noted that "the similarity between the two cases and their subject matter, the joint conduct of their proceedings, and the identity in part of the relief sought make it likely, and in fact it was so expressed, that a simultaneous and consistent disposition was intended." *Id.*

151. *Id.* The *Brace* court noted that the district court had never ruled specifically on the plaintiff's motions relating to defendants' hiring and promotion practices but, rather, had delayed decision on all questions of liability and damages (as to Counts I, II, and IV) until the completion of the City's study. *Id.*

152. *Id.* at 244. For the effect of a dismissal with prejudice, *see* note 135 *supra.*

153. 567 F.2d at 244 n.29a. The court noted that, as a general rule, a stay order is not appealable. *See id.* In extraordinary circumstances, however, "tantamount to a dismissal of the action," a stay can be appealed. *Id., citing* Haberern v. Lehigh & N.E. Ry., 544 F.2d 581, 584 (3d Cir. 1977); *In re* Grand Jury Proceedings (U.S. Steel-Clariton Works), 525 F.2d 151, 155-56 (3rd Cir. 1975). Additionally, the court concluded that, absent extraordinary circumstances, mandamus was inappropriate. 567 F.2d at 244 n.29a. For a discussion of mandamus, *see* notes 200-06 and accompanying text *infra.* Finally, the court noted that, until there was an entry of a final order or a rule 54(b) certification, an appeal could not be taken. *See* 567 F.2d at 244 n.29a. For a discussion of rule 54(b), *see* notes 207-15 and accompanying text *infra.*

154. 567 F.2d at 244 n.29a.

155. *Id.*

156. *Id.*

157. *See id.* at 239 n.5, 243.

158. *Id.* at 245 (Rosenn, J., dissenting). In summarizing the facts of *Brace*, Judge Rosenn paid close attention to the effect that the court's delay had upon the plaintiff's substantive rights and financial resources. *See id.* at 246-47 (Rosenn, J., dissenting). For a discussion of Judge Rosenn's previous views toward a practical approach to finality, *see* notes 55-59 and accompanying text *supra.*

explicitly dismissed the plaintiff's non-severed claims, the order was final and the plaintiff should have been granted the appeal[159] since appeals "are taken from the *orders* of a court, not from its opinions."[160]

Alternatively, had the dismissal without prejudice been, in effect, a stay of the proceedings,[161] Judge Rosenn would have found that, on balance, "the injustice of withholding immediate review outweighed the danger of piecemeal review.[162] As to the plaintiff's individual claim of harassment, Judge Rosenn disputed the argument that the plaintiff's benefits from interim district court orders were enough evidence to deem plaintiff's claim not indefinitely delayed and, therefore, final.[163] Judge Rosenn reasoned that, despite the district court's affirmative action, plaintiff could neither participate as a party in the government's case, nor demand interim relief.[164]

It is submitted that, although the *Brace* majority did not specifically attempt to use section 1257 cases to support its decision under section 1291,

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159. See 567 F.2d at 247-48 (Rosenn, J., dissenting). Judge Rosenn stated that it is well established that "a dismissal without prejudice is ordinarily final for purposes of 28 U.S.C. § 1291." *Id.* at 247 (Rosenn, J., dissenting), *citing* 9 J. MOORE FEDERAL PRACTICE ¶ 110.13[1], at 152 (1975). So, too, he deemed the dismissal of plaintiff's individual harassment claim to be a final order. 567 F.2d at 247 (Rosenn, J., dissenting). Judge Rosenn noted that, according to the majority, the district court order dismissing the plaintiff's non-severed claims was ambiguous because it was qualified pending determination of the government's case. *See id.* Unlike the majority, however, Judge Rosenn would have remanded the ambiguous district court order for clarification. *See id.* at 248 (Rosenn, J., dissenting). He reasoned "that the district court would be in a better position to assess its own intent." *Id.*

160. 567 F.2d at 247 (Rosenn, J., dissenting) (emphasis in original). Judge Rosenn explained the source of his disagreement with the majority as follows:

> In many cases, opinions are unclear or are brief, giving little understanding of the basis for the order. For this reason, courts of appeals review orders, judging appealability *solely* from the content of the order. . . . Ordinarily, we view the opinion for its value in support of the disposition of a case, but an appellate court does not substitute its understanding of the order for that of the district court. I therefore cannot agree with the majority's assessment that the basic difference that divides us in [this part of the] dissent is the interpretation of the June 4th district court order and not a legal principle.

