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

Gary A. Rome

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

I. INTRODUCTION

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

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

3. See McLish v. Roff, 141 U.S. 661 (1891). For a discussion of McLish and the requirement of finality under the common law, see notes 29-30 and accompanying text infra. See also Bachowski v. Usery, 545 F.2d 363, 367 (3d Cir. 1976).
4. 28 U.S.C. § 1291 (1976). Section 1291 provides: “The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States [and of associated territories] except where a direct review may be had in the Supreme Court.” Id. (emphasis added).

(884)
impact of the Third Circuit’s narrow approach is accentuated by the fact that, since finality is the easiest and clearest basis for appeal, litigants in federal courts most often initially assert section 1291 as the jurisdictional ground for their appeals. This comment’s historical review of the finality requirement will suggest that, for purposes of appeal, the courts of appeals should be less restrictive than the Third Circuit has been in defining “final decisions” under section 1291.

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

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

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

11. See notes 27-74 and accompanying text infra.
13. Compare 28 U.S.C. § 1257 (1976) with id. § 1291. Section 1257 provides that the Supreme Court may review certain “[f]inal judgments or decrees rendered by the highest court of a State.” Id. § 1257. For the text of § 1291, see note 4 supra.
15. See notes 75-88 and accompanying text infra.
18. See notes 38-74 and accompanying text infra.
tions or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.”20 In contrast to their divergent application of section 1291, both the Supreme Court and the Third Circuit have adopted a restrictive approach in reviewing the use of section 1292(a)(1).21 In addition, although rarely invoked, other avenues are available for appeals in the federal courts. Because of the equally restrictive approaches taken by the Supreme Court and the Third Circuit with respect to these avenues and with respect to section 1292(a)(1), only a brief overview of their application will be presented.22

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

A. Background

Section 1291 grants jurisdiction to the courts of appeals to review “final decisions of the district courts of the United States.”23 While the finality requirement of section 1291 applies to different substantive areas of the law—including civil24 and criminal appeals25—the threshold question in each case is whether a final decision has been rendered by the district court.26

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

22. For a discussion of the remaining avenues of appeal, see notes 177-215 and accompanying text infra.
23. 28 U.S.C. § 1291 (1976). It should be noted that, under the language of § 1291, no distinction is made between criminal and civil appeals. See id. The courts, however, have emphasized that the “final decision” requirement is of particular importance in criminal prosecutions. See United States v. MacDonald, 435 U.S. 850, 853-54 (1978); Abney v. United States, 431 U.S. 651, 657 (1977); DiBella v. United States, 369 U.S. 121, 126 (1962); Cobbleidick v. United States, 305 U.S. 323, 325-26 (1940); United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979). For a discussion of the rationale behind this emphasis, see notes 114-27 and accompanying text infra.
25. See, e.g., In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 804, 806 (3d Cir. 1979)(per curiam); In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); In re Grand Jury Empanelled (Colucci), 597 F.2d 851 (3d Cir. 1979).
27. Act of Sept. 24, 1789, ch. 20, §§ 21-22, 25, 1 Stat. 83, 83-87 (1789) (current version at 28 U.S.C. §§ 1257, 1291 (1976)). Section 21 provided that “from final decrees in a district court in causes of admiralty and maritime jurisdiction, . . . an appeal shall be allowed to the next circuit court.” Id. § 21. Section 22 provided that “final decrees and judgments in civil actions in a district court, . . . may be re-examined, and reversed or affirmed in a circuit court . . . upon a
jurisdiction only over final dispositions of the trial courts. The statutory requirement of finality reflected the prior common law which had apparently developed without an explicit rationale. This early finality restriction was expressed by the statute in terms of "final decrees" and "final judgments."—language which has been adopted in current provisions. Section 1291, however, is unique in requiring strictly final "decisions".

