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Bryan Lammon

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MANUFACTURED FINALITY

BRYAN LAMMON*

ABSTRACT

Manufactured finality is an umbrella term for the various ways that federal litigants try to create a final, appealable decision. And it has an uncertain future after the Supreme Court’s decision in Microsoft Corp. v. Baker. Yet existing studies of manufactured finality have failed to appreciate its nuances. Several different varieties of manufactured finality exist. Each applies in different contexts, implicates different interests, and has different prospects for future use after Microsoft. In this Article, I comprehensively detail the variables that go into manufactured finality, create a typology of the various forms of manufactured finality that appear in the courts of appeals, and address Microsoft’s impact on each of those forms.

In the course of doing so, I raise two larger issues. The first concerns how we define finality. The predominant conception of finality looks to the substance of a district court’s decision, asking if that court has actually disposed of all claims in an action. The law of appellate jurisdiction might be improved by shifting the focus to asking simply whether the district court has finished with an action. The second issue concerns the role that litigants play in determining when they can appeal. As things stand, courts have essentially complete control over those matters. Experience with manufactured finality suggests that litigants should have some say in identifying proper opportunities for interlocutory appeals.

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**Introduction**

FEDERAL litigants sometimes try to home-brew their own interlocutory appeals by creating—or manufacturing—something that looks like a final decision. Under 28 U.S.C. § 1291, the federal courts of appeals have jurisdiction over the “final decisions” of district courts. A final decision is normally one that ends district court proceedings. Congress, rule makers, and courts have created several exceptions to this general rule, permitting immediate (or “interlocutory”) review of certain district court decisions. But litigants are not always able to use these established avenues for interlocutory appeals. When that happens, litigants sometimes try to create their own. These attempts come in various forms. But at their most basic, they involve two events: (1) a district court decision that, by its terms, resolves fewer than all (and perhaps none) of the claims in an action; and (2) parties’ subsequent efforts to end district court proceedings and produce a “final decision,” which comes via something other than the adversarial litigation of all unresolved claims and often involves a voluntary dismissal.

Despite the frequency with which litigants try to manufacture final decisions, the topic has received little scholarly attention. But it has

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1. See Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020) (citing 28 U.S.C. § 1291 (2024)); see also United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a judgment was appealable if it “end[ed] the litigation and [left] nothing but execution of the court’s decision, the standard definition of ‘final’ under § 1291”). Courts have given “final decisions” a variety of additional definitions in crafting rules of appellate jurisdiction. See generally Bryan Lammon, Finality, Appealability, and the Scope of Interlocutory Review, 93 Wash. L. Rev. 1809 (2018) [hereinafter Lammon, Finality] (cataloguing the three kinds of appellate-jurisdiction rules courts have crafted through interpretations of what it means for a decision to be “final” under Section 1291); Bryan Lammon, Hall v. Hall: A Lose-Lose Case for Appellate Jurisdiction, 68 Emory L.J. Online 1001, 1011–13 (2018) [hereinafter Lammon, Lose-Lose Case] (discussing the forces driving different interpretations of “final” in Section 1291).


4. Like so many appellate-jurisdiction topics, the most extensive treatment is in Federal Practice & Procedure, the newest edition of which expanded its coverage of the matter. See 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3914.8–82 (3d ed. 2022). And a few law review articles have addressed aspects of manufactured finality. See Rebecca A. Cochran, Gaining Appellate Review by “Manufacturing” a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979 (1997); Ankur Shah, Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule, 11 Seton Hall Cir. Rev. 40 (2014); Thomas A. Engelhardt, Note, Bringing More Finality to Finality:
been a hot topic in other circles. Courts regularly address it. And a joint committee of the Advisory Committees on the Appellate and Civil Rules studied it for years before ultimately deciding to not act, noting the difficulty that rulemaking would entail. Courts have given the topic special attention since the Supreme Court’s decision in Microsoft Corp. v. Baker. That decision shut down one kind of manufactured finality. The ultimate holding was narrow: the Court said that plaintiffs cannot appeal from the denial of class certification by voluntarily dismissing their individual claims, as doing so circumvents the normal rules for class-certification appeals. But some of the opinion’s language was broad, disapproving of litigants’ efforts to circumvent appellate-jurisdiction rules generally and not just those concerning class certification.

Some (including me) have read Microsoft to cast doubts on the future of manufactured finality. But Microsoft’s impact is unsettled. Some courts have read the decision narrowly to apply only in the class-certification and similar contexts. Other courts have read the decision broadly to foreclose other efforts to manufacture a final decision. So the courts of appeals are not sure what to make of Microsoft.

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7. Id. at 1712–13.

8. See id. at 1712–15. For more on Microsoft, see infra notes 64–79 and accompanying text.

9. See, e.g., Rowland v. S. Health Partners, Inc., 4 F.4th 422, 435 (6th Cir. 2021) (Moore, J., dissenting) (warning litigants against trying to manufacture finality after Microsoft); Wright, Miller & Cooper, supra note 4, § 3914.8.1 (noting that a broader reading of Microsoft “might defeat all voluntary dismissal finality”); Lammon, Finality, supra note 1, at 1833 n.132 (“Manufactured finality has an uncertain future after Microsoft.”).

10. See, e.g., Trendsettah USA, Inc. v. Swisher Int’l, Inc., 31 F.4th 1124, 1131–32 (9th Cir. 2022) (holding that Microsoft applies only in contexts with specific appellate-jurisdiction rules); Rodriguez v. Taco Bell Corp., 896 F.3d 952, 955 (9th Cir. 2018) (stating that Microsoft did not apply outside of “an attempt to obtain review of a class certification issue”).

11. See, e.g., Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1123 (9th Cir. 2020) (saying that Microsoft’s reasoning applies outside of the class-action context); Bd. of Trs. of the Plumbers, Loc. Union No. 392 v. Humbert, 884 F.3d 624, 626 (6th Cir. 2018) (noting that the parties’ efforts (like those in Microsoft) “would allow the parties to circumvent the limitations that § 1292(b) and the Civil Rules place upon interlocutory appeals”).

12. I take Microsoft as given for purposes of this Article. I note, however, that although Microsoft reached the correct outcome—no appeal—I disagree with its jurisdictional holding. A much better explanation for that outcome would have been that by voluntarily dismissing their claims before losing, the plaintiffs waived
Some of this uncertainty stems from the tension between Microsoft’s narrow holding and broad reasoning. But I suspect that much of it is due to the failure to recognize that there is no single kind of manufactured finality. Efforts to manufacture a final decision instead come in several forms. These involve different kinds of district court orders, different means of ending district court proceedings, and different prospects of any voluntarily dismissed claims being refiled. These varieties also implicate different interests—some of which were present in Microsoft, some of which weren’t. Determining Microsoft’s impact thus requires first breaking down the various kinds of manufactured finality.

In this Article, I take on that task. I show the different variables that go into manufactured finality and the different tactics federal litigants have attempted. And I explain why Microsoft should foreclose some of those tactics while permitting others.

But this study is not merely about Microsoft or manufactured finality. It raises larger questions about the system of federal appellate jurisdiction. That system has long been a target of criticism and reform efforts. And manufactured finality sheds some light on two parts of the system that have received relatively short shrift. The first is how we define a “final” decision for purposes of the traditional, end-of-proceedings appeal. Modern finality doctrine focuses largely on the substance of a district court’s decision, particularly whether the district court has actually resolved all claims. The struggles with manufactured finality suggest an alternative conception of finality that might instead ask only whether the district court has finished with an action. The second is the role that parties play in determining when appeals should come before a final judgment. As things stand, Congress, rule makers, and courts have determined that courts should have almost all control over determining when in the course of litigation parties can appeal. But manufactured finality indicates that litigants might be good at identifying circumstances in which an immediate appeal is warranted. Reformers should seriously consider statutes or procedural rules that give litigants that power.

I proceed as follows. In Part II, I provide general background on the final-judgment rule, manufactured finality, and the Supreme Court’s decision in Microsoft. In Part III, I first detail the variables that go into manufactured finality. I then work through the varieties of manufactured finality that federal litigants have used, exploring the interests that underlie them and what (if anything) Microsoft might mean for each. In
Part IV. I offer preliminary thoughts on two topics for future research inspired by this study of manufactured finality. First is whether to redefine a “final” decision to mean that such a decision exists whenever the district court has finished with an action, regardless of whether the district court has in fact resolved the parties’ claims. Second is the extent to which we should rely on parties to identify the moments in district court proceedings when an immediate appeal is warranted. Part V briefly concludes.

I. Final Decisions, Manufactured Finality, and Microsoft

A. The Final-Judgment Rule and Its Exceptions

As a long-standing, widely accepted, and riddled-with-exceptions rule, federal appeals normally must wait until the end of district court proceedings. The general appellate-jurisdiction statute—28 U.S.C. § 1291—gives the courts of appeals jurisdiction over the “final decisions” of district courts.\(^{15}\) And a “final decision” is normally one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”\(^{16}\) So no matter how many claims a plaintiff brings (or counterclaims, crossclaims, and third-party claims defendants add), and no matter how many interlocutory decisions a district court issues in the course of litigation, appellate review normally must wait until everything has been resolved.

This limit on federal appellate jurisdiction is known as the “final-judgment rule,” and it is thought to balance the interests behind appellate timing.\(^{17}\) The driving interest is avoiding piecemeal appeals. Rather than entertaining a series of appeals throughout the course of district court proceedings, the court of appeals can resolve all issues in a single appeal once those proceedings have ended. District court litigation can thereby proceed without the interruption of multiple appeals.\(^{18}\) Litigants are saved the cost (and potential harassment by well-resourced

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18. E.g., Cobbledick v. United States, 309 U.S. 323, 325 (1940) (“To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.”).
parties) of multiple appeals. Appellate workloads are reduced.\footnote{E.g., Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) ("Pretrial appeals . . . burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial.").} And delaying review also avoids unnecessary appeals, as parties aggrieved by an interlocutory decision might eventually win, rendering harmless any error in that decision.\footnote{Id.}

But the final-judgment rule also has costs. Immediate review and reversal of an erroneous district court decision can avoid what later turns out to be flawed or unnecessary proceedings.\footnote{Id.} Immediate appeals can also provide some appellate oversight for issues that would otherwise escape scrutiny due to a settlement or abandonment of the claims.\footnote{For example, a district court might erroneously dismiss some of a plaintiff’s claims, after which the parties proceed to trial on the remaining claims. Correcting that dismissal after a final judgment might require a second trial, while immediate review would have corrected the course of district court proceedings. \footnote{See, e.g., Fed. R. Civ. P. 23(f).} \footnote{Wright, Miller & Cooper, supra note 4, § 3911.2 ("The final judgment rule . . . rests on a rough calculation that ordinarily the balance between the values of immediate appeal and delayed appeal swings in favor of deferring appeal."); see also id. § 3907 (discussing the purposes of the final-judgment rule).} And erroneous district court decisions might impose immense and irreparable harms on litigants that can be averted only through immediate review.

By typically postponing appeals until the end of district court proceedings, the final-judgment rule reflects a belief that in most cases the benefits of delaying appeals outweigh the costs.\footnote{See sources cited supra note 2.} But the final-judgment rule strikes that balance only generally. Sometimes the balance shifts (or is at least thought to shift) because the benefits of delaying review are especially low, the costs of delaying review are especially high, or both. So the final-judgment rule has exceptions.\footnote{On Section 1292(b), see generally Solimine, supra note 3; Note, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 Yale L.J. 335 (1959); Tory Weigand, Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review, 19 Roger Williams U. L. Rev. 183 (2014).} In fact, it has lots of exceptions. Three are particularly relevant to the present discussion.

First are certified appeals under 28 U.S.C. § 1292(b).\footnote{28 U.S.C. § 1292(b) (2024).} Section 1292(b) authorizes discretionary appeals in civil actions. When the district court determines "that [an otherwise non-appealable] 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," it can certify that order for an immediate appeal.\footnote{The would-be appellant can then petition the court of appeals for permission to appeal. That court in turn has more-or-less complete discretion over whether to hear the appeal. \footnote{28 U.S.C. § 1292(b) (2024).} \footnote{See, e.g., Stringfellow v. Concerned Neighbors in Action, supra note 5, 480 U.S. 370, 380 (1987) ("Pretrial appeals . . . burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial.").}}
The second relevant exception is found in Federal Rule of Civil Procedure 54(b). This rule authorizes district courts to enter a final, appealable judgment on the resolution of some (but not all) claims in a multi-claim action. In multi-claim actions—that is, actions that involve multiple claims against a party, claims against multiple parties, or both—a final decision normally does not come until all claims have been resolved. If litigants want to appeal the resolution of some claims without waiting for the resolution of others, they can turn to Rule 54(b). A Rule 54(b) judgment might be appropriate, for example, when all claims against one defendant are resolved, but claims against other defendants remain pending. Rather than wait until all other claims are resolved, it might make sense to permit immediate appellate review of those resolved claims.

Third and finally is Federal Rule of Civil Procedure 23(f). That rule allows for discretionary appeals from most class-certification decisions. Conventional wisdom tells us that in many class actions (particularly those seeking damages) the class-certification decision is the major issue. If the district court certifies the class, the defendant—suddenly facing immense potential liability—has a strong incentive to settle. If the district court denies class certification, the plaintiffs will likely abandon their claims or settle them for a minimal amount. In either event, appellate review of the class-certification decision is unlikely. Rule 23(f) thus facilitates appellate review of class-certification decisions, giving the courts of appeals discretion to allow immediate appeals from those decisions.

27. For an in-depth study of Rule 54(b), see generally Pollis, supra note 3.
29. For in-depth studies of Rule 23(f), see generally Stephen B. Burbank & Sean Farhang, Class Certification in the U.S. Courts of Appeals: A Longitudinal Study, 84 LAW & CONTEMP. PROBS. 73 (2021); Bryan Lammon, An Empirical Study of Class-Action Appeals, 22 J. APP. PRAC. & PROCESS 285 (2022); Solimine & Hines, supra note 17.
31. See, e.g., Wright, Miller & Cooper, supra note 4, § 3931.1 (“The determination whether to certify a class can effectively conclude the action, one way or the other.”); Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1262 (2002) (“Over the years since 1966, the certification decision has taken on great strategic importance.”); Richard D. Freer, Preclusion and the Denial of Class Certification: Avoiding the “Death by a Thousand Cuts”, 99 IOWA L. REV. BULL. 85, 97 (2014) (“[T]he class certification ruling is the watershed event in the litigation.”); Solimine & Hines, supra note 17, at 1546. But see Burbank & Farhang, supra note 29, at 81, 90 (noting that a fair number of class actions proceed past class certification to a final judgment); Robert H. Klonoff, Class Actions Part II: A Respite from the Decline, 92 N.Y.U. L. REV. 971, 981 (2017) (same).
32. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).
34. Appellate review of a class settlement requires an objector to that settlement. See Devlin v. Scardelletti, 536 U.S. 1, 14 (2002).
35. On the standards for granting review under Rule 23(f), see generally Solimine & Hines, supra note 17; Carey M. Erhard, A Discussion of the Interlocutory Review
There are many other exceptions to the general final-judgment rule. Some are found in statutes. Others—many others—come from judicial decisions expounding on what it means for a decision to be “final” under Section 1291. But litigants are not always satisfied with these established avenues for interlocutory review. And some of these litigants try to create their own interlocutory appeals. Enter the doctrine of manufactured finality.

