Obligatory Insurance as a Form of Social Engineering: A Comparison Paper Between the United States, Italy, Aruba and Poland

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Insurance has been around for centuries. Traditionally, it has been purchased to protect the purchaser, namely, the insured. Over time, the insurance industry has developed an increasing number of products, so that at present one can purchase insurance to cover nearly every risk imaginable. The concept of mandatory or obligatory insurance is a fairly recent development. It traces its origins to the widespread use of the motor vehicle and also employment. Obligatory insurance is designed to protect certain classes of persons, such as workers and those who sustain injury and damage at the hands of others. In this article, the authors compare the current state of obligatory insurance in four democratic countries: the United States, Italy, Aruba and Poland. The aim of the article is to catalogue the similarities and differences in obligatory insurance in those four countries. The countries studied all have obligatory insurance designed to offer some degree of protection to workers injured on the job, and in the course and scope of their work, and to those involved in vehicular collisions. The other primary takeaway from our research is that, predictably, there is less obligatory insurance in the United States than in the other countries studied.

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1 Introduction

Being a trial court judge is an extraordinarily difficult and challenging job. Unlike their appellate brethren, who typically work in panels of three – at the intermediate appellate court level – or a group of nine – at the Supreme Court level – and who therefore can collectively work to share ideas and case load, the trial court judge, working as sole arbiter, is left to make decisions alone. Typically faced with an avalanche of cases and crushing dockets, and with too little support staff to offer meaningful assistance, these judges are overworked and often overwhelmed. They also must be legal jack-of-all-trades in the sense that presiding over cases filed in courts having broad jurisdiction they must deal with nearly every sort of civil case there is, not to mention criminal cases, at least in some courts. Furthermore, trial court judges, when presiding over trials, must rule on many difficult evidentiary issues instantaneously. While many legal issues coming before trial judges are routine, and do not require research, others are indeed very difficult, amorphous, and sometimes not informed by clear legal authority. Every working day, across the country, trial judges make thousands of decisions.

Some cases are disposed of quickly in the trial courts; others are not. Some are complex, involving protracted litigation with a multitude of pre-trial motions. Some trials, of course, are lengthy affairs, involving hundreds of exhibits, dozens of witnesses, complicated jury instructions, and legal issues that crop up that must be resolved by the trial judge in short order, often without the luxury of lengthy deliberations or supplemental briefing. As is the case with sports referees and officials, given the difficulty of their tasks, trial judges for the most part perform their jobs admirably, professionally, fairly, with great skill and aplomb, and are more often correct in their rulings than wrong. When they do make mistakes, many are harmless,[1] insignificant to the ultimate outcome of the litigation, and never are subject to review by an appellate court. On the other hand, some rulings are clearly wrong, have substantial significance on the outcome of the case, and require correction. Some rulings are at least arguably wrong, or involve matters of first impression, have importance to a wider public than merely the litigants before the court, and are so important that they must be reviewed by higher courts.

[1] Indeed, in the United States a harmless error is a ruling by a trial judge that, although mistaken, does not meet the burden for a losing party to reverse the original decision on appeal, or to warrant a new trial. This doctrine indeed is known as the harmless error rule.

The question becomes one of timing. Obviously, appeals courts cannot entertain review of every ruling made by their trial court brethren. If so, their dockets would be overwhelmed and cases would never get finally resolved. Justice delayed, goes the old saw, is justice denied. And, time is money. Furthermore, trial court judges are vested with substantial discretionary authority. This is rightly the case, as they are the judges closest to the action and they require a substantial degree of leeway in order to carry out their job as they deem fit, within the confines and parameters of the rules of course. Given this vast discretionary authority, and bearing in mind too that most interlocutory rulings made by trial court judges can be corrected as the case moves along through the adjudicative phase, the appellate courts cannot be in the position of overseeing and second-guessing every decision made by the lower court judges.

So as is the case in most areas of the legal system, a balance had to be struck. As will be discussed, there is a rich history that disdains a piecemeal approach to appellate practice. The preferred approach, in order to enhance efficiency and fairness, is to delay appeals until final judgment is entered as to all claims and all parties. This doctrine has a name in fact: *the final judgment rule*. This rule has a rich and glorious history dating to the infancy of the American judicial system. However, if rigidly applied, with no exceptions, the rule would wreak havoc and often result in irreparable harm to wronged litigants; an increase in litigation; more expensive litigation; and, ultimately waste and a disdain for the rule of law. But, the question is, how to fine-tune the final judgment rule so as to strike a fairer balance between competing goals and policy objectives

In order to temper the final judgment rule and harsh results that often would flow from it if there were no exceptions, the United States Congress has passed important legislation throughout the years allowing for exceptions to the final judgment rule, by authorizing appellate review of interlocutory orders emanating from the federal district courts.[2] This paper will discuss these exceptions.

[2] The United States has a vast judicial system. Under principles of federalism, as encapsulated in the United States Constitution, there is both a federal judiciary, that handles primarily federal matters, and a separate system of state courts.

The first section of the paper will provide an overview of the United States federal court judiciary. The bulk of appellate court activity is carried out by the courts of appeals.[3] Though obviously very important, beyond a brief description of the Supreme Court, this paper will focus on appeals taken from district court decisions to the courts of appeals. The paper then will discuss the final judgment rule. The balance of the paper will discuss the various methods for appellate review of interlocutory orders. In order, the paper will discuss trial court certifications under Civil Rule 54(b) in multi-party/claim cases; the collateral order doctrine as a method of appealing rulings prior to final judgment of all claims and parties; discretionary interlocutory appeals involving injunctions, relating to receivers, and decrees relating to admiralty cases under 28 U.S.C. §1292(a); discretionary interlocutory appeals under 28 U.S.C. §1292(b) – which is unique in its so-called "dual-gatekeeper" scheme; mandamus[4] as an avenue for interlocutory review in "exceptional" cases; appeals from orders granting or denying class-action certification under Civil Rule 23(f); miscellaneous situations when appeals are allowed prior to entry of final judgment; and finally, review of administrative determinations. The paper will then offer brief concluding remarks.

2 Overview of United States federal court system

The United States federal court system is comprised of a vast array of different courts. The basic structure has been in place since the late 1800's.[5] It consists of three tiers of courts with expansive civil, criminal, and bankruptcy jurisdiction:[6] (1) the trial-level district courts; (2) the appellate-level circuit courts of appeals;[7] and (3) the U.S. Supreme Court. Furthermore, Congress has established within the federal

[3] This is no slight to the US Supreme Court, itself a busy place. However, a detailed description of the work of that Court is beyond the scope of this paper.

[4] Pursuant to the Constitution of 1789, Congress has assumed, under the Necessary and Proper Clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and its power to regulate the issuance of writs. Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Mandamus is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority, to do (or to forbear from doing) some specific act which that body is obligated under the law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty.

[5] See Judiciary Act of 1981, Act of March 3, 1891, ch. 517, 26 Stat. 826, commonly known as the Evarts Act or the Circuit Courts of Appeals Act.

[6] This paper will focus only on civil cases.