Id. at 247-48 (Rosenn, J., dissenting) (emphasis supplied). It is somewhat difficult to understand, however, how the dissent justified presuming the district court's intent after having concluded that it was generally better to remand such an issue to the district court and after concluding that the district court's orders were, "to say the least, unclear." *See id.* at 247 (Rosenn, J., dissenting).

161. *See id.* at 244 n.29a. As to the plaintiff's indvidual harassment claim, the *Dickinson-Gillespie* balancing test would seemingly be satisfied if the dismissal were deemed a stay order. *Id.* at 250 n.9 (Rosenn, J., dissenting), *citing* Hackett v. General Host Corp., 455 F.2d at 629 (Rosenn, J., dissenting). For a discussion of Judge Rosenn's dissent in *Hackett, see* notes 55-59 and accompanying text *supra*. In avoiding the general rule of nonappealability of stay orders, Judge Rosenn remarked:

> This court's treatment of the appealability under section 1291 of stay orders . . . has not been inflexible. . . . The rule of this circuit is not that stay orders are never final; rather the cases teach that it is the duty of this court to examine the circumstances of each case to determine whether an appeal may be taken.

567 F.2d 249 (Rosenn, J., dissenting) (footnote and citations omitted).

162. 567 F.2d at 250 n.9 (Rosenn, J., dissenting).

163. *Id.* at 250 n.10 (Rosenn, J., dissenting). The dissent noted that the plaintiff stood simply "as a mere spectator while other parties decide[d] her fate." *Id.*

164. *Id.*

the same type of restrictive analysis which is appropriate under section 1257 was invoked by the *Brace* court.[165] Arguably, the Third Circuit's failure to distinguish the provisions could have affected the majority's analysis.[166] The dissent, therefore, might have bolstered its criticism of the majority by not only noting the majority's failure to invoke the *Dickinson-Gillespie* balancing test, but also by observing that, if the court were to recognize the differences in purpose and context between sections 1291 and 1257, the majority might have followed a truly practical approach.[167] Furthermore, the dissent might have criticized the majority's failure to separate the collateral order test from the "pure" section 1291 balancing test under *Dickinson* and *Gillespie*.[168]

The remaining problems created by *Brace* center on reconciling the acceptance of the Supreme Court's practical approach language with the

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165. For a discussion of why § 1257 should be interpreted more restrictively than § 1291, *see* notes 81-88 and accompanying text *supra*.

166. *See* Bachowski v. Usery, 545 F.2d 363, 366 n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976). *See also* notes 81-88 and accompanying text *supra*.

167. For a discussion of the policy and language distinctions between §§ 1257 and 1291, *see* notes 81-88 and accompanying text *supra*. Arguably, by reasoning that a court of appeals should disregard district court opinions and determine appealability solely on the content of district court orders, the dissent was applying a mechanistic, rather than a practical, approach. *See* 567 F.2d at 247 (Rosenn, J., dissenting). It is suggested, however, that practicality, for "pure" § 1291 purposes, addresses the plight of the parties in terms of the inconvenience and costs of piecemeal review balanced against the danger of injustice caused by delay. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978); Gillespie v. United States Steel Corp., 379 U.S. at 153-54.