B. Manufactured Finality Generally

Courts and commentators use the term “manufactured finality” to refer to a variety of ways in which litigants try to create a final, appealable decision under Section 1291. As we’ll see, there are more variations of manufactured finality than most recognize. Given this variety, generalizing about manufactured finality is difficult. But some generalities are possible.

1. The Definition

Manufactured finality involves (1) a district court decision that, by its terms, resolves fewer than all (and perhaps none) of the claims in an action; and (2) litigants’ subsequent efforts to end district court proceedings and produce a “final decision,” which comes via something other


36. Most discussions of exceptions to the final-judgment rule focus on instances in which litigants can appeal before the end of district court proceedings. But rules prohibiting appeals, even though district court decisions have ended, should also be regarded as exceptions to the final-judgment rule.


38. See, e.g., Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (holding that a decision on an action’s merits is final despite unresolved attorneys’ fees issues); Mitchell v. Forysth, 472 U.S. 511, 550 (1985) (holding that the denial of qualified immunity is a final, appealable decision); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (holding that certain decisions collateral to an action’s merits are final and thus immediately appealable); N.C. Fisheries Ass’n v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008) (noting that a decision remanding a dispute to an administrative agency is not final).

39. See sources cited infra note 82.

40. See infra Section III.B.
than the adversarial litigation of all unresolved claims. The hope is to create something that looks close enough to a traditional final decision that will permit review of the district court’s orders.

Beyond this general definition, things get complex. In many cases, appellants hope to obtain a reversal and then resume litigation in the district court. But not always. Manufactured finality can involve different kinds of district court decisions and various means of bringing about the end of district court proceedings, and the prospects of any seemingly abandoned claims being refiled varies. These variables define the various kinds of manufactured finality, and I discuss them in depth below.41 For now, it’s enough to know that litigants sometimes try to create final decisions when those decisions wouldn’t normally exist.

2. The Motivation

Litigants’ motivation for home-brewing their own interlocutory appeals is unclear. It might be that some litigants are simply unaware of the established avenues for immediate review; this area of the law can be Byzantine.42 But I imagine that in many cases, the established avenues for interlocutory review are closed. Those avenues are often narrow, available only in certain kinds of cases or for particular kinds of orders,43 And they sometimes come with demanding requirements.

For example, by most accounts, district courts are reluctant to certify interlocutory decisions for immediate appeals under Section 1292(b).44 This might be due in part to district courts’ confidence that their decisions are correct or at least are not subject to “substantial ground for difference of opinion.”45 But it probably has something to do with

41. See infra Section III.A.
44. WRIGHT, MILLER & COOPER, supra note 4, § 3929; Solimine, supra note 3, at 1201, 1203.
45. 28 U.S.C. § 1292(b) (2024).
courts’ narrowly construing the statute’s criteria for certification—a substantial ground for difference of opinion, a controlling question of law, and material advancement of the litigation. A narrow reading of these requirements limits the number of orders that can even be considered for a Section 1292(b) appeal. When it comes to Rule 54(b), courts require separation between the resolved and unresolved claims. Without this separation, the court of appeals might address the same (or at least similar) issues in two appeals: the Rule 54(b) appeal and any appeal after the final judgment. So when the resolved and unresolved claims overlap, litigants might not seek a Rule 54(b) partial judgment, the district court might reject that request, or the court of appeals might hold that the district court abused its discretion in entering the partial judgment.

3. The Concerns

As for manufactured finality’s reception in the courts, it has been mixed. When litigants try to manufacture an appeal, courts often raise two concerns.

First is a concern that district court proceedings are not actually over. Most kinds of manufactured finality involve litigants’ voluntarily dismissing claims before the district court formally has resolved them. When that happens, appellate courts suspect that these seemingly abandoned claims will resurface after the appeal. Indeed, parties sometimes plan on reinstating voluntarily dismissed claims. So district court proceedings might only be paused to facilitate an effectively interlocutory appeal. This risks piecemeal appeals—one from the manufactured final decision and one at the actual end of district court proceedings.

At first glance, this concern might seem odd. After all, even in appeals after a final judgment, there is some risk that district court proceedings will resume if the court of appeals reverses. Why should manufactured appeals be different?

46. Wright, Miller & Cooper, supra note 4, § 3930.
47. Lammon, supra note 43, at 646; Solimine, supra note 3, at 1193.
49. See, e.g., Cincinnati Specialty Underwriters Ins. Co. v. Wood, 856 F. App’x 695, 699 (9th Cir. 2021); Firefighters’ Ret. Sys. v. Citgo Grp., 963 F.3d 491, 491 (5th Cir. 2020) (mem.).
51. See, e.g., Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 688 (8th Cir. 1999); West v. Macht, 197 F.3d 1185, 1188 (7th Cir. 1999).
53. See Page Plus of Atlanta, 733 F.3d at 660 (“The point of the finality requirement is not to let the parties pause the litigation, appeal, then resume the litigation on a half-abandoned claim if the case returns.”).
Part of the answer lies in the predominant conception of a single judicial unit.54 The Federal Rules of Civil Procedure provide for the liberal joinder of claims and parties into a single civil action.55 Preclusion rules require that some of those claims be brought together or else they are lost.56 Joining other claims is optional, particularly when it comes to joining claims against multiple defendants.57

Regardless of how many claims an action contains and whether those claims needed (under the rules of preclusion) to be part of the suit, courts conceive of an action as a single judicial unit. And once that action begins, it’s not over until all claims that are part of it have been resolved. That is, once parties have made a claim part of an action, the parties have committed to that claim’s resolution. Courts thus tend to think that when dismissed claims could be refiled, the action they were part of is not over, and there is no final decision.

The other reason why manufactured appeals are different has to do with courts’ second concern about manufactured finality: their distaste for litigants’ efforts to circumvent the established avenues for interlocutory review.58 Courts deciding manufactured-finality issues often note that Congress and the Supreme Court (via the rulemaking process) control appellate jurisdiction.59 (Courts should probably add that they, too, control appellate jurisdiction through interpretations of what it means for a decision to be “final” under § 1291.)60 So Congress and rule makers (and courts) decide when district court proceedings may be paused for an immediate review. The established means for interlocutory review such as Section 1292(b) and Rule 54(b) reflect legislative accommodations of the competing values that underlie appeal timing. And in creating these avenues, Congress and rule makers have given courts (both district and appellate) significant control over the decision of whether to pause those proceedings.

So litigants are not free to create their own interlocutory appeals.61 If they could, they would undermine the balance of interests struck in the established means of appellate review. They would also seize courts’ control over those means.

59. E.g., Griggs v. S.G.E. Mgmt., L.L.C., 905 F.3d 835, 845 n.54 (5th Cir. 2018); Union Oil Co. of Cal. v. John Brown E&C, 121 F.3d 305, 310 (7th Cir. 1997).
60. See generally Lammon, Finality, supra note 1.
61. Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003) (“[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided.”).
C. Manufactured Finality in Microsoft

Manufactured finality has a long history in the federal courts. But until recently, the Supreme Court has given it only passing attention.\(^\text{62}\) Then came the Court’s 2017 decision in *Microsoft Corp. v. Baker*.\(^\text{63}\)

*Microsoft* held that litigants could not voluntarily dismiss their own claims and then appeal an interlocutory decision denying class certification.\(^\text{64}\) The plaintiffs in *Microsoft* brought a purported class action on behalf of all owners of Microsoft’s Xbox 360 gaming console, claiming that a defect in the console scratched game discs during normal use.\(^\text{65}\) After the district court declined to certify the class, the plaintiffs sought permission to appeal that decision under Rule 23(f).\(^\text{66}\) When the Ninth Circuit declined to hear the Rule 23(f) appeal, the named plaintiffs voluntarily dismissed their claims with prejudice and then, in an appeal from that dismissal, sought review of the certification decision.\(^\text{67}\) The named plaintiffs assumed that reversal of the certification decision would allow them to return to the district court and represent the class.

The Supreme Court rejected this attempt to manufacture an appealable decision. The formal holding was narrow: the Court held that the voluntary dismissal was not a final decision under Section 1291.\(^\text{68}\) And some of the reasoning focused on class-certification decisions and Rule 23(f). The Court explained that discretionary appeals under Rule 23(f)

\(\text{62}\) A few Supreme Court decisions seem to involve efforts to manufacture a final decision, though the discussions are often short and cryptic. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 680 (1958) (holding that the government could appeal after, at the government’s suggestion, the district court dismissed the government’s claims for failure to produce material in discovery); United States v. Wallace & Tiernan Co., 336 U.S. 793, 794 n.1 (1949) (holding that an invited, without-prejudice dismissal was final when the district court’s interlocutory order effectively resolved the government’s claim, as the district court had denied discovery of material “essential to prove the Government’s case”).

\(\text{63}\) 137 S. Ct. 1702 (2017).

\(\text{64}\) Id. at 1707, 1712.

\(\text{65}\) Id. at 1710.

\(\text{66}\) Id. at 1710–11.

\(\text{67}\) Id. at 1711.

\(\text{68}\) Id. at 1706–07. This formal holding was also a bit odd. As Justice Thomas pointed out in his concurrence, district court proceedings in *Microsoft* were over. Id. at 1715–17 (Thomas, J., concurring). But Justice Thomas’s alternative rationale—that the plaintiffs in *Microsoft* lacked appellate standing after voluntarily dismissing their claims with prejudice—is also wrong. Id. at 1717. The parties were adverse. Adam N. Steinman, *Lost in Transplantation: The Supreme Court’s Post-Prudence Jurisprudence*, 70 Vand. L. Rev. En Banc 289, 299 (2017). A better rationale for rejecting the appeal in *Microsoft* is that the plaintiffs waived their right to appellate review by voluntarily dismissing claims on which they had not lost. *See* infra Section IV.A.3; see also Lammon, *supra* note 12; Bryan Lammon, *Appealing When a Case Is Legally (but Not Actually) Over*, Final Decisions (May 27, 2000), https://finaldecisions.org/appealing-when-a-case-is-legally-but-not-actually-over/ [https://perma.cc/B3GW-3TYA]; Bryan Lammon, *Cert Petition Gives the Supreme Court the Chance to Re-Explain Microsoft Corp. v. Baker*, Final Decisions (May 9, 2019), https://finaldecisions.org/cert-petition-gives-the-supreme-court-the-chance-to-re-explain-microsoft-corp-v-baker/ [https://perma.cc/S5QD-BD37].
reflected the Rules Committee’s “careful calibration” of when class-certification orders should be immediately appealable. 69 Permitting the plaintiffs to voluntarily dismiss their claims and appeal would “severely undermine[ ]” this balance.70 This potential undermining of Rule 23(f) was “[o]f prime significance.”

Other parts of Microsoft spoke more broadly. The Court said that permitting the voluntary-dismissal tactic would risk multiple, piecemeal appellate review.72 Under the tactic, plaintiffs could voluntarily dismiss their claims and appeal anytime they faced an adverse interlocutory decision.73 And those appeals would be as of right—the court of appeals would have no discretion to refuse them.74 Such appeals could repeatedly interrupt district court proceedings and require courts of appeals to address issues stemming from a single action multiple times.75 The Court was also concerned that the voluntary-dismissal tactic was one-sided.76 Only plaintiffs could decide whether to take an immediate appeal by voluntarily dismissing their claims.77 Defendants never have that option.

The Court ultimately determined that the manufactured appeal attempted in Microsoft would “undermine § 1291’s firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.”78 The voluntary dismissal thus did not produce a “final decision” under Section 1291.79

II. MANUFACTURED FINALITY AFTER MICROSOFT

Microsoft sparked renewed attention on manufactured finality. But courts aren’t sure what to do with the case. On the one hand, the holding was narrow and focused on Rule 23(f). Perhaps the case applies only in the class-certification context.80 On the other hand, the Microsoft opinion expressed broader concerns over piecemeal appeals and undermining

70. Id. (quoting Swint v. Chambers Cnty. Comm’n, 514 U.S. 35, 47 (1995)).
71. Id. at 1714 (alteration in original) (quoting Swint, 514 U.S. at 46). The Court cited to the rejection of pendent appellate jurisdiction in Swint and the rejection of “death-knell” appeals from class-certification decisions in Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978), both of which undermined Section 1292(b). See Microsoft Corp., 137 S. Ct. at 1713–14.
72. Microsoft Corp., 137 S. Ct. at 1713.
73. Id.
74. Id.
75. Id.
76. Id. at 1715.
77. Id.
78. Id. at 1707.
79. Id.
80. See, e.g., Rodriguez v. Taco Bell Corp., 896 F.3d 952, 955 (9th Cir. 2018) (Microsoft did not apply outside of “an attempt to obtain review of a class certification issue”); Brown v. Cnemark USA, Inc., 876 F.3d 1199, 1201 (9th Cir. 2017) (noting the lack of a Microsoft-like effort “to sidestep Rule 23(f)”.


established rules of appellate jurisdiction. So maybe the case applies more broadly.81 The courts of appeals have thus struggled—and split—on how Microsoft has affected manufactured finality.

Part of the uncertainty over Microsoft’s impact likely comes from the lack of a concrete definition of manufactured finality. Commentators (including myself) have used the term to refer to a variety of different efforts by litigants to secure an appeal, often without recognizing the differences among (or even the existence of) these various tactics.82 Overlooking this variety—and the different interests that underlie different kinds of manufactured finality—has led to confusion among courts and litigants as well as some questionable applications of Microsoft.

Again, at its most general, manufactured finality involves (1) a district court decision that, by its terms, resolves fewer than all (and perhaps none) of the claims in an action; and (2) litigants’ subsequent efforts to end district court proceedings and produce a “final decision,” which comes via something other than the adversarial litigation of all unresolved claims. Going beyond this broad (and not terribly helpful) definition requires digging into the variables that distinguish different kinds of manufactured finality. I turn to those variables next. After that, I describe the forms in which manufactured finality regularly appears in federal court along with Microsoft’s likely impact on each.

A. Variables in Manufactured Finality

Forms of manufactured finality involve three variables: (1) the underlying interlocutory order that led to the attempt to manufacture finality, (2) how litigants bring about the apparent end of district court proceedings, and (3) the likelihood of any unresolved claims being reinstated.