[7] This paper will largely focus on the circuit courts of appeals, since, for all intents and purposes, the vast majority of appeals from the district courts are heard here. The Supreme Court accepts less than one hundred cases a year for appeal.

judiciary a limited number of other courts with specialized, national jurisdiction, including the U.S. Court of International Trade, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.[8]

2.1 United States District Courts

There are 94 District Courts scattered throughout the country, with at least one district court in each state, and the District of Columbia. Four territories of the United States also have U.S. district courts that hear federal cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. Each district includes a U.S. bankruptcy courts as a unit of the district court. District courts are the federal system's trial courts; in European parlance, the courts of first instance. In the District Courts there are two types of federal judges: United States District Judges (confirmed by the Senate with life tenure); and United States Magistrate Judges[9] (appointed through a merit selection process for renewable, eight-year terms). There currently are 870 authorized district court judges. There currently also are 531 full-time Magistrate Judges in the district courts. When both sides to a civil case consent, magistrate judges are authorized to hear the entire dispute, rule on all motions, and preside at the trial.[10] Decisions by District Courts, although binding on the parties to that litigation, have no precedential effect; other district judges hearing similar cases are not bound by decisions made by other district judges.

[8] Congress has also created special courts outside the judiciary, including the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, the military courts, and various bodies in the Executive branch presided over by administrative law judges.

[9] The Federal Magistrates Act of 1968 was enacted "to reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice." See H.R. Rep. No. 1629, 90th Cong., 2d Sess., 11 (1968). This statute created a large number of new judicial officers that would "cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier" of federal judges. S. Rep. No. 371, 90th Cong., 1st Sess. 9 (1967).

[10] Magistrates are empowered to conduct a wide-range of activities in both civil and criminal cases. During the statistical year ended September 30, 2015, magistrate judges nationally disposed of 1,090,734 cases and proceedings. For an excellent discussion of the roles played by magistrate judges see McCabe, P. G. (2014) A Guide to the Federal Magistrate System: A White Paper Prepared at the Request of the Federal Bar Association, available at: www.fed.bar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2 [accessed December 12, 2020]; see also Lee D. A., Davis T. E. (2016) "Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Utilization in the Past Quarter Century, 16 NEV.L. J.

Combined filings in the U.S. District Courts for both civil cases and criminal defendants totaled 425,945 in 2020.[11] 332,732 of total filings involved civil cases.[12] Cases filed in the federal courts generally are of two types: those involving purely federal law or those arising from so-called diversity of citizenship (i.e., disputes between citizens of different states and/or between U.S. citizens and citizens of foreign nations, and where the amount in controversy exceeds the threshold limit of $75,000). In 2020, 140,812 of civil filings involved diversity of citizenship.[13] Many of those filings involved personal injury matters.[14] 148,976 of the civil filings involved federal questions.[15]

2.2 United States Circuit Courts of Appeals

There are thirteen U.S. Courts of Appeal. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. There are eleven "numbered" circuits as well as the D.C. Circuit. These circuits are defined geographically. The 6th Circuit, for example, contains the following districts: the Eastern and Western Districts of Kentucky; the Eastern and Western Districts of Michigan; the Northern and Southern Districts of Ohio; and, the Eastern, Middle and Western Districts of Tennessee. The thirteenth court of appeal is the Court of Appeals for the Federal Circuit. This court has nationwide jurisdiction over certain types of appeals based on what the underlying legal case is about. A court of appeals hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies. Additionally, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims. Federal circuit court judges are appointed for life and are paid approximately $179,500 annually.[16] At the age of 65, a federal judge may choose to retire with his or her full

[11] See Federal Judicial Caseload Statistics 2020, retrieved from: https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 [accessed December 12, 2020].
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] See Ballotpedia, United States Court of Appeals, 2020, retrieved from https://ballotpedia.org/United_States_Court_of_Appeals [accessed December 12, 2020].

salary. Judges also may choose to go on senior status at age 65, if they have served actively for 15 years. There currently are 179 circuit court judges.[17]

The rules governing procedure in the court of appeals are the Federal Rules of Appellate procedure. In a Court of Appeals, an appeal is almost always heard by a panel of three judges. The judges are randomly selected from the available judges, including senior judges and judges temporarily assigned to the circuit. The American legal system, in the common law tradition, is based on precedent. Appeals court decisions, unlike trial court decisions, constitute binding precedent. This means that from the time a circuit court of appeals issues a decision, other courts in that circuit must follow that court's ruling in similar cases. However, other circuit courts are not bound by such a decision.

There was a total of 50,258 filings in the 12 regional courts of appeals in 2020.[18] Of that number, 27,500 (a little more than half) were appeals in civil cases.[19] In 2020 there were 6,356 appeals taken from administrative agency decisions.

2.3 The United States Supreme Court

Article III, Section 1 of the United States Constitution establishes the Supreme Court. The Constitution, while envisaging lower federal courts, left it to Congress to establish these, which it did through the Judiciary Acts. The Constitution states that the Supreme Court has both original and appellate jurisdiction. Its original jurisdiction is limited to cases involving disputes between the states or disputes arising among ambassadors and other high-ranking ministers. However, the vast majority of cases the Supreme Court hears are appeals from the Courts of Appeals.

The primary means to petition the Supreme Court for review is to ask it to grant a writ of certiorari. It is exceedingly difficult to obtain such a writ. Annually, the Court receives over 7,000 requests for review but grants writs in the range of 100 – 150.[20] The Court accepts for review only those cases involving issues holding national significance – typically social issues involving matters such as gun rights, religious rights, abortion – or to harmonize conflicting decisions in the federal Circuit courts.

[17] *Id.*
[18] See Federal Judicial Caseload Statistics 2020, found at uscourts.gov [accessed December 12, 2020].
[19] *Id.*
[20] See United States Courts, Supreme Court Procedures, available at: uscourts.gov [accessed December 12, 2020].

There are at present nine Justices that comprise the Court; one chief Justice and eight associate Justices. Nominated by the President then holding office when a vacancy arises, and upon the advice and consent of the Senate (only; not the House of Representatives), a Supreme Court Justice has life tenure. The Court has its own set of rules. According to its rules, four of the nine justices must vote to accept a case. Lower courts are obligated to follow precedent set by the Supreme Court. As of 2020, Associate Justices have a salary of $265,000 while the Chief Justice has a salary of $277,700.[21] A term of the Supreme Court begins, by statute, on the first Monday in October. Typically, Court sessions continue until late June or early July. The Term is divided between "sittings," when the Justices hear cases and deliver opinions, and intervening "recesses," when they consider the business before the Court and write opinions. Sittings and recesses alternate at approximately two-week intervals.[22]

3 The Final Judgment Rule

As a general proposition, from a procedural standpoint it has been the historic policy in the federal courts that appeals to the Courts of Appeal lie only from final decisions by the district courts. As the Supreme Court stated in *Andrews v. United States*[23] "The long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court. See*, e.g., DiBella v. United States, 369 U.S. 121; Carroll v. United States, 354 U.S. 394; Cobbledick v. United States, 309 U.S. 323*. The standards of finality to which this Court has adhered in habeas corpus proceedings have been no less exacting. See*, e.g., Collins v. Miller, 252 U.S. 364*. There, the Court said that the rule as to finality 'requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved.' 252 U.S. at 252 U.S. 370 (Wright, Miller, Cooper: Jurisdiction 2d §3906.)."