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

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


29. See McList v. Roff, 141 U.S. 661, 665 (1991). The McList Court, reading a finality requirement into a statute authorizing writs of error to be taken to the Supreme Court, noted that "[a]t common law no writ of error could be brought except on a final judgment." Id. Thus, the McList Court observed that the statutory limitation of the appellate jurisdiction of the Supreme Court to final judgments or decrees "was only declaratory of a well settled and ancient rule of English practice" based upon writs of error. Id.


35. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 514, 546 (1949). The Cohen Court further noted that the effect of the finality requirement "is to disallow appeal from any decision which is tentative, informal or incomplete." Id. See also Coopers & Lybrand v. Livesey, 437 U.S. 463, 468 (1978).
occasioned by unrestricted intermediate appeals. The obstruction of just
claims is similarly avoided by prohibiting disruptive separate appeals de-
digned to deliberately harass and create further expense.

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

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

37. See Cobbledick v. United States, 309 U.S. 323, 325 (1940). The Cobbledick Court
reasoned that the finality requirements of § 1291 were supported by the fact that "the right to a
judgment from more than one court is a matter of grace and not a necessary ingredient of
justice." Id. See also Abney v. United States, 431 U.S. 651, 656 (1977).
38. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 n.9 (1974); McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892). As early as 1892, the McGourkey Court noted
that "[p]robably no question of equity practice has been the subject of more frequent discussion
in this court than the finality of decrees. It has usually arisen upon appeals taken from decrees
claimed to be interlocutory." 146 U.S. at 544-45. See also Dickinson v. Petroleum Conversion
United States Steel Corp., 379 U.S. 148, 152 (1964); Dickinson v. Petroleum Conversion Corp.,
338 U.S. 507, 508 (1950); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949);
McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892); Bachowski v. Usery, 545
1978) with id. at 1352-57 (Gibbons, J., dissenting).

Perhaps the best summary of the problems encountered in attempting to define finality was
offered by Justice Powell who stated: "While the application of § 1291 in most cases is plain
enough, determining the finality of a particular judicial order may pose a close question. No
verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide
an utterly reliable guide for the future." Eisen v. Carlisle & Jacquelin, 417 U.S. at 170 (footnote
omitted). Compare Redish, supra note 30, at 90-92 and Comment, Requiem for the Final
United States, 431 U.S. 651, 658 (1977); Gillespie v. United States Steel Corp., 379 U.S. 148,
Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cobbledick v. United States, 309 U.S.
323, 326 (1940).
42. Id. at 511.
stricken from the complaint by the district court. In finding the order to strike final for purposes of section 1291, the Gillespie Court concluded that the Sixth Circuit was correct in determining that the inconvenience and cost of piecemeal review were outweighed by the danger of denying justice by delay. The Court reasoned that, because the Sixth Circuit had already ruled on the issue of whether federal law excluded other means of recovery, as well as on the issue of whether excluded relatives could also recover, the inconvenience and cost of remanding the case to the district court without deciding these issues would be prohibitive. Because the excluded claimants would suffer a delay of "perhaps a number of years" if they had to wait to appeal until the district court had disposed of the remaining claim on its merits, the Court reasoned that a denial of immediate appeal "might work a great injustice." Lastly, although the excluded parties' claims were not formally severable from the plaintiff's claims, the Court acknowledged that, practically, the claims could be viewed as severable.

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

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

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

46. 379 U.S. at 152-54. Plaintiffs petitioned the Sixth Circuit for a writ of mandamus ordering the district court judge to vacate the order to strike. Gillespie v. United States Steel Corp., 321 F.2d 518, 520 (6th Cir. 1963), aff'd, 379 U.S. 148 (1964). Alternatively, petitioners sought an appropriate written statement from the district judge certifying that an immediate appeal was appropriate under 28 U.S.C. § 1292(b) (1976). 321 F.2d at 520. The Sixth Circuit denied extraordinary relief after deciding the merits of the case against the petitioners. Id. at 532. For a discussion of § 1292(b) and mandamus, see notes 195-206 and accompanying text infra.