81. See, e.g., Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1123–24 (9th Cir. 2020) (saying that Microsoft’s reasoning applies outside of the class-action context); Princeton Digit. Image Corp. v. Off. Depot Inc., 913 F.3d 1342, 1347 (Fed. Cir. 2019) (“[A]lthough the Supreme Court in Microsoft relied in part on the conflict between allowing the appeal and the limited appeal right in the class action context, we think that Microsoft’s reasoning extends beyond that context.” (citation omitted)).

82. Lammon, Finality, supra note 1, at 1833 n.132 (addressing voluntary dismissals due to adverse interlocutory decisions); Shah, supra note 4, at 47 (addressing the voluntary dismissal of unresolved claims after the resolution of other claims); Struble, supra note 4, at 238 (addressing conditional dismissals of unresolved claims); Cochran, supra note 4, at 981 (addressing the voluntary dismissal of unresolved claims after the resolution of other claims); Zitko, supra note 4, at 263 (addressing conditional consent judgments in which parties reserve the right to appeal district court decisions). Two exceptions are the work of the Rules Committee and an article by Bennett Evan Cooper, both of which addressed various ways litigants try to manufacture finality after the resolution of some claims. See Minutes of the Civil Rules Advisory Committee 35 (Nov. 7–8, 2011), https://www.uscourts.gov/sites/default/files/fr_import/CV11-2011-min.pdf; Bennett Evan Cooper, “Manufactured Finality” and the Right to Appeal in Federal Courts, A.B.A., Litig. App. Prac. Comm. (Dec. 18, 2012) (on file with the author). But even these did not address all the variety seen in the federal courts.
1. *The Underlying Interlocutory Order*

All varieties of manufactured finality start with a district court decision that, by its terms, does not resolve the action. These decisions fall into one of three categories.

First are what I call “adverse interlocutory decisions.” These decisions make litigating a claim more difficult or limit the potential outcomes. But they don’t—formally or practically—determine who wins. *Microsoft* involved this kind of decision; the denial of class certification made pursuing the claims to a final judgment less attractive. But the plaintiffs had not lost on those claims.

Second are what I call “dispositive interlocutory decisions.” Unlike the first category, these decisions effectively—though not formally—resolve a claim. So rather than simply making a claim less attractive, these decisions determine who wins. For example, a district court might exclude all of a claimant’s evidence of causation in a tort case. The decision is an interlocutory one about the admissibility of evidence. But with no evidence of causation, the plaintiff is destined to lose. The district court has effectively decided the action, even though it has not formally done so.

Third are interlocutory orders resolving some (but not all) of the claims in a multi-claim action. The liberal joinder rules in the Federal Rules of Civil Procedure mean that civil actions can involve numerous claims, numerous parties, or both. And district courts don’t always decide all claims against all parties at once. Unlike the previous two categories of interlocutory orders, these orders formally resolve some claims. But they don’t resolve all of them.

2. *The Means of Ending District Court Proceedings*

All varieties of manufactured finality also involve parties’ efforts to create a “final decision.” This requires bringing some sort of resolution to the district court’s proceedings. But that resolution does not involve a traditional, litigated determination of all unresolved claims. It instead involves claimants’ abandoning claims, pausing them, or seeking an adverse resolution of them. These efforts fall into four categories.

First are claimants’ unilateral, noticed, voluntary dismissals under Rule 41(a)(1)(A)(i). Rule 41 provides that so long as an opposing

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84. *Microsoft Corp.*, 137 S. Ct. at 1710–11.
85. *See*, e.g., Innovation Ventures, LLC v. Custom Nutrition Lab’ys, LLC, 912 F.3d 316, 332 (6th Cir. 2018).
party has neither answered nor moved for summary judgment, a claimant may voluntarily dismiss an action by simply filing a notice with the district court. These dismissals are automatic—the case is dismissed upon the notice’s filing. Neither the district court nor the opposing parties can stop a claimant from using this option.

Second are stipulated voluntary dismissals—wherein the parties agree to dismiss the action—under Rule 41(a)(1)(A)(ii). If the time for a noticed dismissal has passed, the parties can still agree to voluntarily dismiss an action without obtaining the district court’s approval. These can be particularly useful when parties settle claims.

Third are court-ordered voluntary dismissals under Rule 41(a)(2). If the time for a noticed dismissal has passed and the parties cannot agree to a dismissal, claimants can still ask the district court to dismiss an action. Unlike the last two types of voluntary dismissals, the district court is necessarily involved in these dismissals, and the district court can set terms for the dismissal, such as requiring the plaintiff to pay the defendant’s costs.

Fourth and finally are invited dismissals. These can occur when claimants—rather than opposing parties—seek the entry of an adverse judgment outside of the Rule 41(a)(2) context. For example, a claimant might suggest that the district court dismiss an action as a sanction. Or a claimant might suggest that the district court grant summary judgment against it. Claimants might even provoke the district court into dismissing the action by ceasing any prosecution of their claims, which can result in a dismissal for failure to prosecute.

3. The Prospect of Refiling

The third and final manufactured finality variable is the prospect of refiling. Claims that were paused, abandoned, or dismissed at the claimants’ own initiative might spring back to life in the district court or in some other forum. Once again, there are several possibilities.

The first two possibilities involve voluntary dismissals with and without prejudice. Rule 41 provides that many voluntary dismissals are without prejudice unless the notice, stipulation, or court order says

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93. See, e.g., United States v. Davis, 793 F.3d 712, 715 (7th Cir. 2015) (en banc).
otherwise. Involuntary dismissals can also be with or without prejudice. And many courts equate the with-/without-prejudice character of a dismissal as determining whether preclusion will bar a claim’s refiling: a claim dismissed without prejudice can be refiled, while a claim dismissed with prejudice cannot.

That’s not quite right—as the Supreme Court explained in *Semtek International Inc. v. Lockheed Martin Corp.*, the with-/without-prejudice distinction affects only whether a claim can be refiled in the same district court. Preclusion is a separate matter. To be sure, many claims dismissed with prejudice will be precluded from refiling. But the federal rules cannot determine the preclusive effect of a dismissal. Still, most courts understand with-/without-prejudice dismissals to control whether a case can be refiled.

A third possibility—and really a variation on the first two—involves a claim dismissed without prejudice but also with no prospect of refiling. Something, such as a statute of limitations, bars the claim from being refiled. Although these dismissals are technically without prejudice, the claims cannot be refiled. So courts will often treat them as though they were with prejudice.

A fourth possibility is a without-prejudice dismissal that has some risk of being barred from refiling. This can occur when a statute-of-limitations or preclusion defense is possible but not certain. These dismissals involve uncertain prospects of refiling.

Finally are conditional dismissals. With these, litigants place some conditions on when claims can be refiled, which often involve the outcome of the subsequent appeal. Litigants might agree that voluntarily dismissed claims can be reinstated if the court of appeals reverses. Or they might agree that voluntarily dismissed claims can be refiled regardless of an appeal’s outcome.

96. See Fed. R. Civ. P. 41(a)(1)(B) ("Unless the notice or stipulation states otherwise, the dismissal is without prejudice."); id. 41(a)(2) ("Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.").

97. See id. 41(b).

98. See, e.g., Aldossari ex rel. Aldossari v. Ripp, 49 F.4th 236, 262 (3d Cir. 2022) (stating that a dismissal with prejudice "ends the district-court litigation and amounts to a rejection of the plaintiff’s claims on the merits that has preclusive effect on future suits").


100. Id. at 506; see also Bryan Lammon, *Disarming the Finality Trap*, 97 N.Y.U. L. REv. ONLINE 173, 181 (2022).


102. Id. at 505.

103. Id. at 505 (noting that a reading of Rule 41 that "govern[ed] the effect that must be accorded federal judgments by other courts . . . would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules ‘shall not abridge, enlarge or modify any substantive right’" (quoting 28 U.S.C. § 2072(b) (2024))).
B. The Present and Future of Manufactured Finality

Given these variables, the possible permutations of manufactured finality are numerous. Thankfully, the forms that litigants have used are far fewer. I now turn to those forms visible in the case law.

1. Voluntary Dismissals Due to Adverse Interlocutory Decisions

First are voluntary dismissals of claims due to adverse interlocutory decisions. These come after an adverse interlocutory decision that makes a claim less attractive to pursue. But the order does not effectively resolve the claim; the claimant can still win something. Litigants then voluntarily dismiss the affected claim, which can come via notice, stipulation, or court order. These dismissals are normally with prejudice, though a with-prejudice dismissal is sometimes tempered with express conditions that permit refiling on reversal. And refiling of the affected claim is not merely possible—it’s the entire purpose of the dismissal. Claimants hope to appeal and obtain a reversal of the adverse interlocutory order. If that happens, claimants plan to then return to the district court, reinstate the voluntarily dismissed claims, and resume litigation where they left off.

Microsoft involved this kind of manufactured finality. After the district court denied class certification, the plaintiffs no longer wanted to pursue the case (which involved only their individual claims) to a final judgment. So the plaintiffs asked the district court to dismiss the action with prejudice, believing that they could reinstate their claims if the court of appeals reversed. Many other examples exist. A claimant might voluntarily dismiss its claims after the district court orders that they be arbitrated. Or a district court might limit the amount or type of damages, capping recovery or holding that the claimant can’t recover punitive damages.

Courts have largely—though not entirely—rejected these efforts. Even before Microsoft, few litigants had success manufacturing finality

105. Id. at 1711. Although the defendant stipulated to the dismissal with prejudice, the defendant also disputed the plaintiffs’ ability to appeal the voluntary dismissal. Id.
106. See, e.g., Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 243–44 (3d Cir. 2013) (voluntary dismissal after refusal to certify a collective action under the Fair Labor Standards Act); West v. Macht, 197 F.3d 1185, 1187 (7th Cir. 1999) (voluntary dismissal of all claims after denial of in forma pauperis status on some claims); Palmieri v. Defaria, 88 F.3d 136, 138 (2d Cir. 1996) (voluntary dismissal after exclusion of plaintiff’s evidence); Plasterers Loc. Union No. 346 v. Wyland Enters. Inc., 819 F.2d 217, 218 (9th Cir. 1987) (voluntary dismissal after denial of motion to disqualify opposing counsel); Mgmt. Invs. v. United Mine Workers of Am., 610 F.2d 384, 388 (6th Cir. 1979) (voluntary dismissal of federal claims after refusal to extend pendent jurisdiction over state claims).
108. See, e.g., Palka v. City of Chicago, 662 F.3d 428, 436 (7th Cir. 2011).
from an adverse interlocutory order.\textsuperscript{109} Since Microsoft, the trend has been largely the same.\textsuperscript{110}

For example, in one straightforward extension of Microsoft the Tenth Circuit held that the settlement of individual claims did not permit appeal from a prior class-certification decision.\textsuperscript{111} The court determined that all of the reasons underlying Microsoft required treating the decision as non-final.\textsuperscript{112} The possibility of reversal meant the possibility of piecemeal appeals.\textsuperscript{113} The settlement tactic undermined Rule 23(f).\textsuperscript{114} And the tactic benefited only plaintiffs.\textsuperscript{115} Further, the Tenth Circuit saw no meaningful distinction between a unilateral, voluntary dismissal (like the one in Microsoft) and a settlement, as a “[v]oluntary dismissal is functionally a settlement for nothing.”\textsuperscript{116}

Courts have also applied Microsoft’s reasoning to voluntary dismissals that come after a district court orders arbitration. When a district court

\begin{footnotes}
\textsuperscript{109} See, e.g., \textit{Camesi}, 729 F.3d at 245 (holding that FLSA plaintiffs could not appeal an adverse collective action certification by voluntarily dismissing their claims because there was no final decision); \textit{Palmieri}, 88 F.3d at 140 (refusing to review adverse evidentiary rulings after the plaintiff either voluntarily dismissed his claims or was dismissed for failure to prosecute); \textit{Mgmt. Inv.}, 610 F.2d at 393 (refusing to extend pendent jurisdiction over state claims did not effectively resolve sole remaining federal claim, so voluntary, without-prejudice dismissal did not produce a final decision). The Ninth Circuit had allowed appeals from voluntary dismissals after adverse interlocutory orders outside of the class-action context. See \textit{Lippitt v. Raymond James Fin. Servs., Inc.}, 340 F.3d 1033, 1038 (9th Cir. 2003), as amended (Sept. 22, 2003); Or. Bureau of Lab. & Indus. ex rel. Richardson v. U.S. W. Commc’ns, Inc., 288 F.3d 414, 417 (9th Cir. 2002); Lewis v. Tel. Empls. Credit Union, 87 F.3d 1537, 1536 (9th Cir. 1996); \textit{Concha v. London}, 62 F.3d 1493, 1508 (9th Cir. 1995). The First Circuit also has some pre-Microsoft case law suggesting that litigants could appeal after voluntarily dismissing their claims because of an adverse interlocutory decision, so long as the litigants expressly reserved their right to appeal. See \textit{Scanlon v. M.V. Super Servant 3}, 429 F.3d 6, 8–10 (1st Cir. 2005); \textit{John’s Insulation, Inc. v. L. Addison & Assoc.}, 156 F.3d 101, 107 (1st Cir. 1998). The Tenth Circuit had at least one case holding that a plaintiff could appeal a remand denial by voluntarily dismissing its claims with prejudice. See \textit{Martin v. Franklin Cap. Corp.}, 251 F.3d 1284, 1289 (10th Cir. 2001), \textit{abrogated on other grounds by} Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81 (2014). And the Fifth Circuit has one case suggesting that a voluntary, with-prejudice dismissal of the plaintiffs’ claims would have permitted review of a prior remand denial. See \textit{Marshall v. Kansas City S. Ry. Co.}, 378 F.3d 495, 501 (5th Cir. 2004).

\textsuperscript{110} See, e.g., \textit{Lush v. Bd. of Trs.}, 29 F.4th 377, 380 (7th Cir. 2022) (no finality when plaintiff voluntarily dismissed his claims after the district court refused to appoint counsel), \textit{reh’g denied}, No. 21-1394, 2022 WL 1088997 (7th Cir. Apr. 11, 2022); \textit{Princeton Digit. Image Corp. v. Off. Depot Inc.}, 913 F.3d 1342, 1349 (Fed. Cir. 2019) (no finality when claimant requested an adverse judgment after the district court limited recoverable damages).

\textsuperscript{111} Anderson Living Tr. v. WPX Energy Prod., LLC, 904 F.3d 1135, 1145 (10th Cir. 2018).

\textsuperscript{112} \textit{Id.} at 1142.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 1142–43.

\textsuperscript{115} \textit{Id.} at 1143.

\textsuperscript{116} \textit{Id.} at 1145 (“That the Trusts managed to procure a price for the dismissal of their individual claims is simply a new take on the old voluntary-dismissal tactic.”); \textit{see also id.} at 1143.
\end{footnotes}
orders arbitration and stays a case, the order is normally not immediately appealable; review of the arbitration decision must come after arbitration is complete. If an arbitration order merits an immediate appeal, the district court can certify the order under Section 1292(b). Litigants who don’t want to arbitrate their claims have tried to appeal from adverse arbitration decisions by voluntarily dismissing their claims. The courts of appeals have had little of it.