From a statutory standpoint, the final judgment rule, as it commonly referred to, had its origins in the Judiciary Act of 1789, and has been perpetuated ever since. The current Judicial Code gives the courts of appeals "jurisdiction of appeals from all

[21] *Id.*
[22] Supreme Court opinions, along with its docket and other interesting information can be found at the Supreme Court web page, supremecourt.gov [accessed December 12, 2020].
[23] 83 S.Ct. 1236, 1240, 373 U.S. 334, 340, 10 L.Ed.2d 383 (1963).

final decisions of the district courts…"[24] What exactly constitutes a final judgment? It has been said that "a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[25] A judgment is final when it disposes of all claims, involving all parties to the action. Anything less is not a final judgment. The Supreme Courts has stated that a "final decision[n]" is typically one "by which a district court disassociates itself from a case."[26] The purpose of the final judgment rule is both to promote efficiency and prevent piecemeal appeals. A strict final judgment rule often "renders moot or nonprejudicial erroneous interlocutory decisions."[27] However, the Court has never been able to provide any iron-clad, red line definition of what actually constitutes a final judgment. While in the vast majority of cases it is clear when a judgment is indeed final, and hence ripe for appellate review, still the Court has readily acknowledged that "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[28] As one authoritative treatise states, "The saving grace of the imprecise rule of finality is that in almost all situations it is entirely clear, either from the nature of the order or from the crystallized body of decisions, that a particular order is or is not final." (Wright, Kane, 2017 §109, p. 671).

[24] 28 U.S.C.A §1291. This statute applies both in civil and criminal cases; however, this paper is limited to a discussion of appellate remedies in civil disputes. It also is worth noting that in situations where a direct appeal lies to the Supreme Court, the appeal must be lodged there, and in such instances the courts of appeals lack jurisdiction to entertain the appeal. See *Donovan v. Richland County Ass'n for Retarded Citizens*, 102 S.Ct. 713, 454 U.S. 389, 70 L.Ed. 2d 570 (1982).

[25] *Catlin v. U.S.*, 65 S.Ct. 631, 633, 324 U.S. 229, 233, 89 L.Ed. 911 (1945); *see also*, *Lauro Lines S.R.L. v. Chasser*, 109 S.Ct. 1976, 1978, 490 U.S. 495, 497, 104 L.Ed.2d 548 (1989).

[26] *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

[27] Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code (1959) The Yale Law Journal, Vol. 69, p. 334, citing to *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 212 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943) ("Only the seriously prejudicial defects will be dignified by appellate attention [because] … many mistakes … will be seen to be trivial from the perspective of a final disposition of the case…."). A party may lose several interlocutory questions, but still win the law suit. *E.g., Countee v. United States*, 127 F.2d 761 (7th Cir. 1942) (defendant forced to proceed on erroneous burden of proof but won the case).

[28] *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2149, 417 U.S. 156, 170, 40 L.Ed.2d 732 (1974).

4 Appellate Review of Interlocutory Orders

The final judgment rule eschews and is anathema to interlocutory appeals.[29] But as is true in most areas of the law, in order to avoid too harsh results, unfairness, prejudice, and sometimes irreparable harm to litigants, it often is necessary to temper rigid ideology with pragmatism. Over the years, the American federal judicial system has developed a set of appellate rules designed to strike an appropriate balance between, on the one hand, the efficiencies gained by adhering to the final judgment rule while, on the other hand, ameliorating the inevitable hardships that result from delaying immediate appeals.[30]

There are four primary avenues for appellate review of interlocutory orders in federal court that have been developed over the years: (1) certification of judgment under Rule 54(b) of the Federal Rules of Civil Procedure; (2) the collateral order doctrine; (3) discretionary certification under 28 U.S.C. §1292; and (4) a writ of mandamus under the All-Writs Act codified as 28 U.S.C. §1651 (2012). This article will discuss the principal procedural and substantive aspects of each of these four avenues in turn.

4.1 Judgment Upon Multiple Claims or Involving Multiple Parties

Prior to the adoption of the Federal Rules of Civil Procedure in 1938 [Civil Rules], a judgment was appealable only if it finally disposed of both all of the claims involved in the suit and all parties.[31] The Civil Rules, which abolished the strict rules of pleadings, greatly liberalized the joinder of parties and claims; simplified pleadings; and, greatly expanded the opportunity to conduct discovery. These mechanisms led to more multi-party and multi-claim suits. Consequently, it was no longer feasible or desirable to bar all appeals pending the final resolution of all claims and all parties. Civil Rule 54(b) was adopted in order to provide a mechanism for allowing

[29] See *Sierra Club v. March*, 907 F.2d 210, 212 (1st Cir. 1990) (as a general rule, "it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." (Quoting *Director, O.W.C.P. v. Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988)). "'Interlocutory' in law, means not that which decides the cause, but that which settles some intervening matter relating to the cause." *Taylor v. Breese*, 163 Fed. 678, 684 (4th Cir. 1908).

[30] See *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964) (explaining that the finality rule requires the balancing of the competing considerations of "the inconvenience and costs of piecemeal appeal review on the one hand and the danger of denying justice and delay on the other" (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

[31] *Collins v. Miller*, 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed 616 (1920).

immediate appeals in situations where fewer than all parties or claims are resolved and where principles of fairness and justice dictate that an immediate appeal of such claims should be permitted. The purpose of the rule is to permit the entry of judgments upon one or more but fewer than all the parties in an action involving more than one claim or party. Currently, the rule reads as follows. "When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." By virtue of this provision, a partial disposition of a case is not final until and unless the court issues what is called a Civil Rule 54(b) certification (Wright, Miller and Kane: Civil 4th §2654). This salutary provision is of the utmost importance, since it places litigants clearly on notice of when an order is only interlocutory, so that a party need not appeal, and when the order is final, so that it must. Given the importance of Civil Rule 54(b), a few other issues of importance are discussed in the next subsection.

4.1.1 Further Commentary on Civil Rule 54(b) Certifications

It is critical to note that in the absence of the district court judge issuing the necessary certification, a partial disposition of the case is not final. It should also be noted that while the district court judge is given substantial deference as to the question of whether there was no just reason for delaying appeal on a given issue, still the reviewing court may reverse that ruling, dismiss the appeal, and remand the case in situations where the reviewing court concludes that the trial judge's conclusion in weighing the equities was clearly unreasonable (Wright, C.A; Miller A.R; Kane, M.K. Civil 4th §2659).[32] Whether a complaint actually presents multiple claims can present complex questions, which is why reviewing courts give such deference to trial judges, who are in a superior position to make such calls. "If the complaint presents only variants of a single claim, appeal cannot be taken from an order dealing with some

[32] See also *Curtiss-Wright Corp. v. General Elec. Co.*, 100 S.Ct. 1460, 446 U.S. 1, 64 L.Ed.2d 1 (1980).

of these variants, even though the order has been duly certified. The determination of whether there are multiple claims rests on whether the underlying factual bases for recovery state a number of different claims, not mutually exclusive, that could have been separately enforced (Wright, Kane, 2017: §101, p. 672)."[33]

To be appealable in a case falling within the parameters of Civil Rule 54(b), it is mandatory that the district judge include the requisite certificate in the judgment. The failure to do so will lead the Court of Appeals to dismiss the appeal for lack of jurisdiction.[34] Of course, in a situation where the District Court orders judgment on all claims and all parties, such that the case does not fall within the ambit of Civil Rule 54(b), then such a certificate is not required and an appeal must be taken without it.[35]