47. Id. The Gillespie Court did note, however, that the Sixth Circuit's review of the district court's order to strike could be called "piecemeal". Id.

48. Id. The Gillespie Court's practical approach may be described as a review of the decision of the lower court in light of the present position of the parties. See id. Applying this analysis to the facts of Gillespie, it was obvious, especially under the Dickinson balancing test, that once the court of appeals had considered the appealability issue, it would be an extreme waste of time and money, both to the litigants and to the courts, to remand the case to the district court without deciding the merits. See id.
The Third Circuit, however, has maintained that a judicial expansion of the statutory notion of finality will not "serve the goal of speedy justice."²¹ According to the Third Circuit, a broad interpretation of finality leads to piecemeal appeals and the resulting costs and inefficiency are dispositive of the issue.²² Although the Third Circuit has generally avoided the Dickinson-Gillespie practical approach to finality, recent dissenting opinions from the court seem to reflect internal disagreement²³ and an inclination on the part of several judges toward a practical test of some sort.²⁴

Dissenting in Hacket v. General Host Corp.,²⁵ Judge Rosenn would have found an order denying class action certification appealable because the order "effectively terminate[d] the litigation."²⁶ Section 1291, he argued, (6th Cir. 1963), aff'd, 379 U.S. 148 (1964). If the Jones Act were to exclude all other remedies, and the excluded relatives were properly dismissed, only the plaintiff could recover damages. 379 U.S. at 150-51. Practically, therefore, the excluded relatives' claims could be viewed as severable and "fundamental to the further conduct of the case." Id. at 153, quoting United States v. General Motors Corp., 323 U.S. 373, 377 (1945).

51. Hoots v. Pennsylvania, 587 F.2d 1340, 1347 (3d Cir. 1978) (footnote omitted). See also In re Grand Jury Investigation (Sun Co.), 596 F.2d 1224, 1239 (3d Cir. 1979) (Aldisert, J., dissenting) (denial of motion to quash grand jury subpoena not immediately appealable); Bachowski v. Usery, 545 F.2d 363, 373 (3d Cir. 1976) (order to recount union election ballots not final); Hackett v. General Host Corp., 435 F.2d 618, 624 (3d Cir.), cert. denied, 407 U.S. 925 (1972) (order denying confirmation of class action not final); Borden v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969) (order compelling plaintiff to answer deposition questions over his relevancy objection not final).

52. See Bachowski v. Usery, 545 F.2d 363, 371 (3d Cir. 1976); Borden v. Sylk, 410 F.2d 843, 846 (3d Cir. 1969). In concluding that the Third Circuit should suppress the urge to rule on the merits of such cases, the Bachowski court noted:
The appellate system has become increasingly overburdened and the future would appear to promise no relief from the continuous increase in case loads. Accordingly, it would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piece-meal litigation in every instance of temptation.

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

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

56. 455 F.2d 628 (Rosenn, J., dissenting). Alternatively the dissent would have deemed the order final under the collateral order doctrine because the issue of class certification was separable from the merits of the case and the denial of review might cause the loss of an important right. See id. at 627 (Rosenn, J., dissenting). The dissent noted, however, that, because denying class certification may effectively decide the merits of the case by ending the litigation, a practical approach to finality would be more appropriate than the collateral order doctrine. See id. at 629 (Rosenn, J., dissenting). For a discussion of the collateral order doctrine, see notes 89-113 and accompanying text infra. See also Coppes & Lybrand v. Livesay, 437 U.S. 463, 467-89 (1978) (collateral order doctrine inapplicable to order denying class certification).
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requires a Dickinson-Gillespie balancing of the consequences of allowing or disallowing the appeal. It is submitted that, having considered the collateral nature of the class certification order and the collateral order doctrine separately from the Dickinson-Gillespie balancing approach, Judge Rosenn enunciated a “pure” section 1291 balancing approach for cases beyond the ambit of the collateral order doctrine.