In *Langere v. Verizon Wireless Services, LLC*, for example, the Ninth Circuit held that litigants cannot appeal a decision ordering arbitration by voluntarily dismissing their claims with prejudice. Before *Microsoft*, the Ninth Circuit had endorsed this tactic in the arbitration context. But the *Langere* court determined that *Microsoft* abrogated that rule. Although *Microsoft* dealt only with class actions, the Ninth Circuit thought that *Microsoft’s* reasoning applied equally to the arbitration context. Voluntary dismissals after adverse interlocutory orders circumvent the rules governing arbitration appeals, just as they circumvent Rule 23(f). These dismissals also invite piecemeal appeals in the arbitration context just as much as they do in the class-action context. These dismissals give plaintiffs—not courts—control over appeals. And these dismissals are one-sided, benefiting only plaintiffs. So *Microsoft’s* reasoning—“that the voluntary-dismissal device cannot be permitted to subvert the final judgment rule or a finely wrought, discretionary-appellate regime”—required dismissing the appeal.

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118. 9 U.S.C. § 16(b).

119. 983 F.3d 1115 (9th Cir. 2020).

120. *Id.* at 1117.

121. *See* Omstead v. Dell, Inc., 594 F.3d 1081, 1085 (9th Cir. 2010), overruled by Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115 (9th Cir. 2020).

122. *Langere*, 983 F.3d at 1122.

123. *Id.* at 1123–24.

124. *Id.* at 1122–23.

125. *Id.* at 1123.

126. *Id.*

127. *Id.*

128. *Id.; see also* Sperring v. LLR, Inc., 995 F.3d 680, 682 (9th Cir. 2021) (reiterating the rule from *Langere*). For other courts applying *Microsoft* in the arbitration context, see Keena v. Groupon, Inc., 886 F.3d 360, 364–65 (4th Cir. 2018); Bynum v. Maplebear Inc., 698 F. App’x 23, 24 (2d Cir. 2017) (mem.).
Yet not everyone prohibits appeals from voluntary dismissals after adverse interlocutory orders. The Ninth Circuit has continued to allow these appeals in certain contexts.129 In Rodriguez v. Taco Bell Corp.,130 the Ninth Circuit allowed a plaintiff to appeal from the denial of her summary-judgment motion by voluntarily dismissing her claim.131 The court said that Microsoft did not apply because the case did “not involve an attempt to obtain review of a class certification issue.”132 And the court thought that “a voluntary dismissal of remaining claims can render the earlier interlocutory order appealable, so long as the discretionary regime of Rule 23(f) is not undermined.”133 Since Rodriguez was “an appeal seeking review of a partial summary judgment order, not a class-certification denial,” Microsoft did not control.134

The Ninth Circuit followed up on Rodriguez with Trendsettah USA, Inc. v. Swisher International, Inc.135 The court read Rodriguez—alongside its decision in Langere, which rejected this voluntary-dismissal tactic in the arbitration context—to mean that Microsoft applies only when the dismissal “implicate[s] any similar statutory restrictions that would be adversely affected by permitting voluntary dismissal of claims with prejudice.”136 That is, Microsoft applies only in contexts with specific rules of appellate jurisdiction. In other contexts, litigants can still dismiss their claims with prejudice and then appeal adverse interlocutory decisions.

Trendsettah involved one of those other contexts. After the plaintiff prevailed at trial, the district court ordered a new trial.137 Rather than face a retrial, the plaintiff voluntarily dismissed its claims with prejudice and sought to appeal the new-trial order.138 In exercising jurisdiction over the appeal, the Ninth Circuit explained that the plaintiff was “not attempting to take an appeal midstream, such that success on appeal would allow it to continue litigating its claims in a preferred posture or

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129. Indeed, the Ninth Circuit has one post-Microsoft case that seems to allow these appeals in the class-action context. In Brown v. Cinemark USA, Inc., 876 F.3d 1199, 1201 (9th Cir. 2017), the Ninth Circuit held that the settlement of unresolved claims rendered final a prior district court decision on other claims. The details are a bit muddy. The district court dismissed one of the plaintiffs’ claims and denied class certification on the others. Id. at 1200. The parties then settled the remaining claims, with the plaintiffs reserving the right to appeal the dismissal of one claim and the denial of class certification on another claim. Id. at 1200–01. The Ninth Circuit reasoned that there was no evidence of “sham tactics to achieve an appealable final judgment.” Id. at 1201. There was a settlement, not a unilateral dismissal. Id. So there was no Microsoft-like effort “to sidestep Rule 23(f).” Id.
130. 896 F.3d 952 (9th Cir. 2018).
131. Id. at 955–56.
132. Id. at 955.
133. Id.
134. Id. at 955–56.
135. 31 F.4th 1124 (9th Cir. 2022).
136. Id. at 1132.
137. Id. at 1130.
138. Id.
That’s because the plaintiff’s claims had already been litigated to a judgment. Indeed, regardless of how the Ninth Circuit decided the appeal, the case would be over. If the court of appeals affirmed, the plaintiff’s voluntary, with-prejudice dismissal would stand. If it reversed, the court of appeals could reinstate the jury’s verdict.

Although Microsoft did not directly address the general category of adverse interlocutory decisions, its reasoning should probably foreclose future use of this kind of manufactured finality. The concerns underlying Microsoft are the same. Claimants who take these appeals hope to pause their individual claims, obtain reversal of an adverse decision, and then resume district court litigation. These appeals thus come before the district court has resolved all the parties’ claims. That means the parties are circumventing the established avenues for interlocutory appeals, particularly certified appeals under Section 1292(b). In doing so, the claimants seize control over appellate jurisdiction from the district and appellate courts. These appeals thus risk piecemeal review beyond what Congress and rule makers have authorized. To be sure, claimants take a risk—if the court of appeals affirms, their claims are gone. But this sort of gambling claims for an appeal is not something Congress, the Rules Committee, or the courts have condoned.

Also, this is not to say that there aren’t good reasons for allowing some appeals from adverse interlocutory decisions. There are, particularly in the context of new-trial orders. If a party who prevailed at trial is willing to risk everything on an appeal from a new-trial order, it might save a lot of time and resources to allow that party to do so. The same might be said for a plaintiff who sought to bring a damages class action but was denied class certification; when that plaintiff’s individual claims don’t justify the costs of litigation, it’s mighty wasteful to force that plaintiff to litigate to a final judgment. But after Microsoft, any authorization of these appeals will probably need to come from a statute or rule.

139. Id. at 1132.
140. Id.
141. Id.
142. Id.
143. Again, this is not to say that Microsoft was correct in holding that the voluntary dismissal did not produce a final decision. As I explain later, the issue should be one of waiver, not jurisdiction. See infra Section IV.A.3. But so long as the Supreme Court says that the voluntary dismissal in Microsoft did not produce a final decision, that holding should extend to all voluntary dismissals due to an adverse interlocutory decision.
144. Trendsettah’s suggestion that Microsoft applies only in contexts with special appellate-jurisdiction rules is specious. For one thing, it fails on its own terms, as Section 1292(b) is a special rule allowing for interlocutory appeals just as much as the rules for arbitration and class-certification appeals. For another, the general (that is, non-context-specific) rules for appellate jurisdiction reflect legislative decisions about when interlocutory appeals can and should occur just as much as context-specific rules, and these appeals undermine those legislative decisions.
2. Voluntary Dismissals Due to Dispositive Interlocutory Decisions

A second variation on manufactured finality involves voluntary dismissals of claims due to dispositive interlocutory decisions. These voluntary dismissals come after the district court has effectively—though not technically—resolved a claim. The district court’s decision is nominally interlocutory. But its substance resolves the claims; only one party can prevail after the order. Were that party to move for summary judgment, it would win. But sometimes the litigant who lost on the interlocutory order (and thus lost the case) will voluntarily dismiss the action or otherwise invite its end. Like voluntary dismissals due to adverse interlocutory decisions, these dismissals can come via notice, stipulation, or court order.\footnote{145} They are normally with prejudice. And once again, refiling is the plan. The hope is to appeal, obtain a reversal of the interlocutory decision, and return to the district court for further litigation on the voluntarily dismissed claim.

The key characteristic of this kind of manufactured finality is the nominally interlocutory order’s effect on the claims. For example, a district court might exclude evidence that a claimant needs to succeed on a claim.\footnote{146} The evidentiary decision is interlocutory. But it prevents the claimant from prevailing on the merits. Other examples include the resolution of some claims that necessarily resolve other, unadjudicated claims;\footnote{147} denials of summary judgment that effectively resolve the claims;\footnote{148} and the rejection of all theories that the claimant wants to pursue.\footnote{149}

Before Microsoft, the courts of appeals universally allowed these appeals.\footnote{150} Courts recognized that in these cases, the appellants had lost

\begin{itemize}
\item \footnote{145}{In at least one case, a party tried to use an invited, adverse summary-judgment decision to secure an appeal from a dispositive interlocutory order. See Ohio Pub. Empl. Ret. Sys. v. Fed. Home Loan Mortg. Corp., 64 F.4th 731, 733 (6th Cir. 2023). As I note momentarily, this might be preferred to voluntary dismissals. Regardless, it makes no difference in the ultimate analysis of this form of manufactured finality.}
\item \footnote{146}{See, e.g., Fairley v. Andrews, 578 F.3d 518, 521–22 (7th Cir. 2009); McMillian v. Sheraton Chi. Hotel & Towers, 567 F.3d 839, 843–44 (7th Cir. 2009); INB Banking Co. v. Iron Peddlers, Inc., 993 F.2d 1291, 1292 (7th Cir. 1993); Distaff, Inc. v. Springfield Contracting Corp., 984 F.2d 108, 111 (4th Cir. 1993).}
\item \footnote{147}{E.g., Affinity Living Grp., LLC v. StarStone Specialty Ins. Co., 959 F.3d 634, 638 (4th Cir. 2020); Horn v. Berdon, Inc. Defined Ben. Pension Plan, 938 F.2d 125, 126 n.1 (9th Cir. 1991).}
\item \footnote{149}{E.g., Levy v. W. Coast Life Ins. Co., 44 F.4th 621, 626 (7th Cir. 2022); Bogorad v. Eli Lilly & Co., 768 F.2d 93, 94 (6th Cir. 1985); Raceway Props., Inc. v. Empire Corp., 613 F.2d 656, 657 (6th Cir. 1980).}
\item \footnote{150}{See, e.g., Williams v. Empl. Mut. Cas. Co., 845 F.3d 891, 897 (8th Cir. 2017) ("[A] party has not waived its right to appeal a consent judgment when the consent judgment followed a ruling that was, as a practical matter, case-dispositive."); Ali, 719 F.3d at 90 (concluding that the denial of summary judgment effectively}
\end{itemize}
on the merits and were simply trying to accelerate the inevitable end of district court proceedings. So when the district court has effectively resolved a claim as a matter of law (such that “a cross-motion for summary judgment would have been granted”), and the dismissal is “designed only to secure immediate appellate review of an adverse decision,” the parties could appeal.

Since Microsoft, most courts still allow litigants to manufacture finality after a dispositive interlocutory decision. But some think that Microsoft has changed things. Consider the dissenting opinion in Affinity Living Group, LLC v. StarStone Specialty Insurance Co. A majority of the Fourth Circuit held that the voluntary dismissal of two claims produced a final decision when an earlier interlocutory decision had foreclosed any prospect of success on those claims. The voluntarily dismissed claims depended on the validity of claims the district court dismissed earlier in the proceedings. So the district court’s earlier order rendered the remaining two claims “legally deficient.” The plaintiff’s case was thus “not just practically over (as in Microsoft) but legally over.”

resolved the claim, so voluntary, with-prejudice dismissal of the claim was appealable); Fairley, 578 F.3d at 521–22 (holding that the plaintiffs could appeal from a dispositive evidentiary ruling that excluded all causation evidence and “gutted their case”); McMillian, 567 F.3d at 843–44 (holding that the plaintiffs could appeal from a stipulated final judgment after an interlocutory evidentiary ruling effectively precluded recovery); OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1356 (11th Cir. 2008) (holding that a plaintiff could appeal from invited dismissal after the district court excluded a necessary expert witness as a discovery sanction); Distaff, Inc., 984 F.2d at 111 (holding that a plaintiff could appeal an order excluding all evidence of causation by voluntarily dismissing his claim with prejudice); Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut. of Ohio, 982 F.2d 1031, 1034 (6th Cir. 1993) (holding that a plaintiff could appeal voluntary dismissal because the district court’s summary-judgment decision—that the defendant was not the plaintiff’s fiduciary—effectively resolved the plaintiff’s claims), on reh’g en banc (Feb. 23, 1993); Horn, 938 F.2d at 126 n.1 (concluding that the voluntary dismissal of an indemnification claim—despite understanding that it would be revived upon reversal—produced a final decision because the claim was entirely dependent on the resolved claims); Bogorad, 768 F.2d at 94 (holding that a plaintiff could appeal from voluntary dismissal because district court’s decisions “ruled out the cause of action she was seeking to present”); Raceway Props., Inc., 613 F.2d at 657 (holding that the plaintiffs could appeal from voluntary, with-prejudice dismissal after district court’s market-definition decision in an antitrust suit effectively resolved the action; the plaintiffs could not proceed under the district court’s market definition).

151. E.g., Ali, 719 F.3d at 88.
152. Id. at 89 & n.7; cf. Empire Volkswagen Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 94–95 (2d Cir. 1987) (partial summary-judgment decision did not effectively resolve all claims, so court could not review voluntarily dismissed claims).
153. See Levy, 44 F.4th at 624–25; Affinity Living Grp., 959 F.3d at 638; Innovation Ventures, LLC v. Custom Nutrition Lab’s, LLC, 912 F.3d 316, 332 (6th Cir. 2018).
154. 959 F.3d 634 (4th Cir. 2020).
155. Id. at 638.
156. Id.
157. Id. at 639.
158. Id.
Judge King dissented, contending that Microsoft makes clear that “a party may not manufacture § 1291 final decision jurisdiction through a voluntary dismissal.” As Judge King saw things, the parties were “attempt[ing] to perform an end run around the procedural rules governing their circumstances—just as in [Microsoft].” He would have held that the voluntary dismissal did not produce a final, appealable decision.

Judge King’s dissent fails to recognize the difference between the interlocutory orders in Microsoft and Affinity Living and thus the different kinds of manufactured finality. In Microsoft, the order merely denied class certification. Granted, litigating the named plaintiffs’ individual claims to a final judgment was impractical. But the plaintiffs still could have won on those claims. Affinity Living, in contrast, involved an interlocutory order that expressly resolved some claims and effectively foreclosed success on the rest. At that point, there was no route for the Affinity Living plaintiffs to win. So the voluntary dismissal was not an “end run” around any established avenue of interlocutory review. It was instead an efficient path to the inevitable end of district court proceedings.