4.2 The Collateral Orders Doctrine

There are a small class of orders, secondary or subordinate to the principal litigation, that are appealable immediately after they are issued, irrespective of the status of the main litigation. These are known as collateral orders and might be viewed as an exception to the final judgment rule. In *Cohen v. Beneficial Industrial Loan Corporation*[36]defendant, in a stockholders' suit, unsuccessfully moved for an order for security for costs. The Supreme Court held the order was immediately appealable, stating such an order fell within "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….We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration of it."[37]

The First Circuit, in *U.S. v. Alcon Labs.*,[38] summarized the elements required for the collateral orders appealability doctrine to apply as "separability, finality, urgency, and importance." In *Coopers & Lybrand v. Livesay*[39] the Supreme Court held that a ruling

[33] And cases cited therein at fns. 18-19.
[34] See *Borne v. A & P Boat Rentals No. 4*, Inc., 755 F.2d 1131 (C.A.5th 1985).
[35] *Shafer v. Children's hosp.* Soc'y of Los Angeles, 265 F.2d 107 (C.A.D.C. 1959).
[36] 69 S.Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528 (1949).
[37] 69 S.Ct. at 1225-1226, 337 U.S. at 546-547.
[38] 636 F.2d 876, 884 (C.A. 1st 1981), certiorari denied 101 S.Ct. 3005, 451 U.S. 1017, 69 L.Ed.2d 388.
[39] 98 S.Ct. 2454, 437 U.S. 463, 57 L.Ed.2d 351 (1978).

holding that a matter could not proceed as a class action did not fall under the collateral orders doctrine, and hence the ruling was not immediately appealable. The Court noted that the trial court's ruling was not final, as the trial court had the option to reconsider its ruling as the case proceeded and that the question of whether the case was suitable for class certification was intertwined with the underlying facts being litigated. Further, the issue could effectively be reviewed after final judgment by any party involved in the litigation. More specifically, the Court held: "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[40]

In the case of *Firestone Tire & Rubber Co. v. Risjord*[41] the Supreme Court held, in the context of a civil action, that a lower court ruling refusing to disqualify opposing counsel was not appealable, under the third prong of the Coopers & Lybrand test, as the Court concluded that the ruling could effectively be reviewed after final judgment. In a series of fairly high-profile political cases, the Supreme Court has held that rulings by the trial court denying claims of immunity from prosecution satisfy the three-part test since, an immunity defense is irrevocably destroyed if a case is erroneously permitted to proceed to trial.[42]

In *Mohawk Industries, Inc. v. Carpenter*[43] a party moved to have certain information placed under seal, asserting the attorney-client privilege. The trial court denied the motion, rejecting the claim of confidentiality. The moving party sought an immediate appeal under the collateral order doctrine, but the Supreme Court reject6ed the appeal, holding that the question of privilege could be reviewed effectively at the end of the case: "In our estimation, post judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by

[40] 98 S.Ct. at 2458, 437 U.S. at 468.
[41] 101 S.Ct. 669, 449 U.S. 368, 66 L.Ed.2d 571 (1981).
[42] See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 556 U.S. 662, 173 L.Ed.2d 868 (2009) (qualified immunity meets the standard if it turns on an issue of law and the court reviewing the denial can pass on the sufficiency of plaintiff's complaint); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 472 U.S. 511, 86 L.Ed.2d 411 (1985) (qualified official immunity*); Nixon v. Fitzgerald*, 102 S.Ct. 2690, 457 U.S. 731, 73 L.Ed.2d 349 (1982) (absolute official immunity).
[43] 130 S.Ct. 599, 558 U.S. 100, 175 L.Ed.2d 458 (2009).

vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."[44]

The Court reasoned that in applying the doctrine, "we have stressed that is must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'"[45] The Court went on to reason that its ruling "reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration', and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation.'"[46] In sum, said the Court, "The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes."[47]

4.3 Discretionary Interlocutory Appeals under 28 U.S.C. §1292

4.3.1 Discretionary Review Regarding Injunctions, Receiverships, Admiralty Cases 28 U.S.C. §1292(a)

There are three statutory situations in which the courts of appeals have jurisdiction to review interlocutory orders of the district court. Each arises under 28 U.S.C. §1292. The first deals with injunctions and provides that "**(a)** Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: **(1)** Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District of the Virgin Islands, or of the judges thereof, 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."

28 U.S.C. §1292 (a)(2) provides that courts of appeals have jurisdiction to review interlocutory orders of the district court appointing receivers or refusing orders to

[44] *Id.*
[45] *Id.,* quoting in part from *Digital Equipment Corp. v. Desktop Direct*, Inc., 511 U.S. 863, 868 (1994).
[46] *Id.*, quoting in part from *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (19850) ("[T]he district judge can better exercise [his or her] responsibility [to police the prejudgment tactics of litigants] if the appellate courts to not repeatedly intervene to second-guess prejudgment rulings").
[47] *Id.*

wind up receiverships or to take steps to accomplish purposes of a receivership, such as directing sales or other disposals of property.

Finally, under 28 U.S.C. §1292 (a)(3) the courts of appeals have jurisdiction to review interlocutory decrees determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

A statute enacted in 1992 authorizes the Supreme Court to prescribe rules to provide for an appeal of an interlocutory decision that is not provided for in any of the three specific categories described in the preceding paragraphs. The Supreme Court utilized this statute in 1998 when it amended Civil Rule 23, concerning class actions, by adding subdivision (f) thereto. Under this provision, a court of appeals, at its discretion, may permit an appeal from an order either granting or denying class-certification. The rule is silent in terms of criteria that might inform the appellate court on when to accept appellate review from such an order and, accordingly, courts of appeal can establish those criteria they find appropriate to support granting interlocutory review.[48]

In Bodinger[49] the Supreme Court, in explaining the rationale of the various statutory exceptions from the long-standing and usual requirement of finality, stated that they "seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted."

Regarding injunctions, orders either granting or denying permanent injunctions are appealable as a matter of right.[50] While orders either granting or denying preliminary injunctions are appealable,[51] at least traditionally orders involving temporary

[48] See *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (C.A.1st, 2000) (the court observed that the advisory committee's note accompanying Rule 23(f) states that "[t}he court of appeals is given unfettered discretion whether to permit the appeal." Relying on *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Mowbray court concluded that if an of the following three factors exist, the appellate court should ordinarily exercise its discretion under Civil Rule 23(f) and permit appellate review: (1) when denial of class status effectively ends the case; (2) when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle; (3) an appeal will lead to clarification of a fundamental issue of law. See *id.*, at 834-35.

[49] *Baltimore Contractors v. Bodinger*, 75 S.Ct. 249, 252, 348 U.S. 176, 181, 99 L.Ed. 233 (1955).

[50] *U.S. v. Bayshore Assocs.*, 934 F.2d 1391, 1395-1396 (C.A.6th, 1991); *EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 132 (C.A.5th, 1991).