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

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

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

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

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

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

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

61. Id. at 1352 (Gibbons, J., dissenting). The district court had denied approval of the plan because of a lack of evidence of broad community support, the failure of the community to devise its own plan, the effect of busing non-white children into unfamiliar grounds, the traffic problems emanating from busing, and loss of community control. Id. Denial of the plan prolonged the de jure segregation which had been found to have existed five years before the present appeal. See Hoots v. Pennsylvania, 359 F. Supp. 807, 824 (W.D.Pa. 1973), aff’d, 587 F.2d 1340 (3d Cir. 1978). Plaintiffs had brought suit seven years before the present appeal was taken. 587 F.2d at 1352 (Gibbons, J., dissenting).
relief and would result in further, unreasonable delay. Although Judge Gibbons did not invoke the Dickinson-Gillespie balancing test, he apparently did utilize a practical approach, emphasizing the cost and inconvenience caused by delay of the litigation and asking whether the order "has the effect of denying all relief for a violation of a constitutional right." While arguably based upon legitimate concerns of judicial policy, it is submitted that the Third Circuit's stance against expanding finality does not begin to clarify or define which decisions are final under section 1291 and, consequently, it is of little help to the lower courts. In order to provide a clear and workable standard of finality, it is suggested that the Third Circuit should adopt the Dickinson-Gillespie balancing test in order to decide whether a district court's order is final. By using such a "pure" section 1291 balancing approach, the Third Circuit would conform with the apparent mandate of the Supreme Court.

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

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

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

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

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

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

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

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

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

Although the Supreme Court has subsequently limited Gillespie to its "unique facts," it cannot be said to have abandoned the balancing test approach. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978). Significantly, the "unique facts" of Gillespie centered upon the fact that the substantive issues had already been decided by the court of appeals, which mitigated against the cost and inconvenience of piecemeal review. See id. See also note 47 and accompanying text supra. Certainly, more guidance concerning appealability survives from this apparent application of the balancing test than the particular decision that, after the
The *Dickinson-Gillespie* balancing approach, devised in light of section 1291's purpose of avoiding piecemeal review,\(^{71}\) can hardly be said to have been designed to negate the finality requirement or to sanction uncontrolled piecemeal review.\(^{72}\) Furthermore, in light of the fact that the danger of piecemeal review has never been considered to be an absolute barrier to granting an appeal,\(^{73}\) it would seem that appeals from orders where the danger of denying justice as a result of delay outweighs the cost and inconvenience of piecemeal review should be permitted as a matter of fairness to litigants.\(^{74}\) Since the concept of justice necessitates a fair and timely opportunity for litigants to settle disputes, appeals from orders endangering this opportunity must be considered.

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

\(^{71}\) See *Gillespie v. United States Steel Corp.*, 379 U.S. at 152-53.

\(^{72}\) See id. at 153.


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

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

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

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crees rendered by the highest court of a State." 77 Dissimilarly, section 1291 authorizes review of "final decisions" from lower federal courts. 78 Besides failing to acknowledge this difference in language, 79 the courts have also failed to distinguish the differences in the postures of such appeals. 8 0

Appeals under section 1291 do not affect federal-state relations, as do those under section 1257, 8 1 and are regulated simply to effect "efficient administration." 8 2 Federal review of state decisions, however, must not only discourage piecemeal review, but must also ensure comity and avoid intrusion into local matters which the states are capable of resolving themselves. 8 3 Unnecessary infringement upon the state courts by the federal courts would disrupt both "the smooth working of our federal system," 8 4 and the state systems as well. 8 5