168. *See* 567 F.2d at 243 & n.27a. Arguably, the dissent alluded to separating the collateral order doctrine from "pure" § 1291 considerations by referring to the *Cohen* and *Gillespie* tests separately. *See id.* at 252 (Rosenn, J., dissenting). Also, Judge Rosenn referred generally to having distinguished these tests for § 1291 finality purposes five years earlier in *Hackett*. *See id.* at 250 n.9 (Rosenn, J., dissenting), *citing* Hackett v. General Host Corp., 455 F.2d at 626-27, 629 (Rosenn, J., dissenting). In *Hackett*, Judge Rosenn maintained that these tests ought to be treated as separate means for obtaining an appeal because, under *Dickinson* and *Gillespie*, finality must be judged in terms of the merits while, under *Cohen*, finality is decided in view of the collateral issue. *See* Hackett v. General Host Corp., 455 F.2d at 620 (Rosenn, J., dissenting). It is arguable, however, that Judge Rosenn's conclusion in *Hackett*, if it stands for the proposition that the balancing test is satisfied by a finding that the merits of the case as to the appealing party are effectively determined, may not have withstood Supreme Court scrutiny. *Compare id. with* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476-77 & n.30 (1978). *But see* note 57 *supra*. Nevertheless, neither the practice of separating collateral order considerations from pure § 1291 decisions nor the use of the *Dickinson-Gillespie* test for analyzing pure § 1291 determinations have been explicitly overruled by the Supreme Court. *See* Coopers & Lybrand v. Livesay, 437 U.S. at 477. Therefore, because the *Coopers & Lybrand* Court merely held that an order denying class certification was not appealable under the collateral order doctrine or the "death knell" doctrine, it appears possible to decide correctly that an appeal is to be granted under a pure § 1291 analysis if the merits of the case are effectively terminated, thereby causing the danger of injustice created by delay to outweigh the inconvenience and costs of piecemeal review. *See* note 57 *supra*. As to Judge Rosenn's conclusion in *Hackett* that an order denying class certification is appealable under either *Cohen* or *Dickinson-Gillespie*, the Supreme Court has explicitly disagreed. *See* Coopers & Lybrand v. Livesay, 437 U.S. at 477.

utilization of a technical or restrictive approach.[169] Although, as in *Fiumara,*[170] the Third Circuit has paid lip service to the *Cohen-Abney* test in determing whether orders are collateral,[171] mere recitation of this test, or of the precept mandating a "practical rather than a technical construction of the finality requirement,"[172] will not result in consistent determinations of appealability. It is suggested that the Third Circuit might find the true course of practicality if it recognized that the "pure" balancing analysis of *Gillespie* and *Dickinson* is a separate test from that of the collateral order doctrine.[173] With this in mind, the further realization that section 1257 cases should not be used in interpreting section 1291,[174] and that section 1291 should not be so restrictively construed—even though there *are* good reasons for restricting final judgments under section 1257[175]—should lead the Third Circuit to the correct path of practicality. Accordingly, in determining whether to grant an appeal, it is submitted that the Third Circuit should first apply the *Dickinson-Gillespie* balancing test for finality, and, if the party seeking an appeal cannot meet its requirements, then the court should examine the applicability of the *Abney* collateral order criteria.

III. A BRIEF SURVEY OF INCIDENTAL AVENUES OF APPEAL

A. *Interlocutory Orders and Appealability Under Section* 1292(a)

An additional avenue of appeal is provided by the statutory grant of jurisdiction to the courts of appeals to review certain interlocutory orders.[176] Under section 1292(a)(1) of the Judicial Code, the courts of appeals are granted jurisdiction over interlocutory orders of a district court "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."[177] Section 1292(a) also grants the courts of appeals power to review certain judgments in civil actions for patent infringement[178] and

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169. *See* 567 F.2d at 245 (Rosenn, J., dissenting).

170. For a discussion of *Fiumara, see* notes 116-19 and accompanying text *supra.*

171. 605 F.2d at 118.

172. *See* Brace v. O'Neill, 567 F.2d at 243, *quoting* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546.

173. For a discussion of the *Abney* criteria for determining the appealability of collateral orders, *see* notes 97-101 and accompanying text *supra.*

174. *See* Bachowski v. Usery, 545 F.2d 363, 367-71 (3d Cir. 1976).

175. *See* notes 83-85 and accompanying text *supra.*

176. *See* 28 U.S.C. § 1292(a) (1976). If the broader final decision test of § 1291 cannot be met, appellate jurisdiction under § 1292(a) is often sought. *See* Hoots v. Pennsylvania, 587 F.2d at 1346. For a discussion of the various types of interlocutory orders which are appealable under § 1292(a), *see* notes 177-80 and accompanying text *infra.*

177. *See* 28 U.S.C. § 1292(a)(1) (1976).