[51] *Deckert v. Independence Shares Corp.*, 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189 (1940).

restraining orders are not.[52] However, there have been recent cases that tend not to look merely at the label given to the order in determining whether an appeal should be allowed. According to this line of cases, the grant of appellate review is warranted even in the case of temporary restraining orders in situations where there is a strong showing of irreparable harm if immediate appellate review is denied.[53]

4.3.2 The Demise of the Enselow-Ettelson Doctrine

An interesting issue that has arisen with some degree of regularity is whether a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is immediately appealable under either §1291 or §1292(a)(1). The Supreme Court resolved this issue in *Gulfstream Aerospace Corporation v. Mayacamas Corporation.*[54] Gulfstream sued Mayacamas in state court for breach of contract. Mayacamas did not exercise its option/right to remove the action to federal court but instead, one month later, filed a diversity action against Gulfstream in federal district court for breach of the same contract. Gulfstream moved the district court for an order to stay or, in the alternative, to dismiss the action before it, but the district judge denied the requests, finding that the facts of the case fell short of those necessary to justify the requested discontinuance under *Colorado River Water Conservation Dist. v. United States*,[55] which held that, in "exceptional" circumstances, a district court may stay or dismiss an action because of similar state-court litigation. The Court of Appeals dismissed Gulfstream's appeal for lack of jurisdiction, holding that neither 28 U.S.C. §1291, which provides for appeals from "final decisions" of the district courts, nor §1292(a)(1), which authorizes appeals from interlocutory orders granting or denying injunctions, allowed an immediate appeal from the district court's order.[56] The Court of Appeals also declined to treat Gulfstream's notice of appeal as an application for a writ of mandamus under the All Writs Act.[57]

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[52] *In re Chapman*, 895 F.2d 490, 492 (C.A.8th, 1990); see also 16 Wright, C.A; Miller, A. R; Cooper, E.H. Jurisdiction 3d, §3922.1 n. 4 and cases cited therein.
[53] See *e.g., Doe v. Village of Crestwood*, 917 F.2d 1476, 1477 (C.A.7th, 1990); *Religious Technology Center v. Scott*, 869 F.2d 1306, 1308-1309 (C.A.9th, 1989).
[54] 108 S.Ct. 1133, 485 U.S. 271, 99 L.Ed.2d 296 (1988).
[55] 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483 (1976).
[56] See 806 F.2d 928 (C.A. 9th Cir. 1986).
[57] The so-called extraordinary writs of mandamus and prohibition are additional avenues of immediate appeal and will be discussed later in this paper.

The Supreme Court held that a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is not immediately appealable under either §1291 or §1292(a)(1).[58] The Court reasoned that since the order in question did not end the litigation, but instead only ensured that it would continue in the district court, it was not appealable under §1291. Further, the order failed to fall within the collateral-order exception to §1291 because it did not satisfy the exception's "conclusiveness" requirement since it was inherently tentative and not made with the expectation that it would be the "final word" on the subject addressed. Given both the nature of the factors to be considered under the Colorado River case and the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation.[59]

Additionally, the Court concluded that since the order in question related only to the conduct or progress of litigation before the district court, it could not be considered an injunction appealable under §1292(a)(1). Furthermore, Gulfstream's claim that the order was appealable pursuant to the doctrine previously announced in the cases of *Enelow v. New York Life Ins. Co.*,[60] and *Ettelson v. Metropolitan Life Ins. Co.*,[61] under which orders granting or denying stays of "legal" proceedings on "equitable" grounds were considered to be immediately appealable injunctions, was rejected. The Supreme Court overruled the so-called Enelow-Ettelson doctrine because, in the Court's view, that doctrine was based on outmoded procedural differentiations and produced arbitrary and anomalous results in modern practice.[62] Justice Marshall wrote that the Enelow-Ettelson rule "is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals."[63] However, denial of an express request for an injunction is appealable, and appeal also can be taken if an order has the practical effect of granting or denying an injunction and threatens serious, perhaps irreparable consequence.[64]

[58] 485 U.S. at pp. 275-288.
[59] *Id.* at pp. 275-288.
[60] 55 S.Ct. 310, 293 U.S. 379, 79 L.Ed. 440 (1935).
[61] 63 S.Ct. 163, 317 U.S. 188, 87 L.Ed. 176 (1942).
[62] *Gulfstream v. Mayacamas*, 485 U.S. at pp. 279-288.
[63] 108 S.Ct. at 1140, 485 U.S. at 283.
[64] 108 S.Ct. at 1142-1143, 485 U.S. at 287-288.

The Court also concluded that Gulfstream had failed to satisfy its burden of showing that the district court's refusal to order a stay or dismissal of the suit before it constituted an abuse of discretion sufficient to warrant the extraordinary remedy of mandamus in the Court of Appeals. Further, the Court rejected Gulfstream's assertion that a party's decision to spurn removal and bring a separate federal-court suit invariably constitutes "exceptional" circumstances warranting stay or dismissal under the Colorado River doctrine.[65]

4.3.3 Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b)

4.3.3.1 Text of Statute and Preliminary Considerations

The system of interlocutory review in federal court civil appeals underwent a major change with the passage of the Interlocutory Appeals Act of 1958.[66] This Act greatly modified and expanded the federal final judgment rule. The Judicial Conference of the United States recommended this statute as "a compromise between those who opposed any broadening of interlocutory review and those who favored giving the appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge (Wright, Kane, 2017: §102, p. 683)."[67] The statute provides as follows: "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 which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for any 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."[68]

[65] *Id.* at pp. 288-290.
[66] 28 U.S.C. §1292(b) (1958).
[67] Citing *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (C.A.2d 1959).
[68] 28 U.S.C. §1292(b).

At the outset it is important to note that this statute does not supplant the various methods of securing interlocutory review addressed above; instead, the statute supplements them. It also should be noted that there could be interlap over when §1292(b) and Civil Rule 54(b) might be used. In that regard, Wright and Kane contend that "Although it is preferable to use Rule 54(b) rather than §1292(b) in those cases within the rule, an order that disposes of fewer than all of the parties or claims is interlocutory in the absence of a Rule 54(b) certificate. Thus, it is within the terms of the statute, and the appellate court can take the case if a §1292(b) certificate is made (Wright, Kane, 2017: §102, p. 684)."[69]

One of the most noteworthy aspects of this statute is that it requires both the district judge and court of appeals to agree to the appeal.[70] In other words, unlike interlocutory appeals sought under §1292(a) pertaining to injunctions, receivers and receiverships, and admiralty decrees, which can be taken as a matter of right, §1292(b) is discretionary, and in a dual fashion, as both the district judge and majority of the court of appeals must agree to hear the interlocutory appeal.[71] The statute does not set any time limit for when a party must seek certification from the district court judge, and the courts have not wholly agreed on when such a motion might come too late.[72] While some commentators believe district judges should have some degree of flexibility in terms of when to grant certification, based on the specifics of the case, other courts have held that unreasonable delay, or inexcusable dilatory requests, are grounds for denial of certification (Wright, 1991: §3929, 464-65)[73] The cautious practitioner is well-advised to move for certification sooner rather than later

[69] Citing, *DeMelo v. Woolsey Marine Indus*., Inc., 677 F.2d 1030 (C.A. 5th 1982); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. America v. Thompson Farms Co*., 642 F.2d 1065, 1069 n. 4 (C.A. 7th 1981); *Sass v. District of Columbia*, 316 F.2d 366 (C.A.D.C. 1963); and cases cited in Wright, C.A; Miller, A. R; Cooper, E.H. Jurisdiction 3d §3922.1 n. 34.

[70] See *Heddendorf v. Goldfine*, 263 F.3d 9 (9th Cir. 1959).

[71] *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959); see also *Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under Section 1292(b) is by permission while interlocutory appeal under Section 1292(a) is by right).