Unfortunately, Judge King is not alone—the Sixth Circuit appears to have applied his reading of Microsoft in Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp. The case involved a securities class action in which the district court denied class certification, excluded the plaintiff’s expert witness, and ruled against the plaintiff on its theories of recovery and methods of proof. After the Sixth Circuit refused to review the class-certification decision via Rule 23(f), the plaintiff asked the district court to “sua sponte” enter summary judgment against it. The plaintiff argued that the class-certification decision prevented it from proving loss causation and thus from proceeding any further on the claim. The district court agreed and entered judgment in favor of the defendant.

The Sixth Circuit held that this invited, adverse summary-judgment decision was not final because the plaintiff was trying to circumvent Rule 23(f). As the court saw things, the case was just like Microsoft. The plaintiff’s invited summary judgment would risk piecemeal appeals, as the plaintiff’s victory on appeal would result in further district court proceedings.

159. Id. at 643 (King, J., dissenting).
160. Id. at 644.
161. Id.
162. 64 F.4th 731 (6th Cir. 2023).
163. Id. at 733.
164. Id.
165. Id.
166. Id.
167. Id. at 735.
168. See id. (“Because the tactic used by OPERS in this case—requesting summary judgment in Freddie Mac’s favor—implicates the Microsoft concerns, we do not have jurisdiction here and accordingly are unable to reach the significant issues of law OPERS raises on appeal.”).
proceedings and probably another appeal.\footnote{Id.} The tactic was one-sided, as only plaintiffs could use it.\footnote{Id.} And the tactic undermined Rule 23(f).\footnote{Id.}

The \textit{Ohio Public Employees} opinion is not crystal clear on whether the plaintiff had effectively lost.\footnote{If the plaintiff in \textit{Ohio Public Employees} had not effectively lost—that is, if it could have pursued its individual claims to a final judgment and possibly won, even after the district court’s decisions—then the case is not meaningfully different from \textit{Microsoft}. The only distinction would be the means of ending district court proceedings—\textit{Microsoft} involved a voluntary dismissal, while \textit{Ohio Public Employees} involved an invited, adverse summary-judgment decision. But that distinction is irrelevant. In both situations, plaintiffs were trying to create an interlocutory appeal in a case that they had not effectively lost.\footnote{The plaintiff argued that the district court’s reasoning in its class-certification denial “doomed [the plaintiff’s] ability to prove loss causation.” \textit{Id.} at 733.} But it looks like it had.\footnote{Id.} And if it had, the plaintiff’s invitation for the district court to rule against it should not create any problems. For one thing, the nominally interlocutory decision effectively ended the case, so there is no concern that the case is not actually over. For another, no rule of appellate jurisdiction was being undermined. All the plaintiff did was accelerate the inevitable end of district court proceedings. Had it instead been the defendant that sought summary judgment, the district court would have granted it—probably without opposition. No one would have suspected that such a decision was not final. And to the extent this kind of manufactured finality is one-sided, that’s because only the losing side can use it.

\textit{Microsoft} should thus have not precluded the appeal in \textit{Ohio Public Employees}. Indeed, it should have no impact on this valuable variation on manufactured finality. None of the concerns behind \textit{Microsoft} are present. All claims have been resolved, district court proceedings are effectively over, and there is no attempt to secure any sort of interlocutory review. The only potential issue these dismissals raise is claimants’ being wrong about an interlocutory order’s effect on their case. That is, a claimant might not be correct in thinking that an interlocutory order effectively resolved its claims. A better avenue might be the one pursued—and rejected—in \textit{Ohio Public Employees}: asking the district court to enter summary judgment. That way, the district court can say on the record that the interlocutory order effectively decided the case.

3. \textit{Stipulated Resolutions of Unresolved Issues}

A third kind of manufactured finality involves stipulating to all unresolved issues. Sometimes a district court’s interlocutory decision resolves the issues that the parties care about most. That decision might resolve some claims or even parts of claims (such as liability but not the amount of damages). The parties then stipulate to the resolution of all other issues. They then seek to appeal the district court’s decision.
So long as the stipulation conclusively resolves all outstanding issues, courts have held that the stipulation produces a final, appealable decision. This holds even if the precise resolution that the parties agreed to depends on the appeal’s outcome. But if the parties reserve the right to relitigate any of the issues they purportedly stipulated to, there is no final decision.

In *Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*,174 for example, the Fourth Circuit allowed the parties to appeal a liability ruling after they stipulated to the amount of damages.175 The parties in *Sprint Nextel* had agreed that the amount of damages turned on the scope of liability—the issue the district court resolved and the parties wanted to appeal.176 The Fourth Circuit cautioned “that parties may not gin up appellate jurisdiction by entering into a stipulation that is directly conditioned on the outcome of an appeal.”177 That’s “not really a stipulation at all. A true stipulation is a conclusive resolution of a factual issue that is binding for the rest of the litigation; it does not evaporate after appeal.”178 But stipulations can contain conditions, such as “a set amount of damages if liability is established.”179

The parties in *Sprint Nextel* had not tried to reserve the right to relitigate any issues that they had stipulated to.180 They had instead stipulated that damages turned on the scope of liability.181 And the court saw “no reason why a valid stipulation on damages cannot turn on the scope, as opposed to the bare existence, of liability.”182 The stipulation was binding and “not one that vanishes as soon as we vacate the district court’s order on liability.”183

Contrast *Sprint Nextel* with *Board of Trustees of the Plumbers, Local Union No. 392 v. Humbert*,184 in which the Sixth Circuit held that defendants’ stipulation to the amount of damages after an adverse liability ruling was not final, as they reserved the right to challenge damages upon reversal.185 The district court in *Humbert* granted summary judgment for the

174. 938 F.3d 115 (4th Cir. 2019).
175. 938 F.3d 115 (4th Cir. 2019) (emphasis omitted).
176. 938 F.3d 115 (4th Cir. 2019).
177. 938 F.3d 115 (4th Cir. 2019).
178. 938 F.3d 115 (4th Cir. 2019).
179. 938 F.3d 115 (4th Cir. 2019).
180. 938 F.3d 115 (4th Cir. 2019).
181. 938 F.3d 115 (4th Cir. 2019).
182. 938 F.3d 115 (4th Cir. 2019).
183. 938 F.3d 115 (4th Cir. 2019).
184. 938 F.3d 115 (4th Cir. 2019).
185. 938 F.3d 115 (4th Cir. 2019).
plaintiffs on liability, but it had not resolved the amount of damages when the parties appealed.\textsuperscript{186} So the parties stipulated to the amount of damages to facilitate the appeal.\textsuperscript{187} But that stipulation purported to reserve the right to litigate the amount of damages if the Sixth Circuit reversed.\textsuperscript{188} The purported stipulation, the Sixth Circuit explained, did not conclusively resolve damages.\textsuperscript{189} It thus left open the possibility of more litigation and future appeals.\textsuperscript{190} The court added that, much like \textit{Microsoft}, deeming the order final “would allow the parties to circumvent the limitations that § 1292(b) and the Civil Rules place upon interlocutory appeals.”\textsuperscript{191}

\textit{Microsoft} does not appear to have affected courts’ treatment of these stipulations. Nor should it. So long as they’re conclusive, these stipulations are little different from parties’ stipulating to issues \textit{before} a district court decision. And because these stipulations conclusively resolve district court litigation, there is no risk of piecemeal review or undermining established avenues for interlocutory review. The opposite is true for nonconclusive stipulations like that in \textit{Humbert}. Those stipulations contemplate future district court proceedings, at least under certain conditions. So they are closer to varieties of manufactured finality that merely pause the litigation.

4. \textit{Voluntary, With-Prejudice Dismissals of Unresolved Claims}

Another variety of manufactured finality involves the voluntary, with-prejudice dismissal of all unresolved claims. The district court decides some (but not all) of the claims in a multi-claim action. Rather than litigate the remaining claims to a judgment, parties voluntarily dismiss them. These voluntary dismissals can come via notice, stipulation, or court order. The dismissal is, as the name implies, with prejudice. And according to most courts, this with-prejudice dismissal means that the voluntarily dismissed claims cannot be reinstated.\textsuperscript{192}

Courts have long held that the with-prejudice dismissal of all unresolved claims produces a final, appealable decision.\textsuperscript{193} They continue to do so after \textit{Microsoft}.\textsuperscript{194} And for good reason. The with-prejudice dismissal ensures that any unresolved claims will not be refiled in the district

\begin{itemize}
  \item \textsuperscript{186} \textit{Id.} at 625.
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{189} \textit{Id.} at 626.
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} Again, that’s not entirely accurate. \textit{See supra} notes 99–103 and accompanying text.
  \item \textsuperscript{193} \textit{See, e.g.} Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1158 n.1 (9th Cir. 2002); Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 687 (8th Cir. 1999); Empire Volkswagen Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 94–95 (2d Cir. 1987).
  \item \textsuperscript{194} \textit{See, e.g.}, Wesco Ins. Co. v. Roderick Linton Belfance, LLP, 39 F.4th 326, 334–35 (6th Cir. 2022).
\end{itemize}
court. So district court proceedings are finished, and there is no effort to circumvent the established avenues for appellate review.

To be sure, one of Microsoft’s concerns applies: this kind of manufactured finality is one-sided, as only claimants can use it. But that shouldn’t matter. The case is over, and no one is playing games with the rules of appellate jurisdiction.

5. Voluntary, Without-Prejudice Dismissals of Unresolved Claims

Then there are voluntary, without-prejudice dismissals of unresolved claims. These are like the last category—the district court decides some of the claims in a multi-claim action, and parties voluntarily dismiss the remainder in an effort to secure an appeal. These dismissals can come via notice, stipulation, or court order. The key difference is that these dismissals are without prejudice. And as most courts see things, the without-prejudice dismissal means that the voluntarily dismissed claims can be reinstated.

These efforts at manufacturing finality have received a mixed reception in the courts of appeals. Most courts hold that voluntary, without-prejudice dismissals do not produce a final decision. But this general rule has exceptions. Many courts allow litigants to convert the without-prejudice dismissal to one with prejudice by disclaiming the right to refile the voluntarily dismissed claims. Courts have held that a

195. When the order is flipped—parties voluntarily dismiss some claims without prejudice, and the district court later resolves the remainder—courts have had little difficulty in holding that there is a final decision. See Stevens v. St. Tammany Par. Gov’t, 17 F.4th 563, 569 n.3 (5th Cir. 2021); United States v. Eli Lilly & Co., 4 F.4th 255, 260 (5th Cir. 2021); Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). These appeals rarely (if ever) involve an attempt to manufacture appellate jurisdiction. So courts are comfortable allowing the appeals. Courts have reached a similar conclusion when the appelate voluntarily dismisses unresolved claims without prejudice. See CSX Transp., Inc. v. City of Garden City, 235 F.3d 1325, 1329 (11th Cir. 2000); Kirkland v. Nat’l Mortg. Network, Inc., 884 F.2d 1367, 1369–70 (11th Cir. 1989). To hold otherwise would permit appelletes to prevent an appeal.


197. In addition to exceptions, some courts have laid a trap for litigants whereby the voluntary dismissal forever precludes appellate review. See Lammon, supra note 99, at 182–87. Litigants get caught in the trap when they dismiss some of their claims without prejudice to appeal, but the appellate court dismisses the appeal, and the district court refuses to change the terms of the dismissal. See, e.g., CBX Res., L.L.C. v. Ave Am. Ins. Co., 959 F.3d 175, 176 (5th Cir. 2020). This leaves litigants in jurisdictional limbo—their case is over and done within the district court, but it is not final (and can never become final) for purposes of appeal.

198. See, e.g., Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach, 778 F.3d 390, 394 (2d Cir. 2015); India Breweries, Inc. v. Miller Brewing Co., 612 F.3d 651, 657 (7th Cir. 2010); Erie Cnty. Retirees Ass’n v. Cnty. of Erie, 220 F.3d 193, 201 (3d Cir. 2000).
voluntary, without-prejudice dismissal is final when a statute of limitations or some other impediment would bar refiling. The Ninth Circuit has a line of cases holding that a voluntary, without-prejudice dismissal results in a final decision if (1) the district court is meaningfully involved in the dismissal, and (2) there is no evidence of efforts to manipulate appellate jurisdiction. And at least one court has held that the voluntary, without-prejudice dismissal of an unresolved claim resulted in a final decision because the voluntarily dismissed claim was insignificant.

Two circuits have adopted the opposite rule: the voluntary, without-prejudice dismissal of unresolved claims is final. The Eighth Circuit has the most developed case law on this point. Since at least *Chrysler Motors Corp. v. Thomas Auto Co.*, it has held that the voluntary, without-prejudice dismissal of unresolved claims permits an appeal from the district court’s resolution of other claims. The Eighth Circuit has reasoned that the dismissal ends the case, which is the test for a final decision under Section 1291.

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199. See Dukore v. District of Columbia, 799 F.3d 1137, 1142 (D.C. Cir. 2015); Palka v. City of Chicago, 662 F.3d 428, 433 (7th Cir. 2011); Fassett v. Delta Kappa Epsilon (N.Y.), 807 F.2d 1150, 1155 (3d Cir. 1986). But see Mesa v. United States, 61 F.3d 20, 22 n.6 (11th Cir. 1995) (rejecting this statute-of-limitations exception and noting that appellate courts are poorly situated to determine if a limitations period has run).

200. See Galaza v. Wolf, 954 F.3d 1267, 1272 (9th Cir. 2020); Sneller v. City of Bainbridge Island, 606 F.3d 636, 638 (9th Cir. 2010); James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1070 (9th Cir. 2002). Other courts have emphasized the district court’s involvement when holding that voluntary, without-prejudice dismissal was final. See Dukore, 799 F.3d at 1142; Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987). Still others have suggested that district court involvement is irrelevant. See Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435–36 (7th Cir. 1992).

201. See Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

202. There are also some outlier cases in the circuits that reject finality. See, e.g., Munns v. Kerry, 782 F.3d 402, 408 n.4 (9th Cir. 2015) (holding that the voluntary dismissal of all claims against remaining defendants resulted in a final decision as to other claims because there was no evidence of an intent to manipulate appellate jurisdiction); Equity Inv. Partners, LP v. Lenz, 394 F.3d 1398, 1341 n.2 (11th Cir. 2003) (permitting an appeal from the without-prejudice dismissal of unresolved claims because the parties were not trying to manufacture an appeal); United States v. Kaufmann, 985 F.2d 884, 892 (7th Cir. 1993) (holding that the voluntary, without-prejudice dismissal of unresolved criminal counts was final because there was no intent to circumvent the normal appellate rules).