178. *Id.* § 1292(a)(4). The courts of appeals have jurisdiction over "[j]udgments in civil actions for patent infringement which are final except for accounting." *Id.*

interlocutory orders and decrees relating to receiverships[179] and admiralty issues.[180]

Despite the objective of avoiding piecemeal review of nonfinal orders,[181] Congress has apparently recognized a litigant's need to challenge interlocutory orders which could have "serious, perhaps irreparable, consequence[s]."[182] A certain degree of elasticity with respect to injunctions was created in order to prevent such irreparable harm as could be created from an erroneous order.[183] Although that provision itself does not limit review to such serious circumstances, the Supreme Court has been very hesitant to allow review of interlocutory orders.[184]

Not surprisingly, the Third Circuit also applies section 1292(a)(1) restrictively,[185] adopting the narrow construction applied by the Supreme Court

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179. *Id.* § 1292(a)(2). Section 1292(a)(2) provides for appellate jurisdiction over "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." *Id.*

180. *Id.* § 1292(a)(3). The courts of appeals have jurisdiction over "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *Id.*

181. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978); Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 180 (1955); Hoots v. Pennsylvania, 587 F.2d at 1346; Mayershy v. Celebrezze, 353 F.2d 89, 89 (3d Cir. 1965) (per curiam). The *Gardner* Court, particularly, emphasized "the long established policy against piecemeal appeal. . . ." 437 U.S. at 480.

182. *See* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). As the *Baltimore Contractors* Court noted:

> [N]o discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. . . . The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants.

Id. (footnotes omitted). *See generally* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE & PROCEDURE § 3921 (1977) [hereinafter cited as C. WRIGHT & A. MILLER]; Note, *supra* note 39, at 367-68.

183. *See* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955); Stateside Mach. Co. v. Alperin, 526 F.2d 480, 482 (3d Cir. 1975). *See also* 16 C. WRIGHT & A. MILLER, *supra* note 182, § 3921; Note, *supra* note 39, at 367-68. At least one commentator has noted that:

> An erroneous order either granting or denying a preliminary injunction, for instance, may have consequences that cannot effectively be cured by formal reversal many months or years later. The statutory provisions for interlocutory appeal from injunction[s] . . . may be justified by the determination that the danger of injury simply outweighs the costs of interlocutory appeal.

16 C. WRIGHT & A. MILLER, *supra*, § 3920, at 6.

184. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480-82 (1978); Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). The *Gardner* Court concluded that this "exception is a narrow one." 437 U.S. at 480. In *Baltimore Contractors*, the Supreme Court engaged in a thorough discussion of section 1292(a)(1) and concluded that the district court's order denying a stay under the Arbitration Act was a step in controlling the suit before the trial court and not a refusal of an interlocutory injunction within the meaning of section 1292(a)(1). *See* 348 U.S. at 185.

185. *See* Hoots v. Pennsylvania, 587 F.2d at 1348-51. For a discussion of the Third Circuit's restrictive approach in cases involving section 1291, *see* notes 51-66 & 128-56 and accompanying text *supra*.

and the Second Circuit.[186] In *Hoots v. Pennsylvania*,[187] for example, the Third Circuit recently outlined two criteria for appealability under section 1292(a)(1): 1) "the original or prior order must have been injunctive in character,"[188] and 2) "that injunction must have been modified in some respect by the order from which the appeal has been taken."[189] Finding that it was not bound by "[t]he literal characterization of an order as an injunction"[190] the *Hoots* court concluded that an order commanding preparation of a remedial school desegregation plan[191] did not constitute an injunction under section 1292(a)(1).[192] Alternatively, the *Hoots* court concluded that, even if the order in question were an injunction, the later order denying defendants' motion for approval of a desegregation plan, filed pursuant to the original order, did not modify that original order and, thus, was not appealable.[193]

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186. *See* Hoots v. Pennsylvania, 587 F.2d at 1348 n.42. The *Hoots* court noted that "literalism has not been the approved canon of construction for the interlocutory appeals statute," and that, instead, "the courts have looked to the presumed purpose of the . . . exception to the historical rule prohibiting appeals from nonfinal judgments, and have classified as injunctions within the meaning of § 1292(a)(1) those interlocutory orders 'of serious, perhaps irreparable consequence.' " *Id.*, *quoting* Stateside Mach. Co. v. Alperin, 526 F.2d 480, 482 (3d Cir. 1975) (footnotes omitted), *quoting* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

The *Hoots* court also quoted with approval the conclusion of the Second Circuit that § 1292(a)(1) "was intended as a narrow exception to the policy of the basic final judgment rule. . . . The great advantages of that policy in the administration of federal justice dictate against a reliance on the strict letter of § 1292(a)(1) which would cause the exception to encroach unduly upon the rule." 587 F.2d at 1348 n.2, *quoting* Western Geophysical Co. of America v. Bolt Assocs. Inc., 463 F.2d 101, 104 (2d Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972) (citation omitted).