[72] Some courts have denied certification in instances where the motion was not made for several months after the underlying order was issued. See *e.g., Scanlon v. M.V. Super Servant 3*, 429 F.3d 6,8 (1st Cir. 2005) (district court denied as untimely motion to amend to certify an interlocutory appeal filed more than four months after order issued); *Hypertherm, Inc. v. Am. Torch Tip Co*., No. 05-373, 2008 WL 1767062, at *1 (D.N.H. Apr. 15, 2008) (certification denied as untimely when five months had passed since underlying order had issued).

[73] Charles Alan Wright *et. al,* argue some "flexibility" should be given to the district judge in terms of when to certify an order because "[t]he wisdom of certification may extend in unexpected directions and that what is most important is the soundness of the certification at the time it is made, not an inquest into the comparative desirability of a vanished opportunity for earlier appeal." But some courts have disagreed. See *e.g.*, *Weir v. Propst*, 915 F.2d 282, 287 (7th Cir. 1990) (finding abuse of discretion when district court allowed motion to amend interlocutory order three months after the order was entered and no showing of any reason for delay).

in order to circumvent the possibility of having certification denied on the ground of dilatoriness.

It also is important to bear in mind that §1292(b) is separate and distinct from Civil Rule 54(b), which as discussed earlier, provides an avenue for permitting appeals for final judgments in multiple party/claims cases. As stated by Wright and Miller, "Rule 54(b) cannot be used to enter judgment on deciding claims closely related to claims that remain, in an effort to curtail the scope of appellate discretion as to interlocutory appealability, [n]or should §1292(b) be used on final disposition of a separate matter when there is no substantial ground for difference of opinion as to a controlling question whose present disposition will materially advance ultimate disposition of the case." (Wright, 1991: §3929, 477-78) Courts have held that district judges should not evade their exercise of discretion under §1292(b) by inappropriately entering judgment under Civil Rule 54(b) instead.[74] If the district judge agrees to certify the order, the party has ten days to file a petition with the appeals court.[75]

The appellate courts have held that §1292(b) should be used sparingly "and only in exceptional circumstances and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority."[76] There even are some cases which have held that it should be restricted only to protracted, drawn out cases including anti-trust or conspiracy cases, and eschewed in "ordinary litigation."[77] In any event, the dual gatekeeping function of the rule dictates that both district court judges and their court of appeals counterparts have separate discretion in whether to allow interlocutory appeals under this statute. It is the standards that underlie that discretion that we shall turn to next.

[74] See *Spiegel v. Trs. Of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) (holding that interrelationship between an adjudicated and un-adjudicated claim established that the district judge erred in entering judgment under Civil Rule 54(b) and observing that discretion of the appeals court to determine under 1292(b) cannot be so evaded).
[75] Fed. R. App. P 5(a)(2).
[76] See *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959) (quoting *Kroch v. Texas Co.*, 167 F. Supp. 947, 949 (D.C.S.D.N.Y. 1958)) (Section 1292(b) "should be used sparingly and only in exceptional cases)".
[77] *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64 (D.R.I. 1988) (citing *Fisons Limited v. United States*, 458 F.2d 1241, 1245 n.7 (7th Cir. 1972)).

4.3.3.2 First Criterion: Controlling Question of Law

First, it is immediately apparent from the text of Section 1292(b) that it does not have applicability to all cases that come before district judges. The statute does not apply, for example, to appeals of orders in criminal cases.[78] The statute does apply, however, to grand jury proceedings[79] up until such a time as formal charges are brought against the accused.[80] The statute also applies in a criminal action that has essential civil characteristics, such as an order regarding the return of monies deposited into a court registry.[81] Various courts have otherwise held that certain proceedings are essentially hybrid civil/criminal matters and fall within the ambit of the statute.[82]

For an order of the district judge to qualify as one he can certify as interlocutory under Section 1292(b) there are three criteria that must be satisfied. There must be (1) a "controlling question of law," (2) over which there is a "substantial ground for difference of opinion," and (3) an immediate appeal will "materially advance the ultimate termination of the litigation..." We shall consider each of these criteria in turn.

To constitute a "controlling question of law" the issue on appeal must be "serious to the conduct of the litigation either practically or legally"[83] and should materially advance the termination of the case.[84] Some courts have looked to whether the issue is pivotal or highly important, not only in the case at hand, but more broadly in the substantive area in dispute, to the public and to future litigation involving other litigants.[85] The issue certified must involve pure question of law, and not matters that lie within the sole discretion of the district judge.[86] As articulated by leading

[78] *United States v. Pace*, 201 F.3d 1116, 1119 (9th Cir. 2000), *United States v. Selby*, 476 F.2d 965, 967 (2d Cir. 1973).
[79] *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978).
[80] *Post v. United States*, 161 U.S. 583, 587 (1896).
[81] *United States v. Beach*, 113 F.3d 188, 189 n.3 (11th Cir. 1987).
[82] See *e.g. Bonnell v. United States*, 483 F. Supp. 1091, 1092-93 (D. Minn. 1979) (holding that grand jury proceedings are "hybrid" civil and criminal proceedings and fall within "civil action" intention of §1292(b)).
[83] *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (citing *Hearing on H.R. 6238, before Subcomm. No. 3 of the H. Comm. On the Judiciary*, 85th Cong., 2d Sess. 2 (1958), reprinted in 3 U.S.C.C.A.N. 5256 (1958)).
[84] See *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985) ("[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.").
[85] See *e.g. Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 821 (1st Cir. 19920 (holding that "in light of the pivotal importance and broad commercial consequences of the question, we accepted certification.").
[86] See *e.g. United Airline inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010); *White v. Nix*, 43 F.3d 374, 377-378 (8th Cir. 1994) (discovery order); *Herold v. Braun*, 671 F.Supp. 936 (D.C.N.Y. 1987) (discovery sanctions).

commentators, "Ordinarily a district court should refuse to certify such matters, not only because of the low probability of reversal, but also because the recognition of discretion results from a studied determination that appellate courts should not generally interfere. But the key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies underling §1292(b) (Wright and Kane, 2017: §102, p. 684)."[87]

Some courts have held that a controlling question of law is one that "the court of appeals [can] decide quickly and cleanly, without reviewing the record."[88] It also has been held that a reversal of the district judge's ruling that would either terminate the action or, at the least, significantly alter or lessen the scope of the case upon return of the matter to the district court, would be sufficient to constitute a controlling question of law.[89]

4.3.3.3 Second Criterion: Substantial Grounds for Difference of Opinion

The second requirement is that there must be "substantial grounds for difference of opinion" about the controlling question of law. One court held this means that there must be "one or more difficult and pivotal questions of law not settled by controlling authority."[90] A question arises as to whether this criterium is not met when there is clear precedent in the circuit court that has jurisdiction, but where other circuits adhere to differing views on the issue at hand. Although at least one court has held that certification under this prong is not appropriate and that certification therefore should be denied when the question is governed by clear precedent in its own circuit, even though five other circuits held to a contrary view,[91] a respected treatise states "The better view, however, is that a clear ruling in the local circuit is a strong reason for not certifying, but that this is cannot be dispositive. (Wright, Kane, 2017: §102, p. 685)."[92] Weigand (Weigand, 2014: p. 205-206)[93] states that "When the difference

[87] And cases and authorities cited in n. 110 therein.
[88] *Ahrenholtz v. Bd. of Tr. of Univ. of Illinois*, 219 F.3d 674, 676-77 (8th Cir. 2000).
[89] See *Arizona v. Ideal Basic Indust.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (stating that all that must be shown in order for a question to be controlling is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court); *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I 1995) (defining "controlling" to mean "serous to the conduct of the litigation, either practically or legally").
[90] *Phillip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997).
[91] *Berger v. U.S.,* 170 F.Supp. 795 (D.C.N.Y. 1959).
[92] Citing *Giglio v. Farrell Lines, Inc.*, 424 F. Supp. 927 (D.C.N.Y. 1977); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3rd Cir. 1959) (appeal allowed where other circuits held a contrary view to that of court allowing appeal on controlling question of law).
[93] Fns. 124-129 and authorities collected therein.

of opinion is substantial, there is usually significant uncertainty and conflict presented in the case law, 'marked room for varying opinion,' confusion, or a question of first impression. Some courts have noted that the 'touchstone' of the substantial ground prong is the likelihood of success on appeal.' This has been tempered by some courts to the extent that 'the purpose of the appeal is not to review the correctness of an interim ruling, but rather to avoid harm to litigants or to avoid unnecessary or repeated protracted proceedings.'"