203. That case law is not entirely consistent. See Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 842 (8th Cir. 2013) (“In this circuit, unless the appellant’s claims are unequivocally dismissed with prejudice, there is no final appealable decision.”). 204. 939 F.2d 538 (8th Cir. 1991).

205. Id. at 540. *Chrysler Motors* relied on *Merchants & Planters Bank v. Smith*, 516 F.2d 355, 356 n.3 (8th Cir. 1975), which said that a summary-judgment decision was final because an unresolved counterclaim had been voluntarily dismissed after oral argument in the appeal. *Chrysler Motors*, 939 F.2d at 540. But *Merchants & Planters* did not specify whether the dismissal was with or without prejudice.

206. Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999).
jurisdictional one. The Eleventh Circuit similarly holds that voluntary, without-prejudice dismissals are final, at least when they come via a court order.

Microsoft has strengthened most courts’ attitudes against this kind of manufactured finality. That’s probably because these appeals implicated two of the forces driving Microsoft concern over piecemeal appeals and circumventing established rules of appellate jurisdiction. Because the claims dismissed without prejudice might be refiled, appellate courts believe that district court litigation is not necessarily over. It’s merely been paused with some likelihood of restarting after the appeal. And this voluntary-dismissal tactic is an end run around Rule 54(b). That rule tasks the district court with determining when the resolution of some (but not all) claims warrants an immediate appeal. Litigants take over when they attempt to appeal after the voluntary, without-prejudice dismissal of unresolved claims.

6. Conditional Dismissals of Unresolved Claims

Another variety of manufactured finality involves conditional dismissals. These appeals can look like other kinds of manufactured finality.

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207. Id.; see W. Am. Ins. Co. v. RLI Ins. Co., 698 F.3d 1069, 1071 n.1 (8th Cir. 2012) (criticizing “the use of dismissals without prejudice to manufacture appellate jurisdiction in circumvention of the final decision rule”); Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 519 F.3d 421, 425 n.4 (8th Cir. 2008) (“Despite our frequent warnings, many lawyers use this dismissal-without-prejudice tactic to evade the statute limiting our appellate jurisdiction to the review of final orders. Regrettably, we often review such bogus final orders . . . .”).

208. See Corley v. Long-Lewis, Inc., 965 F.3d 1222, 1231 (11th Cir. 2020); see also Hardwick v. CorrectHealth Bibb LLC, No. 22-10878, 2023 WL 4350574, at *2 (11th Cir. July 5, 2023) (stating that Corley “was limited to voluntary dismissals by court order under Rule 41(a)(2)”). Corley might be of only minor relevance, however, as the Eleventh Circuit has held that Rule 41 allows for the voluntary dismissal only of entire actions, not discrete claims. See Rosell v. VMSB, LLC, 67 F.4th 1141, 1143 (11th Cir. 2023) (holding that voluntary dismissals via a Rule 41(a)(2) motion permit the dismissal of only entire actions); Perry v. Schumacher Grp. of La., 891 F.3d 954, 958 (11th Cir. 2018) (holding that plaintiffs cannot use Rule 41(a)(1) noticed dismissals to voluntarily dismiss individual claims); see also In re Esteva, 60 F.3d 664, 669 (11th Cir. 2023) (reiterating Perry). So the only context in which Corley might apply are voluntary dismissals of all claims against some defendants, done to appeal the resolution of claims against other defendants—which the Eleventh Circuit has allowed. See id. at 677.


210. See, e.g., Rowland v. S. Health Partners, Inc., 4 F.4th 422, 427 (6th Cir. 2021); see also Swope v. Columbian Chems. Co., 281 F.3d 185, 193 (5th Cir. 2002); First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 801 (7th Cir. 2001); United Nat’l Ins. Co. v. R & D Latex Corp., 141 F.3d 916, 918 n.1 (9th Cir. 1998), as amended (May 14, 1998); Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

211. Conditional dismissals in the context of manufactured finality are different from situations in which the district court grants a motion for voluntary dismissal but imposes some conditions on refiling. See, e.g., Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 556 (9th Cir. 1986); LeCompte v. Mr. Chip, Inc., 528 F.2d 601,
The district court either issues an interlocutory decision that affects or effectively decides some claims, or it expressly resolves some (but not all) of the claims.\textsuperscript{212} The parties then agree to dismiss all unresolved claims, often with prejudice, but also with conditions.\textsuperscript{213} Sometimes the only condition attached to the dismissal is a right to reinstate the voluntarily dismissed claims upon reversal.\textsuperscript{214} Other times, the condition involves the express waiver of certain defenses, such as limitations and preclusion.\textsuperscript{215}

Nearly all courts hold that these conditional dismissals do not result in a final decision.\textsuperscript{216} The reasons are, by now, familiar. Conditional dismissals mean that district court proceedings are not necessarily over, thereby creating a risk of piecemeal review.\textsuperscript{217} Conditional dismissals also circumvent the limits on interlocutory review in Section 1292(b) and Rule 54(b).\textsuperscript{218}

Only the Second Circuit permits these conditional dismissals. In\textit{Purdy v. Zeldes},\textsuperscript{219} the Second Circuit held that a plaintiff could appeal from a conditional voluntary dismissal, as the plaintiff took some risk of losing the voluntarily dismissed claim.\textsuperscript{220} After losing on some claims, the plaintiff in\textit{Purdy} dismissed the remainder.\textsuperscript{221} The dismissal would be without prejudice if the court of appeals reversed the dismissal of the

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\textsuperscript{212} E.g., \textit{West v. Louisville Gas & Elec. Co.}, 920 F.3d 499, 502 (7th Cir. 2019) (conditional dismissal after the district court resolved all claims against one of two defendants); \textit{Page Plus of Atlanta, Inc. v. Owl Wireless, LLC}, 733 F.3d 658, 659 (6th Cir. 2013) (conditional dismissal after the district court decided liability but not damages).\textsuperscript{216}

\textsuperscript{213} If a litigant unilaterally claims the right to reinstate dismissed claims, the tactic is better categorized as one of the previous kinds of manufactured finality.


\textsuperscript{215} See, e.g., \textit{West}, 920 F.3d at 502 (describing the parties’ “tolling and standstill agreement” that permitted the plaintiff to reinstate claims if the court of appeals reversed and barred the defendant from raising a limitations defense).

\textsuperscript{216} See, e.g., \textit{id. at 506}; \textit{Blue}, 764 F.3d at 18–19; \textit{Page Plus of Atlanta}, 733 F.3d at 662; \textit{Orion Fin. Corp. of S.D. v. Am. Foods Grp., Inc.}, 201 F.3d 1047, 1049 (8th Cir. 2000).

\textsuperscript{217} See, e.g., \textit{Page Plus of Atlanta}, 733 F.3d at 660 (“The point of the finality requirement is not to let the parties pause the litigation, appeal, then resume the litigation on a half-abandoned claim if the case returns.”); see also \textit{Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.}, 316 F.3d 431 (3d Cir. 2005).

\textsuperscript{218} First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 801 (7th Cir. 2001) (noting that when the requirements for Rule 54(b) “are not satisfied, the parties and district judge are not at liberty to home-brew their own approach to obtaining appellate review while portions of the case remain unresolved”); see also \textit{Page Plus of Atlanta}, 733 F.3d at 660.

\textsuperscript{219} 337 F.3d 253 (2d Cir. 2003).

\textsuperscript{220} \textit{Id. at 258}.

\textsuperscript{221} \textit{Id. at 257}.
other claims; it would otherwise be with prejudice. The Second Circuit thought that the situation was meaningfully different from appeals in which unresolved claims are voluntarily dismissed without prejudice. The plaintiff was not “completely free” to refile the voluntarily dismissed claims. He instead took some risk that he would forever lose those claims. The Second Circuit concluded that this risk was sufficient to produce a final decision.

In many ways, conditional dismissals are not all that different from the unconditional varieties of manufactured finality that they resemble. If, for example, a district court decision has made a claim less attractive to pursue, the conditionality of a subsequent dismissal is merely another reason for disallowing the appeal. If instead the district court has effectively (though not technically) resolved the claims, a stipulation merely brings about the inevitable end of district court proceedings and any conditions for reinstating claims are superfluous.

The distinct characteristic of conditional dismissals is the express plan to reinstate the voluntarily dismissed claims. In some other kinds of manufactured finality, the refiling of voluntarily dismissed claims is a possibility. It might happen. Or it might not—a claimant might choose not to refile, a defense might bar refiling, or the district court might not allow it. Conditional dismissals make a difference when they remove these possible barriers to reinstating the voluntarily dismissed claims. When that happens, refiling is no longer a mere possibility. It’s expressly planned, and impediments have been cleared. That makes courts especially wary of conditional dismissals.

I do not expect Microsoft to change the chilly reception that conditional dismissals have received in the courts of appeals. Like voluntary, without-prejudice dismissals of unresolved claims, the possibility of refiling makes courts suspect that district court proceedings are not actually over. These dismissals also undermine the district court’s “dispatcher” role under Section 1292(b) and Rule 54(b). In short, conditional dismissals result in appeals “in fits and starts,” which “diminishes the role of the district court, delays the district court proceedings and wastes appellate court resources.”

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222. Id.
223. See id. (discussing Chappelle v. Beacon Commc’ns Corp., 84 F.3d 652 (2d Cir. 1996)).
224. Id. at 258.
225. Id. at 257.
228. See Blue v. D.C. Pub. Schs., 764 F.3d 11, 18 (D.C. Cir. 2014); see also First Health Grp. Corp. v. BCE Emergis Corp., 269 F.3d 800, 801 (7th Cir. 2001); Page Plus of Atlanta, Inc. v. Owl Wireless, LLC, 733 F.3d 658, 661 (6th Cir. 2013).
229. Page Plus of Atlanta, 733 F.3d at 661.
7. Failure-to-Prosecute Dismissals

Finally are appeals after dismissals for failure to prosecute. These are appealable, and the court of appeals will review the propriety of the dismissal. The more interesting question for present purposes is what else the court of appeals will review. The merger rule normally means that all interlocutory orders merge into a final judgment. But allowing litigants to appeal interlocutory decisions after those litigants invite a failure-to-prosecute dismissal raises the same concerns as several other kinds of manufactured finality—party manipulation and piecemeal review.230 There’s also the added concern about inviting and rewarding dilatory behavior.231

Most courts accordingly hold that dismissals for a failure to prosecute do not permit review of interlocutory orders.232 The rationale normally involves an exception to the merger rule.233 Courts hold that interlocutory decisions do not merge into—and thus cannot be reviewed in an appeal from—a dismissal for failure to prosecute.234

There are some outliers.235 Primary among them is the Second Circuit. Two decisions from that court—Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,236 and Allied Air Freight, Inc. v. Pan American World Airways, Inc.237—have allowed plenary review after failure-to-prosecute dismissals.238 The Second Circuit reasoned that litigants risk losing their claims by inviting a dismissal for failure to prosecute, thereby creating little risk of piecemeal review.239

There’s also the Third Circuit’s decision in Bethel v. McAllister Bros.,240 in which that court reviewed a new-trial order after the plaintiff refused

231. See John’s Insulation, Inc. v. L. Addison & Assocs., 156 F.3d 101, 105–06 (1st Cir. 1998); Ash v. Cvetkov, 739 F.2d 493, 497 (9th Cir. 1984).
232. For discussions of the circuit case law on this issue, see AdvantEdge Bus. Grp., L.L.C. v. Thomas E. Mestmaker & Assocs., 552 F.3d 1233, 1237–38 (10th Cir. 2009); see also John’s Insulation, 156 F.3d at 101.
233. See, e.g., Huey v. Teledyne, Inc., 608 F.2d 1234, 1240 (9th Cir. 1979). The Tenth Circuit has reached the same result via a prudential rule, not an exception to the merger rule. See AdvantEdge Bus. Grp., 552 F.3d at 1237–38.
234. See, e.g., Beadle v. City of Omaha, 983 F.3d 1073, 1076 (8th Cir. 2020); Griggs v. S.G.E. Mgmt., L.L.C., 905 F.3d 835, 845 n.54 (5th Cir. 2018); DuBose v. Minnesota, 893 F.2d 169, 171 (8th Cir. 1990); Marshall, 492 F.2d at 919.
235. See, e.g., Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 675 (5th Cir. 1982) (suggesting that the Fifth Circuit had rejected the rule for failure-to-prosecute appeals).
237. 393 F.2d 441 (2d Cir. 1968).
238. See Gary Plastic Packaging Corp., 903 F.2d at 179 (reviewing a class-certification denial after a failure to prosecute); Allied Air Freight, 393 F.2d at 444 (reviewing an interlocutory stay order after dismissal for failure to prosecute).
239. See Gary Plastic Packaging Corp., 903 F.2d at 179; Allied Air Freight, 393 F.2d at 444.
240. 81 F.3d 376 (3d Cir. 1996).
to proceed and had its claims dismissed. Bethel’s reasoning focused on the new-trial context. Because the plaintiff had disclaimed any intent to proceed with the retrial, the appeal would definitively resolve the litigation: either the Third Circuit would reinstate the prior judgment, or the case would be finally dismissed for failure to prosecute. So regardless of how the appeal was decided, the case was over. The case’s being over, the Third Circuit thought, distinguished Bethel from other failure-to-prosecute appeals.

And in Walton v. Bayer Corp., the Seventh Circuit held that a plaintiff could appeal the refusal to remand a suit after the action was dismissed for failure to respond to discovery. The court applied the normal merger rule to the failure-to-prosecute dismissal. The Seventh Circuit thought that reviewing the remand denial was efficient; the plaintiff had wagered her entire claim on jurisdiction (meaning an affirmation would end the action), and a reversal would avoid wasted proceedings in the district court.

Microsoft likely forecloses any further attempts to manufacture finality through failure-to-prosecute dismissals. Even before Microsoft, the Second Circuit had questioned the wisdom of case law on failure-to-prosecute appeals. Microsoft listed the Second Circuit’s decision in Gary Plastic Packaging Corp. as one of the cases on the wrong side of the split, meaning that Microsoft likely abrogated the decision. And in many ways, these appeals are merely a variation on voluntary dismissals after adverse interlocutory orders. The main difference is the method of ending district court proceedings. So the reasons for precluding manufactured appeals from adverse interlocutory orders apply just as much.

III. Rethinking the Definition of, and Responsibility for, Finality

The current system of federal appellate jurisdiction—consisting of a variety of statutory, rule-based, and court-created rules—is regularly maligned for its complexity, confusion, inconsistency, unpredictability, and rigidity. This area of the law is thus ripe for reform. As we imagine

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241. Id. at 383.
242. Id. at 379–80.
243. Id.
244. Id. at 380–81.
245. 643 F.3d 994 (7th Cir. 2011).
246. Id. at 997.
247. Id.
248. Id. at 997–98.
251. See, e.g., Carrington, supra note 42, at 165–66; Cooper, supra note 17, at 157; Eisenberg & Morrison, supra note 42, at 291; see also Lammon, Finality, supra note 1, at 1821–22 (collecting criticisms of federal appellate jurisdiction); Adam N. Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. Rev. 1237, 1238–39 (2007) (same).
what wholesale reform of federal appellate jurisdiction might look like, manufactured finality suggests two topics worth considering. The first has to do with the way we define a “final” decision. The second concerns the extent to which litigants—rather than Congress, rule makers, and courts—should determine when interlocutory appeal should occur.