187. 587 F.2d at 1340. For a discussion of *Hoots*, *see* notes 60-66 and accompanying text *supra*.

188. 587 F.2d at 1348.

189. *Id.*

190. *Id.* at 1348 n.42, *quoting* Stateside Mach. Co. v. Alperin, 526 F.2d 480, 482 (3d Cir. 1975).

191. *See* Hoots v. Pennsylvania, 359 F. Supp. 807, 824-25 (W.D. Pa. 1973), *rev'd*, 587 F.2d 1340 (3d Cir. 1978).

192. 587 F.2d at 1351. As to the portion of the order in which the defendants were "enjoined and restrained from taking any action, directly or indirectly, that may in any way limit or otherwise affect any school assignment options that could possibly be considered or proposed by any parties to this action," the *Hoots* court reasoned that the § 1292(a)(1) requirements were not met because the order was presently operative and unmodified by any subsequent district court order. *Id.* at 1348 n.43, *quoting* Hoots v. Pennsylvania, 359 F. Supp. at 825. The court also concluded that the order requiring the submission of a desegregation plan was not an injunction, but "merely a step in a judicial proceeding leading to the formulation of . . . relief. [A]n appeal from the . . . order could not vest jurisdiction in a reviewing court because the 'appellate perspective' remained subject to alteration until the particulars of the remedy had been formulated." 587 F.2d at 1351.

193. 587 F.2d at 1351. The *Hoots* court reasoned that the order denying defendants' motion for approval of a desegregation plan did not "specify the nature and scope of the desegregation remedy," but rather, "continue[d] to look toward the future formulation of a decree which [would] afford the plaintiffs the relief to which they are entitled under the district court's original order." *Id.*

B. *Discretionary Appealability of Orders Involving a Controlling Question of Law Under the Interlocutory Appeals Act*

The Interlocutory Appeals Act, section 1292(b) of the Judicial Code,[194] provides a distinct avenue of appeal for certain orders which are not otherwise immediately appealable.[195] For an appeal to be proper under this provision, the district court judge must certify that the order appealed from contains a controlling question of law with respect to which there are substantial grounds for differences of opinion, creating the likelihood that an immediate appeal will materially advance a final determination of the litigation.[196] Consistent with the intent of Congress to grant only a narrow, discretionary exception to the final judgment rule, the Supreme Court interprets section 1292(b) strictly.[197] Not surprisingly, the Third Circuit has also construed this jurisdictional grant in a narrow fashion.[198]

C. *Mandamus: An Extraordinary Avenue of Review*

Although not strictly an avenue of appeal,[199] the common law writ of mandamus can be used as an alternate route for review.[200] Mandamus is

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194. 28 U.S.C. § 1292(b) (1976).

195. *Id.* Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id. (emphasis in original).

196. *See id.*

197. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978) (party seeking § 1292(b) appealability faces harsh burden in light of congressional restrictions). *See also* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 745-46 (1976) (application to court of appeals must be made within 10 days and all § 1292(b) criteria must be complied with in a strict fashion); Tidewater Oil Co. v. United States, 409 U.S. 151, 164-74 (1972) (§ 1292(b) does not establish appellate jurisdiction over certain government civil antitrust cases).

198. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 212 (3d Cir. 1977), *aff'd on other grounds*, 437 U.S. 478 (1978); Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 862-63 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977); Katz v. Carte Blanche Corp., 496 F.2d 747, 753-56 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

199. *See* Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (writ of mandamus not to be used as substitute for appeal, but appropriate for clear abuses of discretion); *Ex parte* Fahey, 332 U.S. 258, 260 (1947) (writ of mandamus reserved for extraordinary cases, not mere substitute for appeal). *See also* Hoots v. Pennsylvania, 587 F.2d at 1346. The *Hoots* court noted that the "jurisdiction of the courts of appeals normally is confined to the review of final orders . . . or to the classes of interlocutory orders described in 28 U.S.C. § 1292(a) (1976)." *Id.* (footnote omitted).