Weigand[94] adds that "Additionally, a number of courts have noted that 'novelty' is not enough and that 'the issue must relate to the actual legal principle itself, not the application of that principle to a particular set of facts.' As such, Section 1292(b) certification does not necessarily arise when 'a court is called upon to apply a particular legal principle to a novel fact pattern.' Similarly, certification has been rejected where the argument for certification is reduced to the contention that the court misapplied settled law."

4.3.3.4 Third Criterion: Materially Advance the Termination of Litigation

Finally, the district judge must be of the view that immediate appeal "may materially advance the ultimate termination of the litigation." Interlocutory review under the statute has therefore been denied in situations where appeal was sought from orders dealing with sufficiency of pleadings, in view of the fact Civil Rule 15 permits liberal amendments, prior to, during, and even after trial.[95] There are other cases holding that this prong is be satisfied when the case must proceed to trial against other parties, even if the challenged ruling is likely wrong.[96] Wright and Kane (Wright and Kane, 2017: §102, p. 685)[97] sum up this criterion in the following terms "Generalizing from this statutory language, and from the legislative history of the statute, three is a good deal of authority for the proposition that §1292(b) should not be used in 'run-of-the-mill' cases and is intended for 'exceptional cases' in which appeal may avoid 'protracted and expensive litigation.' The Fifth Circuit, however, has expressly disapproved statements from other courts calling for a strict construction of §1292(b), or suggesting that it should be restricted to exceptional

[94] *Id*., at p. 208, fns. 137-139 and authorities collected therein.
[95] *City of Burbank v. General Elec*, Co., 329 F.2d 825 (9th Cir. 1964); *Urbach v. Sayles*, 779 F.Supp. 351, 364-365 (D.C.N.J. 1991). See also Civil Rule 15.
[96] *Bowling Machines, Inc., v. First Nat. Bank of Boston*, 283 F.2d 39 (1st Cir. 1960).
[97] Fns. 115-117 and authorities collected therein.

cases, though in later cases it has taken a narrower view of when the statute it properly used."

As previously noted, in cases where the district judge is satisfied that the criteria of Section 1292(b) have been met, the judge must state this in writing in his order and then within ten days of entry of the order the party wishing to appeal must also petition the court of appeals, again asking for leave to appeal. The court of appeals has discretion whether to permit the appeal and may deny the appeal for any reason.[98] In situations where the appellate court accepts review, it is free to consider any issue subsumed within the order being appealed, not just the question(s) the district judge has certified for appeal.[99]

4.4 Mandamus as Avenue for Interlocutory Review

Mandamus is another distinct avenue for seeking immediate appellate review of a district judge's order in the absence of a final judgment. Mandamus, however, has been described as a "drastic and extraordinary" remedy reserved for exceptional circumstances when the district court has committed a clear abuse of discretion or otherwise usurped its power.[100] The Supreme Court in *Will v. United States*[101] stated that, seldom granted, mandamus is one of "the most potent weapons in the judicial arsenal." While the precise standards for when a grant of a writ of mandamus should issue are somewhat amorphous, in *Cheney*[102] the Supreme Court stated that a petitioner must demonstrate that there is "no other adequate means to attain the relief he desires," that the right to the relief sought is "clear and indisputable" and that the writ is otherwise "appropriate under the circumstances."

It should be noted, therefore, that ordinarily if Section 1292(b) provides an avenue for interlocutory review, mandamus will not be available, since the statute provides an adequate means to obtain appellate relief. In the case of *In re Ford Motor Company*[103]

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[98] *Digital Equip. corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 2004 n. 9, 511 U.S. 863, 883 n. 9, 128 L.Ed.2d 842)1994); *Coopers & Lybrand v. Livesay*, 98 S.Ct. 2454, 2461, 437 U.S. 463, 475, 57 L.Ed.2d 351 (1978).
[99] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S.Ct. 619, 623, 516 U.S. 199, 205, 133 L.Ed.2d 578 (1996).
[100] *Cheney v. U.S. District Court for District of Columbia*, 124 S.Ct. 2576, 542 U.S. 367, 159 L.Ed.2d 459 (2004) (appellate court erred in not granting mandamus to review district court orders permitting discovery against Vice President and other senior officials in the Executive Branch).
[101] 88 S.Ct. 269, 389 U.S. 90, 107, 19 L.Ed.2d 305 (1967).
[102] 542 U.S. at 380-81.
[103] 344 F.3d 648, 654 (7th Cir. 2002).

the Seventh Circuit observed that litigants cannot circumvent the dual-gatekeeper structure set forth in Section 1292(b) by petitioning for a writ of mandamus to direct a district court judge to certify an order for appeal under that statute. "If someone disappointed in the district court's refusal to certify a case under §1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed." On the other hand, in situations where a party moves for certification under Section 1292(b) and the request is denied, the aggrieved party may then pursue a mandamus petition, not for the purpose of compelling a Section 1292(b) certification, but rather to review the substance of the underlying order being challenged.[104]

In *Parr v. U.S.*[105] the Supreme Court summed up the doctrine in the following terms, "Such writs may go only in aid of appellate jurisdiction. 28 U.S.C.A. §1651. The power to issue them is discretionary and it is sparingly exercised. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see Roche v. Evaporated Milk Ass'n, 63 S.Ct. 938, 941, 319 U.S. 21, 26, 87 L.Ed 1185, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland v. Soper*, 46 S.Ct. 185, 189, 270 U.S. 9, 29-30, 70 L.Ed. 449. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals."

There are cases, however, where appellate courts have concluded that it would be futile for a litigant to seek certification under Section 1292(b), based on the district judge's prior refusal to reconsider decisions or certify orders for appeal, and therefore have not required Section 1292 (b) certification as a pre-condition for seeking mandamus.[106]

The Supreme Court had held a number of times that mandamus is an appropriate remedy to require a jury trial in instances where the right was improperly denied.[107]

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[104] *Id.* at 654. See also, *In re* Lott, 424 F.3d 446, 449 (6th Cir. 2005); *In re* U.S., 463 F.3d 1328, 1337 (Fed. Cir. 2006).
[105] 76 S.Ct. 912, 917, 351 U.S. 513, 520, 100 L.Ed. 1377 (1956).
[106] See *e.g., In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996); *In re Briscoe*, 448 F.3d 201, 213 n.7 (3d Cir. 2006).
[107] See *e.g., Dairy Queen Inc. v. Wood*, 82 S.Ct. 894, 901, 369 U.S. 469, 480, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 79 S.Ct. 948, 957, 359 U.S. 500, 511, 3 L.Ed.2d 988 (1959).