A. Final if Finished

1. The Traditional, Ever-Evolving Definition of “Final”

_Catlin v. United States_\(^{252}\) provides the classic definition of a final decision: “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.”\(^{253}\) Within this definition are two events.\(^{254}\) First is the resolution of all claims, captured in the phrase “ends the litigation on the merits.”\(^{255}\) Second is the end of district court proceedings, captured in the phrase “leaves nothing for the court to do.”\(^{256}\) These are distinct events. Granted, they often coincide; once the district court has resolved all the parties’ claims, the merits litigation is over and the district court often has nothing else to do. But not always. There’s a difference between an action’s being resolved and a district court’s being done. A district court might believe that it is done with an action despite not having resolved all the claims in that action. And a district court might have more to do after resolving an action’s merits.

Modern finality doctrine largely focuses on the first event—the resolution of all claims. We can see this in several kinds of manufactured finality. Consider voluntary, without-prejudice dismissals of all unresolved claims. Courts hold that these dismissals do not produce final decisions largely due to the district court’s not having resolved all the parties’ claims. The voluntarily dismissed claims are effectively paused and might be resumed after the appeal. Conditional dismissals are similar, although the freedom to resume the paused claims expressly depends on the appeal’s outcomes. Hence the general rules that these dismissals preclude finality.

There are other examples beyond manufactured finality. A decision on the merits of the parties’ claims is final despite an unresolved issue of attorney fees.\(^{257}\) When adopting this rule, the Supreme Court

\(^{252}\) 324 U.S. 229 (1945).

\(^{253}\) Id. at 233; see also WRIGHT, MILLER & COOPER, supra note 4, § 3909 (noting that Catlin’s definition is “one of the most-quoted judicial statements” on the meaning of a final decision).

\(^{254}\) Lammon, supra note 99, at 190.

\(^{255}\) Catlin, 324 U.S. at 233. Note, a decision “on the merits” as that phrase is used in the finality context does not necessarily mean a decision on the merits of the parties’ claims. A district court decision that dismisses an action for a lack of subject-matter jurisdiction, for example, is final, even though a court without jurisdiction necessarily cannot determine a claim’s merits.

\(^{256}\) Id.

emphasized that finality comes with a resolution of an action’s merits. So a decision on the claims is final and appealable despite the district courts’ having more to do—namely, determine fees. Similarly, courts of appeals frequently hold that there is no final decision when the district court—despite entering a final judgment, closing the case, or otherwise indicating that it is done—overlooked one of the parties’ claims. In those cases, the district court had washed its hands of the case. But the failure to expressly resolve all claims precluded finality.

This isn’t to say that all finality doctrine looks to the substance of the district court’s decision to determine whether the district court has resolved all claims. In some cases, courts look beyond the classic definition of a final decision. They instead give “final” an entirely new meaning, often in an effort to craft pragmatic rules of appellate jurisdiction. Microsoft is one example. Recall that the plaintiffs in Microsoft voluntarily dismissed their claims with prejudice. That meant all claims in the case had been resolved, and the district court had nothing left to do. Yet there was no final decision. Other examples abound.

Granted, judicial elaborations on what it means for a decision to be “final” have been necessary. The statutes and procedural rules governing appellate jurisdiction are few, and they alone don’t meet the needs of modern litigation. Courts have been left the task of filling in the gaps. In doing so, courts have used case-by-case interpretations of Section 1291. But just because this has been necessary does not mean it has been good. It hasn’t. The federal courts have made a hash of finality. This has led to substantial uncertainty and litigation over what it means for a decision to be final. And that’s not acceptable for a rule that involves short, jurisdictional deadlines.

258. Id. at 199.
259. Id. at 200.
260. Id. at 202–03; see also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emps., 571 U.S. 177, 179 (2014) (reiterating the rule in Budinich).
261. See, e.g., RJ Control Consultants, Inc. v. Multiject, LLC, No. 22-1102, 2023 WL 2785764, at *1–2 (6th Cir. Apr. 5, 2023) (holding that the district court’s judgment dismissing the case was not final because it did not resolve the defendants’ counterclaims); SD Voice v. Noem, 987 F.3d 1186, 1191–92 (8th Cir. 2021) (holding that even though a district court “signaled that the case was finished,” the court’s decision was not final—and the plaintiff’s appeal should be dismissed—because one of the plaintiff’s claims was unresolved); Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc., 170 F.3d 536, 538–39 (5th Cir. 1999) (noting that a district court’s decision was “[c]learly” not final, despite the district court’s entering a final judgment, due to unresolved claims and crossclaims); cf. Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 895 (7th Cir. 2011) (finding finality despite one claim not being expressly resolved because the district court’s decision necessarily resolved that claim).
263. See Lammon, Finality, supra note 1, at 1833–34.
264. See id. at 1825–37.
2. A New Conception of Finality

Some of the reform efforts for federal appellate jurisdiction should accordingly focus on redefining “final” for the traditional final-judgment appeal. And when those reform efforts do, a new conception of finality might focus on the other event in the traditional definition of a final decision: when the district court has finished with a case. I call this the “final-if-finished” conception of finality. The rule would be that once the district court is done with a case, it has issued a final decision, and the court of appeals has jurisdiction.

Courts sometimes hint at this conception of finality. It appears most clearly in decisions from the Seventh Circuit. In Chase Manhattan Mortgage Corp. v. Moore, for example, the Seventh Circuit said that the test for finality “is not the adequacy of the judgment but whether the district court has finished with the case.” There’s a difference, the court explained, between a “final order” and the “proper disposition” of an action. A judgment can be “radically defective” in not adjudicating all of the parties’ claims or in not awarding proper relief. But neither of those would preclude finality. Once the district court has “end[ed] the lawsuit, the judgment can be appealed.” Similarly, in Hill v. Potter, the court explained that “[t]he test for finality is not whether the suit is dismissed with prejudice or without prejudice, on the merits or on a jurisdictional ground or on a procedural ground such as failure to exhaust administrative remedies when exhaustion is not a jurisdictional

265. See Bryan Lammon, Cumulative Finality, 52 GA. L. Rev. 767, 827–30 (2018). Finality also plays a role in appeals that come well before or after the end of district court proceedings, as well as in the scope of those appeals. Lammon, Finality, supra note 1, at 1837–50 (discussing finality’s role in rules governing appeals well before the end of district court proceedings and rules governing the scope of an appeal); Bryan Lammon, Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction, 51 U. Rich. L. Rev. 371, 393–400 (2017) (discussing finality’s role in rules governing appeals in post-judgment proceedings). Those other uses of finality raise their own issues and must be addressed separately from appeals at or near the end of district court proceedings, a topic I leave for another day.

266. See, e.g., United States v. Wallace & Tiernan Co., 336 U.S. 793, 794 n.1 (1949) (in the course of holding that a without-prejudice dismissal was a final decision, noting that “denial of relief and dismissal of the case ended this suit so far as the District Court was concerned”); Umbrella Inv. Grp., L.L.C. v. Wolters Kluwer Fin. Servs., Inc., 972 F.3d 710, 713 (5th Cir. 2020) (holding that a decision was final when the district court had “denied relief, dismissed the case, and ended this suit so far as the court was concerned”).

267. See also Vona v. County of Niagara, 119 F.3d 201, 206 (2d Cir. 1997) (holding that a decision is final, despite not resolving all claims, because the district court had closed the case).

268. 446 F.3d 725 (7th Cir. 2006).

269. Id. at 726.

270. Id. at 727.

271. Id. at 726–27.

272. Id. at 726.

273. 352 F.3d 1142 (7th Cir. 2003).
requirement.”274 “The test is whether the district court has finished with the case.”275 And concurring in Carter v. Buesgen,276 the Seventh Circuit’s Judge Easterbrook said that “a decision closing the case always is final.”277

This final-if-finished rule might have some benefits. First, it’s intuitive. The district court’s washing its hands of a case is probably what most lawyers would think of as a final decision.278 And where possible, the rules of finality should be intuitive. For those steeped in the law of appellate jurisdiction, counterintuitive rules might be acceptable; experts can navigate much of this law, although it still produces instances of uncertainty.279 But the rules of appellate jurisdiction are for everyone, as an appeal is possible in every federal case. When rules run counter to lawyers’ instincts, litigants risk losing opportunities to appeal, and sometimes they lose their right to appeal at all.280

Second, and relatedly, final-if-finished might be a simple and clear rule. The rules of appellate jurisdiction should be as simple and clear as possible.281 Confusion over whether an appeal is immediately available

274. Id. at 1144.
275. Id.
276. 10 F.4th 715 (7th Cir. 2021).
277. Id. at 724–25 (Easterbrook, J., concurring); see also Greenhill v. Vartanian, 917 F.3d 984, 987 (7th Cir. 2019) (“[A judgment that did not provide the relief to which the prevailing party was entitled] shows that the district court is done with the case, which permits an appeal, but it does not resolve the parties’ dispute.”); Thornton v. M7 Aerospace LP, 796 F.3d 757, 763 (7th Cir. 2015) (“Once a district court signals that it is finished with its work by entering final judgment under Rule 58, its order is final and appealable.”); TDK Elecs. Corp. v. Draiman, 321 F.3d 677, 678 (7th Cir. 2003) (“[B]ecause the magistrate judge made it clear that he has washed his hands of the case, the resolution is as final as it can be. Nothing more ever will happen in the district court.”).
278. Cf. Note, Finality of Decision for Purposes of Appeal, 33 Harv. L. Rev. 1076, 1076–77 (1920) (explaining that a “final” decision is the last in an action, not the final resolution of some particular issue).
279. See Cooper, supra note 17, at 157 (“Lawyers and judges who are expert in working with the system are able to identify the doctrinal rules and lines of argument, but often encounter elusive uncertainty in seeking clear answers to many problems.”).
281. See Budinich, 486 U.S. at 202 (“The time of appealability, having jurisdictional consequences, should always all be clear.”); Carter, 10 F.4th at 724 (Easterbrook, J., concurring) (“Appellate jurisdiction is supposed to be determined using simple, bright-line rules.”); Kilgus v. U.S. Fire Ins. Co., 811 F.2d 1112, 1117 (7th Cir. 1987) (stating, in the context of the time for filing an appeal, that “[t]he mechanical application of a jurisdictional rule, the better,” as “[t]he chief and often the only virtue of a jurisdictional rule is clarity”); Cooper, supra note 17, at 163 (“It is important that the rules for timing appeals be clear and well understood.”).
or must wait until some later time can lead to protective appeals, as litigants who are uncertain about appellate jurisdiction want to avoid missing an opportunity for review. When litigants do so, the result can be substantial procedural litigation over what counts as a “final” decision and ultimately wasted proceedings when the court of appeals concludes that a decision is not final.

Things are much worse when confusion leads to a late appeal. Litigants often have a brief window of time in which to file an appeal. Failure to file a timely appeal in a civil case is a jurisdictional bar to review. Although an untimely appeal is not a jurisdictional defect in criminal cases, courts will dismiss late criminal appeals so long as the government raises the issue.

A final-if-finished rule could thus bring some much-needed simplicity and clarity to appeals that come at or near the end of district court proceedings. It’s easier to determine whether a district court has finished with a case than it is to examine the substance of the judgment. As for determining when a district court is done, it might be helpful to simply ask. Arizona has something like this in Arizona Rule of Civil Procedure 54(c), which says that “[a] judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 54(c).” The Supreme Court of Wisconsin adopted a similar rule via judicial decision. Additional clarity would come if district courts needed to declare when they’re finished, with the appeal clock not starting until they do. Such a requirement would be similar to the pre-2003 version of Federal Rule of Civil Procedure 58, which (with narrow exceptions) required that a judgment be set out in a separate document before the appeal clock began to run. Under that version of the rule, parties could wait forever (as one court put it, “until Judgment Day”) before appealing if that’s necessary.

This is not to say that all jurisdictional rules should (or can) be clear. See generally Scott Dodson, The Complexity of Jurisdictional Clarity, 97 Va. L. Rev. 1 (2011) (arguing that clarity in jurisdictional rules is not always attainable or desirable).


284. Fed. R. App. P. 4(b) (setting a fourteen-day deadline for appeals in criminal cases); United States v. Lopez, 562 F.3d 1309, 1313 (11th Cir. 2009) (explaining that the criminal-appeal deadline, while not jurisdictional, must be applied if the government objects to a late appeal).

285. A final-if-finished rule would not affect courts’ interpretations of “final” to permit appeals before the end of district court proceedings, such as the collateral-order doctrine. Those must be addressed separately.


287. See Wambolt v. W. Bend Mut. Ins. Co., 728 N.W.2d 670, 673 (Wis. 2007) (“In order to further limit the confusion regarding what documents are final orders or judgments for the purpose of appeal, we will, commencing September 1, 2007, require a statement on the face of a document that it is final for the purpose of appeal.”).

288. See Lammon, Finality, supra note 1, at 1851.
how long it took the district court to set out the judgment in a separate
document. The rule thus ensured that litigants would know when the
time to appeal began running.

This Article is only a starting point for thinking about the final-if-
finished approach. And shifting the focus of finality to whether the
district court is done with an action would require rethinking several
existing rules of appellate jurisdiction. But appellate jurisdiction could
use a shake-up. The current law often leaves litigants and courts confu-
sed over whether appellate jurisdiction exists. One way to simplify
matters might be to focus on what a final decision sounds like: a decision
that marks the end of an action.

3. A Case Study: Manufactured Finality

For now, let’s consider how a final-if-finished approach might change
some of the existing rules on manufactured finality.

a. Voluntary Dismissals Due to Adverse Interlocutory Decisions

Let’s start with the Microsoft scenario: a voluntary dismissal after an
interlocutory decision that makes a claim less attractive. These voluntary
dismissals end district court proceedings. So under a final-if-finished
approach, there would be a final decision under Section 1291.

This is not to say that litigants could use this tactic to obtain
appellate review of interlocutory orders. There’s another (and much
simpler) rule to prevent these appeals: waiver. Federal courts (including
the Supreme Court) have long held that litigants waive their right
to appeal when they (1) have not lost on the merits of their claims and
(2) invite an adverse judgment. So despite the finality of these dismissals,
appellate review is still unavailable due to waiver.