200. The power of the federal courts to grant mandamus was "given a statutory basis by the All Writs Act." Rapp v. Van Dusen, 350 F.2d 806, 811 (3d Cir. 1965) (footnote omitted). *See* 28 U.S.C. § 1651(a) (1976). Under the All Writs Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law." *Id.*

appropriate when a district judge fails to lawfully exercise the authority that is vested in the district court when it is necessary to effectuate a remedy to which a party is entitled in an extraordinary case where the potential for irreparable harm is plainly apparent.[201] The Supreme Court has repeatedly cautioned, however, that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."[202]

In restricting the availability of mandamus, the Court has reasoned that the consequences of forcing a district court judge to become a litigant are undesirable,[203] and that the policy of discouraging piecemeal review underlying section 1291 similarly compels a restrictive application of mandamus.[204] This restrictive view of mandamus has been followed consistently in the Third Circuit.[205]

D. *Certifying Finality Under Rule 54(b) of the Federal Rules of Civil Procedure*

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,[206] appellate jurisdiction may be founded upon 1) a district court's determination that there is no just reason for delay and 2) its entry of a final judgment involving fewer than all claims or parties involved in a multiple claim and/or multiple party civil action.[207] As stated by the Supreme Court, the basic purposes of rule 54(b) are as follows: 1) to avoid uncertainty and possible unjust delays which would result if appeal were postponed pending a final

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201. *See, e.g.*, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661-67 (1978); Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964); Citibank v. Fullam, 580 F.2d 82, 86-87 (3d Cir. 1978). The *Will* Court noted that mandamus has been used in the federal courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 437 U.S. at 661, *quoting* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

202. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976) (citations omitted). *See also* Will v. United States, 389 U.S. 90, 95 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384-85 (1953); *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947). In *Ex parte Fahey*, the Court concluded that mandamus "should be resorted to only where appeal is a clearly inadequate remedy." 332 U.S. at 260.

203. *See* Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384-85 (1953); *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947). The Court concluded in *Ex Parte Fahey* that the exercise of mandamus obligates the district court judge to obtain personal counsel or to rely on the litigants before the court to assert his defense. 332 U.S. at 260.

204. *See* Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Will v. United States, 389 U.S. 90, 96 (1967); Parr v. United States, 351 U.S. 513, 520-21 (1956).

205. *See* United States v. Helstoski, 576 F.2d 511, 516 (3d Cir. 1978), *aff'd sub nom.* Helstoski v. Meanor, 442 U.S. 500 (1979).

206. FED. R. CIV. P. 54(b). Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Id.

207. *Id.*

decision of all claims;[208] and 2) to effecuate the policy of the Federal Rules of Civil Procedure in permitting "the liberal joinder of claims in multiple claims actions" without seriously prejudicing any party.[209]

In effect, rule 54(b) permits a district court to take a practical approach to finality when multiple claims or parties are involved.[210] It is clear, however, that the rule does not relax the fundamental finality requirement or permit certification of an order which would not be a final decision under section 1291 if sued on alone.[211] While the specific criteria upon which a district judge should rely in ruling on applications for rule 54(b) certification have never been explicitly enumerated by the Supreme Court[212]—leading to a highly restrictive approach to the rule in the Third Circuit[213]—the

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208. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434-36 (1956).

209. *Id.* at 432, 434-36. For a discussion of the purposes and significance of rule 54(b), *see* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 2654, 2661 (1973). For example of instances in which the Federal Rules of Civil Procedure encourage or require the joinder of multiple claims and parties, *see* FED. R. CIV. P. 13-14, 18-21. *See also* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S.. 445, 451-53 (1956).

210. Sears, Roebuck & Co. v. Mackey, 351 U.S. 435 (1956). The *Sears* Court noted:

> To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal.

Id. (emphasis in original). *See also* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 453 (1956). The Third Circuit articulated this principle by stating that rule 54(b) "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 363 (3d Cir. 1975), *noted in the Third Circuit Review*, 22 VILL. L. REV. 697 (1976). *See also* Aetna Ins. Co. v. Newton, 398 F.2d 729, 734 (3d Cir. 1968); RePass v. Vreeland, 357 F.2d 801, 804 (3d Cir. 1966); Panichella v. Pennsylvania R.R., 252 F.2d 452, 454-55 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960).

211. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956). In *Sears*, the Court noted:

> The District Court *cannot*, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions.

Id. (emphasis in original). The *Sears* Court observed that rule 54(b) "merely administers [the final decision requirement under § 1291] in a practical manner." *Id.* at 438. However, by its "negative effect," rule 54(b) may operate "to restrict in a valid manner the number of appeals in multiple claims actions." *Id. See also* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 743 n.3 (1976); Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 362-65 (3d Cir. 1975). Accordingly, rule 54(b) "does not supersede any statute controlling appellate jurisdiction." Sears, Roebuck & Co. v. Mackey, 351 U.S. at 437.