78. Id. § 1291 (emphasis supplied). For the text of § 1291, see note 4 supra.
79. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940); United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979); Bachowski v. Usery, 545 F.2d 363, 368-71 (3d Cir. 1976). But see United States v. MacDonald, 435 U.S. 850, 853-55 (1978); Abney v. United States, 431 U.S. 651, 657-59 (1977). Yet even in MacDonald and Abney, where a possible distinction was noted, the Court continued to refer to final judgments and the final judgment rule in regard to § 1291 finality. See United States v. MacDonald, 435 U.S. at 853-55; Abney v. United States, 431 U.S. at 657-59.
81. See, e.g., National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977) (per curiam); Abney v. United States, 431 U.S. 651, 660 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. at 478 & n.7; Hoots v. Pennsylvania, 557 F.2d at 1396 & n.11 (Gibbons, J., dissenting); Bachowski v. Usery, 545 F.2d 363, 366 n.14, 368 & n.28, 369 & nn.33 & 35 (3d Cir. 1976). It has been suggested that the analyses used in cases decided under §§ 1291 and 1257 should not be used indiscriminately unless simply mentioned with regard to the historical purposes and rationale behind the requirement of finality. See Cox Broadcasting Corp. v. Cohn, 420 U.S. at 502-05 (Rehnquist, J., dissenting). With respect to the Third Circuit, it is submitted that the Bachowski court's failure to differentiate between §§ 1291 and 1257 not only tainted that court's lengthy summation of the history and purpose of § 1291, but also arguably formed an incorrect basis for the Third Circuit's later reliance upon Bachowski in declining to expand § 1291. See Bachowski v. Usery, 545 F.2d at 367-71. See also Hoots v. Pennsylvania, 587 F.2d at 1347 & nn.35 & 36; In re W.F. Breuss, Inc., 586 F.2d 983, 990 n.17 (3d Cir. 1978) (Adams, J., dissenting); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543 & nn.9-10 (3d Cir. 1977).
85. See id. See also Younger v. Harris, 401 U.S. 37, 42-45 (1971). Although Younger did not deal with § 1257 in addressing the narrow issue of whether a state criminal prosecution should be enjoined, the Court's language pertaining to the importance of a smooth working state and federal system is highly relevant. The Younger court stated:

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

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

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

Orders, “final in [their] nature as to . . . matter[s] distinct from the general subject of litigation and affecting only the parties to the particular controversy” have generally been found to satisfy the section 1291 finality requirement. The seminal case for allowing appeals of orders collateral to the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clear way to describe it, is referred to by many as “Our Federalism” . . . . The concept does not mean blind deference to “States’ Rights” . . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

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


89. United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926). See also Arnold v. Guimarin & Co., 263 U.S. 427, 432-33, 434 (1923) (finality denied where court of appeals decided amount due plaintiff but remanded for further proceedings concerning the claims of intervening creditors); Collins v. Miller, 232 U.S. 364, 370-71 (1919) (district court order denying habeas corpus relief as to one charge, but ordering further hearings on other charges, lacks finality and completeness); Williams v. Morgan, 111 U.S. 684, 699 (1884) (deeree from court of appeals which ordered foreclosure and fixed compensation is final as to that matter).


It is also unclear whether the collateral order doctrine simply falls within the Dickinson-Gillespie balancing approach in light of the great danger of injustice caused by waiting until final disposition of the entire case before allowing appeal of collateral orders. For a discussion of the Dickinson-Gillespie balancing approach, see notes 40-50 and accompanying text supra.
the general controversy is *Cohen v. Beneficial Industrial Loan Corp.*\(^{91}\) In *Cohen*, the Supreme Court, one year before deciding *Dickinson*,\(^{92}\) construed finality liberally by applying a "practical rather than a technical construction to section 1291."\(^{93}\) The United States District Court for the District of New Jersey, sitting in diversity, had denied defendant's motion to require plaintiff to post security as required under New Jersey law.\(^{94}\) Although noting that similar cases may arise infrequently,\(^{95}\) the *Cohen* Court allowed the appeal, holding that the order denying security was appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."\(^{96}\)

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

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91. 337 U.S. 541 (1949).
92. For a discussion of *Dickinson*, see notes 41-42 and accompanying text *supra*.
93. 337 U.S. at 548.
94. *Id.* at 543-44. Plaintiff had brought a stockholder's derivative action alleging mismanagement and fraud. *Id.* at 543.
95. *Id.* at 546. The *Cohen* Court noted:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

*Id.*

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

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

*Id.* at 547.