In another case[108] the Court held mandamus was appropriate when a district court remanded a case removed from state court on improper grounds. In *In re Apple Inc.*,[109] the Eighth Circuit held that mandamus was a proper remedy when a district court refused to transfer a case to California from Arkansas, which "had no connection to the dispute," even though the defendant had not first pursued interlocutory review under Section 1292(b). It would appear from a review of the cases on mandamus that in trying to ascertain whether the failure to pursue an interlocutory appeal under Section 1292(b) might preclude issuance of a writ of mandamus, the appellate courts are strongly influenced by just how egregious the ruling being challenged is, and the extent of the harm it would cause petitioner. In most cases, it is wise for the party seeking interlocutory review to pursue all available options before seeking mandamus.

4.5 Class Action Certifications Under Civil Rule 23(f)

Class action litigation is, and has been for many years, prolific in the United States. 28 U.S.C. Section 1292 (e) provides that "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d). Seizing upon this statutory authority, effective December 1, 1998, Civil Rule 23, the class action rule, was amended to allow discretionary interlocutory appeals of class certification decisions. The amendment, set forth in subdivision (f) of the rule, currently provides as follows: "(f) APPEALS. A court of appeals *may* permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit court within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a Unites States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."[110]

[108] *Thermtron Prods., Inc. v. Hermansdorfer*, 96 S.Ct. 584, 423 U.S. 336, 46 L.Ed.2d 542 (1976).
[109] 602 F.3d 909, 911-12 (8th Cir. 2010).
[110] Civil Rule 23(e)(1), as referenced in Civil Rule 23(f), concerns notice requirements to class members regarding settlement, voluntary dismissal, or compromise.

Civil Rule 23(f) is therefore another interlocutory appeal exception to the final judgment rule. It is unique, however, in that it was created through rule (although upon statutory authority) as opposed to by statute, as is the case with the other avenues of interlocutory appeal previously discussed in this paper. As articulated by Gould (Gould, 1999: p. 310-311)[111] "The purposes of the new rule are severalfold: to provide a mechanism for needed appellate review of class certification orders that as a practical matter are unlikely to receive review; to afford a more regular means of appellate involvement in the class certification process; and to enable the courts of appeals to develop certification standards. Although the amendment may not appear of great consequence to those unfamiliar with class action litigation in the federal courts, the Chair of the Standing Committee on Rules of Practice and Procedure declared that rule 23(f) 'alone . . . might well prove to be the most effective solution to many of the problems with class actions.' If so, rule 23(f) will operate as an agent of change indirectly and gradually as the courts of appeals further develop the law applicable to certification of class action decisions."

Under this rule, the decision whether to allow an appeal rests within the sole discretion of the appellate court and the rule does not set forth any particular requirements to inform that discretion. Accordingly, courts of appeals can establish those criteria that they believe most appropriately support granting interlocutory review (Wright, Miller and Kane: Civil 3d §3926).[112]

4.6 Miscellaneous Exceptions Permitting Interlocutory Appeals in Absence of Final Judgment

Another exception to the final judgment rule "is that a judgment directing immediate delivery of physical property is appealable, if necessary in order to avoid irreparable injury, even though the court also has ordered an accounting that has not yet taken place (Wright and Kane, 2017: §101, p. 675)."[113] Additionally, "[c]ivil contempt orders against a person not a party to the case are considered final and appealable, since that person could not appeal a final judgment in the case. Criminal-contempt

[111] See fns. 5-6 and authorities referenced therein.
[112] See also *e.g. Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).
[113] Fn. 36 and authorities cited therein.

orders also are regarded as severable from the main action and appealable before final judgment in that action."[114]

4.7 Appellate Review of Administrative Determinations

In 1950, U.S. Congress passed legislation permitting review of orders issued by the many federal administrative agencies with the courts of appeals.[115] In order to obtain review, the aggrieved party must file a petition for review with the court of appeals for the circuit where the party or parties seeking review reside or have their principal office, or with the Court of Appeals for the District of Columbia.[116] "Review ordinarily will be on the record made at the hearing before the administrative agency, with the findings of fact by the agency accepted if they are supported by substantial evidence in the light of the whole record (Wright and Kane, 2017: §103, p. 687)."[117]

5 Conclusion

Appellate courts have existed for many millennia, as a system for correcting errors made by lower courts. During the dynasty of Babylon, Hammurabi and his governors served as the highest appellate courts in the land (Dellapena, Gupta, 2009). The United States first created a system of federal appellate courts in 1789, but a federal right to appeal did not exist in the United States until 1889, when Congress passed the Judiciary Act to permit appeals in capital cases. Two years later, the right to appeals was extended to other criminal cases, and the United States Courts of Appeals were established to review decisions from the federal district courts.[118]

As a general proposition, the vast majority of appeals from the district court to the courts of appeals occur after entry of final judgment as to all parties and all claims. Indeed, as we have seen, the final judgment rule dictates that the courts of appeals do not have jurisdiction to consider orders and judgments that are not final, at least absent a statute (or in limited cases rule, e.g., Civil Rule 23(f). As elsewhere in the

[114] *Id.*, fns. 37-38 and authorities cited therein.
[115] See H.Rep. No. 2122, 81st Cong., 2d Sess. 1950; 1950 U.S.Code Cong.Serv., pp. 4303, 4306. See also *D.L. Piazza Co. v. West Coast Line, Inc.,* 210 F.2d 947, 949 (2d Cir. 1954).
[116] 28 U.S.C.A. §§2342, 2343.
[117] Fns. 131-132 and authorities cited therein.
[118] See Act of February 6, 1989, ch. 113, §6, 25 Stat. 656; Act of March 3, 1891, ch. 517, §5; 26 Stat. 826, 827-28.

law, there are almost always exceptions to the general rule, developed out of necessity. Such is the case with the final judgment rule. In the United States federal court system, there are numerous, fairly well-defined situations where, by way of statutes passed by the Congress, interlocutory orders issued by the district judges can be reviewed by the courts of appeals. Most of this authority stems from 28 U.S.C.A. 1292 and its various subparts.

The adoption of Civil Rule 54(b) was a major development, and improvement in civil practice, as it allows the district judge to issue certifications that certain of its rulings should be considered final for purposes of immediate appeal, even though additional claims remain to be adjudicated. The adoption of this rule has proven to be very useful in multiple party/claims cases. This rule certainly promotes the ideals of speedy justice, judicial efficiency and cost savings.

Civil Rule 23(f) is a more recent example of a provision that has promoted efficiency in the class action arena, which comprises a substantial amount of litigation in the federal courts system. The district judge's decision on whether to certify a class is one of the crucial steps in class action litigation, and it certainly made great sense to carve out an exception to the final judgment rule in this important area of the law.

I believe it is fair to say that, for the most part, where the final judgment rule has proven too harsh, and inequitable, the Congress has stepped in to write legislation that has provided necessary and reasonable relief. Furthermore, for the most part, it would seem that the various vehicles for interlocutory review are reasonably straightforward and cover most of the areas that routinely occur in the law where immediate appellate review is necessary and desirable prior to entry of final judgment as to all claims and parties.

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