This rule goes back to at least the Supreme Court’s 1879 decision in
Pacific Railroad v. Ketchum, in which the Court explained that a con-
sent judgment did not deprive it of jurisdiction, though the consent can
waive issues on appeal. The Court’s jurisdictional provision at that
time “provide[d] that an appeal shall be allowed from all final decrees
in the circuit courts,” and that the Court “shall receive, hear, and deter-
mine such appeals.” There was accordingly a right to appeal from

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290. See Cooper, supra note 17, at 157 (“Those who are less than expert are apt
to go far astray.”).
291. See generally Lammon, supra note 12.
292. 101 U.S. 289 (1879).
293. Id. at 296–97. It might go back further. Both United States v. Evans, 5 U.S.
(1 Cranch) 280, 280 (1809), and Evans v. Phillips, 14 U.S. (1 Wheat.) 73, 74 (1819),
hold that the Court will not review judgments to which an appellant consented,
though the grounds for these holdings—waiver or jurisdiction—are not clear.
final decrees. Consent to a judgment didn’t affect jurisdiction. Consent could, however, affect what the Court could review. The Court “cannot consider any errors that may be assigned which were in law waived by the consent.” And “[i]f all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing.” In either case, the Court “must still receive and decide the case.”

Similarly, in 1881’s United States v. Babbitt, the Supreme Court held that consent to a judgment waived any claim of error. The government in Babbitt had won before the Court of Claims, but it asked that court to enter a judgment against it to facilitate appellate review. Apparently Babbitt was one of several cases raising the same issue (whether to include time at West Point within the calculation of army officers’ longevity pay), and the government wanted an appellate ruling on the issue. The Supreme Court held that the government’s consent to the judgment prevented the government from taking an appeal. “[W]hen a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent.”

Contrast Ketchum and Babbitt with Thomsen v. Cayser, in which the Court held that the plaintiffs had not waived a challenge to a judgment when they declined to pursue a new trial on a different theory of relief. The plaintiffs initially prevailed in a trial of their antitrust claims, though the trial court did not require that the plaintiffs prove that the restraint at issue was unreasonable. The court of appeals reversed—holding that the plaintiffs needed to prove unreasonableness—and ordered a new trial at which the plaintiffs could try to prove unreasonableness. But the plaintiffs did not want to pursue that theory. So they waived their right to a retrial and asked the court to enter an appropriate judgment. The Supreme Court held that the plaintiffs had not waived any challenge.

295. Id.
296. Id.
297. Id. (“If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent . . . .”).
298. Id.
299. Id.
300. Id.
301. 104 U.S. 767 (1881).
302. Id. at 768.
303. Id.
304. Id.
305. Id.
306. Id.
308. Id. at 83.
309. Id. at 75.
310. Id. at 75–76.
311. Id. at 76.
to the judgment: “The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.”

Consent to the judgment is a much more straightforward resolution of the Microsoft problem. Again, the plaintiffs had not lost on the merits when they voluntarily dismissed their claims with prejudice. So when they sought to dismiss their claims with prejudice, they were not simply seeking to formalize their loss in a final judgment. They instead sought to end district court proceedings while they still had a chance to win. That’s consent to an adverse judgment. And that waives the right to appeal.

A final-if-finished approach would thus not change the outcome of these appeals. But that approach would prevent them from twisting finality into something unrecognizable.

b. Voluntary, Without-Prejudice Dismissals of Unresolved Claims

What about voluntary, without-prejudice dismissal of unresolved claims? Again, under the final-if-finished approach, these would result in a final decision. After the voluntary dismissal, there is nothing left for the district court to do. To be sure, the voluntarily dismissed claims might resurface in the future. But the district court is still done.

This would be a massive change in the rules of appellate jurisdiction. Recall that only two circuits regularly hold that voluntary, without-prejudice dismissals produce final decisions. So the final-if-finished rule would seemingly open the door to parties’ circumventing Rule 54(b) and home-brewing their own interlocutory appeals in multi-claim cases. The evils of manufactured finality would run amok.

There might be one way to stop these appeals: prevent claimants from dismissing discrete claims—rather than entire actions—under Rule 41. The rule’s provisions on voluntary dismissals speak of dismissing “actions,” and other parts of Rule 41 distinguish between claims and actions. This has led some courts to conclude that claimants can dismiss only entire actions, not discrete claims, under Rule 41. If that’s the rule, then manufactured appeals via the voluntary, without-prejudice dismissal of unresolved claims shouldn’t happen.

312. Id. at 83.
313. See Wright, Miller & Cooper, supra note 4, § 3914.8.1 (“Dismissal without prejudice, leaving the way open to revive much or all of the action in the event of reversal, would dramatically increase the inroads that could be made on the final judgment rule.”).
314. See Fed. R. Civ. P. 41(b) (“If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.”).
315. See, e.g., Perry v. Schumacher Grp. of La., 891 F.3d 954, 958 (11th Cir. 2018).
But rather than rely on a questionable reading of Rule 41 to block these appeals, I want to address them more directly.\textsuperscript{316} In doing so, I don’t see these appeals as terribly problematic.

In at least two scenarios, I don’t even find voluntary dismissals of unresolved claims to be objectionable. The first involves multiple defendants—the district court resolves all claims against some defendants, and the claimant voluntarily dismisses claims against all other defendants without prejudice.\textsuperscript{317} Those claims might be reinstated. But nothing required that these claims and defendants be joined in the first place. The plaintiff could have brought its claims against each defendant in separate proceedings. All the voluntary dismissal does is “unjoin” the joined defendants.\textsuperscript{318}

The second scenario involves unrelated claims—the district court resolves some of the claims, and the claimant voluntarily dismisses all unrelated claims without prejudice. Again, these claims might be reinstated in some court at some point in the future. But nothing—neither the Federal Rules of Civil Procedure nor the law of claim preclusion—required that they be brought alongside the resolved claims. The plaintiff could have brought these unrelated claims in a separate suit. So once again, all the voluntary dismissal does is “unjoin” the unrelated claims.

In both scenarios, the only reason for rejecting “un-joinder” is the traditional view that all claims made part of an action—whether they needed to be or not—must be resolved for that action to be final.\textsuperscript{319} This view turns joinder into a commitment that must be formally undone via an amended pleading or severance.\textsuperscript{320} This commitment might encourage joinder and thus efficient dispute resolution. And perhaps that’s a

\textsuperscript{316} I’m also not entirely convinced by the narrow reading of Rule 41. See Bryan Lammon, Finality After Rule 41 Dismissals of Claims & Actions, FINAL DECISIONS (Feb. 20, 2023), https://finaldecisions.org/finality-after-rule-41-dismissals-of-claims-actions [https://perma.cc/G7VN-MW89].

\textsuperscript{317} Even courts that generally prohibit using Rule 41 to dismiss discrete claims sometimes allow claimants to dismiss all claims against some defendants under Rule 41. See, e.g., Pedrina v. Chun, 987 F.2d 608 (9th Cir. 1993).

\textsuperscript{318} See Duke Energy Trading & Mkgt., L.L.C. v. Davis, 267 F.3d 1042, 1049 (9th Cir. 2001); Missouri ex rel. Nixon v. Coeur D’Alene Tribe, 164 F.3d 1102, 1106 (8th Cir. 1999).

\textsuperscript{319} See Constr. Aggregates, Ltd. v. Forest Commodities Corp., 147 F.3d 1334, 1337 (11th Cir. 1998) (per curiam) (rejecting this “un-joinder” concept because, although the voluntarily dismissed claim did not need to be filed, it was, and the court would deal with the case as filed).

\textsuperscript{320} District courts can undo joinder by authorizing amendments to the pleadings under Rule 15(a)(2) that remove claims or parties and by severing claims or parties under Rule 21. See Corley v. Long-Lewis, Inc., 965 F.3d 1222, 1237–38 (11th Cir. 2020) (Pryor, C.J., concurring). And parties can agree to amendments that drop claims under Rule 15(a)(2). See Silver Comet Terminal Partners, LLC v. Paulding Cnty. Airport Auth., No. 21-12906, 2023 WL 2988443, at *9–10 (11th Cir. Apr. 18, 2023) (per curiam). But even amendments are not a certain path to creating a final decision, as there’s some authority that the dropping of a claim via amendment must be with prejudice to the claim’s refiling for there to be a final decision. See Campbell v. Altec Indus., Inc., 605 F.3d 839, 841 n.1 (11th Cir. 2010).
good reason for prohibiting "un-joinder." But it has nothing to do with finality.

All that remains are cases in which claimants voluntarily dismiss claims that are related to resolved claims and thus need to be brought to avoid preclusion. Here, there is a claim-splitting issue. An affirmance on appeal will likely preclude refiling of the voluntarily dismissed claims. But a reversal would permit the claimant to reinstate them. 321 That’s a pretty clear end run around Rule 54(b).

Ultimately, the issue is whether risking these sorts of end runs is acceptable. I think it is. Odds are that the court of appeals will affirm the district court’s decision. Claim preclusion will then probably bar the refiling of related, voluntarily dismissed claims. Only if the court of appeals reverses is there a real chance of refiling. Even then, the onus is on the claimant to reinstate the voluntarily dismissed claim. And if the claimant was willing to risk a claim to secure an immediate appeal, that claim is probably not terribly important.

So refiling is hardly certain. As one member of the Rule 41 Subcommittee of the Advisory Committee on Civil Rules recently observed, “[e]ven focusing on the cases in which defendants resist dismissal without prejudice, only one in fifty ever returns.” 322 So “[t]he likelihood is that an abandoned claim, even without prejudice, will not actually be revived later.” 323

The acceptability of these appeals likely turns on their incidence, which is ultimately an empirical question. We can only guess at how litigants will respond to a change in the rules. I suspect that the incidence will increase, though it would not be terribly high. And that makes me think the benefits of a final-if-finished approach might be worth it in this context.

B. Parties and Interlocutory Appeals

As things stand, the parties to a lawsuit have little say in when they can appeal before the end of district court proceedings. Congress sets the general rules for interlocutory appeals, with the Rules Committee occasionally adding its own touches. The rest comes from the courts. And throughout those rules is a running theme of court control—the courts (district, appellate, or both) largely control access to appellate review before the end of district court proceedings. Certified appeals under Section 1292(b), for example, require both the district court and court of appeals to allow the appeal. District courts have discretion to enter partial judgments under Rule 54(b). And the courts of appeals

323. Id.
have discretion in granting appeals under Rule 23(f) and in reviewing orders via mandamus.

To be sure, litigants have some say in things. They invoke these avenues to appellate review through motions and petitions. And the parties’ agreement that one of these avenues is appropriate probably increases the odds of the courts’ allowing an appeal.\(^\text{324}\) Still, courts largely determine if and when interlocutory review will occur.

This near-exclusive court control stands in some tension with the interests behind appeal timing. Some of those interests concern the courts, such as protecting the district court’s authority and minimizing appellate workloads. But some concern the parties (or concern the parties, too). Recall that one reason for delaying appeals is avoiding both delay in district court proceedings and the potential harassment of multiple appeals from well-resourced parties.\(^\text{325}\) And reasons for allowing immediate appeals include avoiding potentially irreparable harm to the parties and avoiding unnecessary district court proceedings. So litigants’ interests have long been part of the analysis.

Manufactured finality suggests that litigants want—and perhaps should have—some more control over their access to appellate review. When claimants unilaterally dismiss claims to seek immediate review, that suggests they do not mind the delay from, or inconvenience of, interlocutory review. When parties agree to dismiss claims, it appears that neither side is concerned about those potential costs. And when district courts bless these agreements, it appears that everyone—except the court of appeals—thinks immediate review is worth it. Parties might also be good at identifying issues that warrant immediate review, circumstances in which they face irreparable costs, or situations in which immediate review could avoid what might later turn out to be unnecessary district court proceedings.\(^\text{326}\)

Consider the Seventh Circuit’s decision in *Horwitz v. Alloy Automotive Co.*\(^\text{327}\) The district court dismissed some of the plaintiffs’ claims, and the plaintiffs wanted the court of appeals to review that dismissal before proceeding to trial on the remaining claims.\(^\text{328}\) At a hearing on how to facilitate an appeal, the district judge complained that he “can never get the Seventh Circuit to take an interlocutory appeal” under Section 1292(b) or Rule 54(b).\(^\text{329}\) So the parties and district court agreed


\(^{325}\) See *supra* Section II.A.

\(^{326}\) See Pfander & Krohn, *supra* note 324, at 1058 (arguing that parties can identify situations that warrant interlocutory appeals).

\(^{327}\) 957 F.2d 1431 (7th Cir. 1992).

\(^{328}\) Id. at 1432.

\(^{329}\) Id. at 1438. The district court added that the Seventh Circuit was “never ever going to take an interlocutory appeal in a case such as *[Horwitz]*, even though it made no “economic sense to try the balance of the case.” Id.
to dismiss all unresolved claims “without prejudice to refiling.” The Seventh Circuit dismissed the subsequent appeal. District court litigation was not over—“[e]verybody, including the district court, expect[ed] to see this case again”—so there was no final decision. The Seventh Circuit was technically correct under the prevailing view of finality. But the case raises the question of whether the parties and district court had identified an appeal that the Seventh Circuit should have heard, and whether parties (and perhaps the district court) can do so more generally.

Experience with manufactured finality thus lends some support to suggestions for greater party control over interlocutory appeals. One such suggestion comes from James Pfander and David Pekarek Krohn. They would allow parties to agree to seek an interlocutory appeal, which the district court would then have discretion to allow. Pfander and Krohn suggest that doing so would let parties identify when an immediate appeal is warranted, something that is difficult to do with ex ante categorical rules. And district court involvement protects against the disruption that might come from full party control.

One uncertainty with Pfander and Krohn’s proposal is how frequently parties would agree to seek an interlocutory appeal. Experience with manufactured finality suggests that this could happen more frequently than one might think. After all, every case in which the parties stipulated to dismiss all unresolved claims to facilitate an appeal is a situation in which Pfander and Krohn’s proposal could have worked.

Conclusion

The tension between Microsoft’s narrow holding and its broad reasoning—coupled with the frequent overlooking of the different kinds of manufactured finality—has led to significant confusion (and some bad decisions) in this area. In this Article, I explained the different kinds of manufactured finality and the impact (if any) that Microsoft should have on each. But studying manufactured finality suggests looking beyond Microsoft and its definition of finality for new, simpler, and better ways of defining a final decision. And litigants’ attempts to manufacture finality suggests that greater party control over interlocutory appeals just might work.

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330. Id. at 1433.
331. Id. at 1437.
332. Id. at 1435–36.
333. See, e.g., Kenneth K. Kilbert, Instant Replay and Interlocutory Appeals, 69 BAYLOR L. REV. 267 (2017) (arguing for instant-replay-like review, where each side could take one interlocutory appeal as of right).
334. See Pfander & Krohn, supra note 324.
335. Id. at 1053.
336. Id.; see also id. at 1059–60.
337. Id. at 1053–54.
338. Id. at 1090–94.