212. *See* Panichella v. Pennsylvania R.R., 252 F.2d 452, 454 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960). The *Panichella* court, in noting that an abuse of a district court's discretion in awarding a rule 54(b) order is reviewable, pointed out that "the Supreme Court has not suggested any guide to [the] judgment [of] whether a 54(b) order reflects a proper exercise of discretion." *Id. But see* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956) (courts of appeals must not disturb district court's discretion in denying certification unless trial judge did not consider relevant factors).

213. *See, e.g.*, Curtiss-Wright Corp. v. General Elec. Co., 597 F.2d 35 (3d Cir. 1979) (per curiam), *vacated and remanded*, 100 S. Ct. 1460 (1980); Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360 (3d Cir. 1975). For a discussion of the Third Circuit's restrictive application of rule 54(b) as well as a general overview of the implementation of the rule, *see* Note, *A Proposed Two-Part Analysis for the Exercise of a Trial Judge's Discretionary Certification of a Claim as Final Under Rule 54(b) When a Counterclaim Remains Pending*, 25 VILL. L. REV. 179 (1980).

Court has recently made clear that, because it requires a careful weighing of all of the exigencies of a particular case, a district judge's decision on a rule 54(b) motion is entitled to "substantial deference" on appeal.[214]

IV. CONCLUSION

As has been observed, the Third Circuit appears to be largely in agreement with the Supreme Court in utilizing a restrictive approach to appealability under section 1292(a),[215] the Interlocutory Appeals Act,[216] and the mandamus power.[217] Further, the Supreme Court's recent decision in *Curtiss-Wright Corp. v. General Electric Co.*,[218] should go far to reconcile the varying approaches of the courts to appealability under rule 54(b).[219]

It is submitted, however, that the Third Circuit's inconsistency in applying the collateral order doctrine of *Cohen*[220] and its continuing refusal to adopt a practical approach to finality under section 1291,[221] have resulted in an appellate system significantly more restrictive than, and at least arguably inconsistent with, the intent of Congress and the mandates of the Supreme Court. As evidenced by the *Brace* decision, this restrictive approach raises the very real possibility of serious inconvenience and substantial injustice to parties involved in complex litigation.[222]

Consequently, it is suggested that the Third Circuit would do well to reexamine its appealability analysis in light of the *Dickinson-Gillespie* balancing test for finality[223] and the *Cohen-Abney* criteria for application of the collateral order doctrine.[224] In so doing, it is submitted, the court would be likely to develop a more precise appealability analysis which would be consistent with the intent of Congress and the mandates of the Supreme Court, as well as an effective tool of judicial administration and a fair and equitable framework within which litigants may operate.

Gary A. Rome

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214. Curtiss-Wright Corp. v. General Elec. Co., 100 S. Ct. 1460, 1466 (1980), *vacating and remanding* 597 F.2d 35 (3d Cir. 1979) (per curiam). The *Curtiss-Wright* Court reiterated that rule 54(b) certification should not be routinely granted, but refused to "fix or sanction narrow guidelines for the district courts to follow." 100 S. Ct. at 1466. Rather, the Court found that the decision to grant a request for rule 54(b) certification was one committed "to the sound judicial discretion of the district court" based upon the trial judge's evaluation of the equities of the case. *Id.*, *citing* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956). The court stated that once the trial judge's evaluation has been made, "the proper role of the Court of Appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record." 100 S. Ct. at 1466.

215. *See* notes 185-94 and accompanying text *supra*.
216. *See* notes 198-99 and accompanying text *supra*.
217. *See* notes 203-06 and accompanying text *supra*.
218. 100 S. Ct. 1460 (1980), *vacating and remanding* 597 F.2d 35 (3d Cir. 1979) (per curiam).
219. *See* notes 213-15 and accompanying text *supra*.
220. *See* notes 110-27 and accompanying text *supra*.
221. *See* notes 157-76 and accompanying text *supra*.
222. *See* notes 157-76 and accompanying text *supra*.
223. *See* notes 40-50 and accompanying text *supra*.
224. *See* notes 93-101 and accompanying text *supra*.