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

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

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

431 U.S. at 659. *See also United States v. Fiumara*, 605 F.2d 118, 118 (3d Cir. 1979); *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 169 (3d Cir. 1973).
would be merged in final judgment'; rather, it [must have] resolved an issue completely collateral to the cause of action asserted."\(^{100}\) Finally, the court of appeals must determine that the district court's decision "involved an important right which would be 'lost, probably irreparably,' if the review had to await final judgment."\(^{101}\)

In *United States v. MacDonald*,\(^ {102}\) the Supreme Court recently addressed the problem of applying the collateral order doctrine to criminal cases.\(^ {103}\) Utilizing the *Cohen* test as expressed in *Abney*,\(^ {104}\) the *MacDonald* Court concluded that a pretrial order denying defendant's motion to dismiss an indictment on the ground that his right to a speedy trial had been violated is not appealable.\(^ {105}\) The *MacDonald* Court emphasized that "the rule
of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.' 

The Cohen case had been decided by the Third Circuit prior to the Supreme Court's affirmance of that decision. In contrast to its current approach to appealability under section 1291, the Third Circuit had defined finality broadly in Cohen and granted the appeal. Since Cohen, however, the Third Circuit's application of the collateral order doctrine has not been uniform. In several cases, the court has declared that the doctrine should be construed narrowly. In other cases, however, the court has applied a practical and, consequently, broader construction of the collateral order rule. The difference in approach is apparently not attributable to the severity of the impact which the decision will have on the party seeking the appeal.

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

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

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


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

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

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


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

Similarly, in In re Grand Jury Proceedings (FMC Corp.), albeit without citation to Cohen, the Third Circuit declared that an order concerning the suppression of evidence is nonappealable because it is “merely a step in the criminal prosecution.” Although, in the grand jury context, there exists a narrow exception to finality for “orders denying motions for the re-
the FMC court concluded that appellant's motion resulted in what was essentially a nonappealable order concerning the suppression of evidence.\footnote{604 F.2d at 807.}

Other recent Third Circuit decisions have found orders appealable under the Criminal Appeals Act,\footnote{18 U.S.C. § 3731 (1976). For the text of § 3731, see note 126 infra.} holding only alternatively that the appeal was proper under the section 1291 finality provision.\footnote{In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1226 (3d Cir. 1979); In re Grand Jury Empanelled (Colucci), 597 F.2d 851, 855, 857-58 (3d Cir. 1979).} Because the Criminal Appeals Act is to be liberally construed,\footnote{18 U.S.C. § 3731 (1976). Section 3731 provides in pertinent part:

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court (sic) suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. ... The provisions of this section shall be liberally construed to effectuate its purposes. Id. (emphasis added).} however, this unexplained alternative grant of appeal under section 1291 does little to indicate what must be established to satisfy the possibly less expansive statute.\footnote{So, too, granting an appeal under § 1291 without a proper analysis does little to clarify what constitutes a final decision. For a discussion of the problems that courts have encountered in defining "final decisions" under § 1291, see notes 38-39 and accompanying text supra.}

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

The Third Circuit's decision in \textit{Brace v. O'Neill}\footnote{567 F.2d 237 (3d Cir. 1977).} illustrated the continual problems it will face whenever the pure section 1291 balancing test is not applied\footnote{See supra at 242-43 with id. at 249-50 and 68-70 and accompanying text supra.} and whenever the pure balancing test is not distinguished from the collateral order doctrine.\footnote{See supra at 239 n.5, 243. Although frequent references were made to \textit{Cohen}, neither the majority nor the dissent discussed \textit{Cohen} in terms of finality criteria. Compare id. at 242-43 with id. at 249-50 (Rosenn, J., dissenting). Similarly, \textit{Abney}, decided three months earlier, was not cited. The majority did, however, conclude that "the proceedings below remain[ed] open,' 'unfinished,' and 'inconclusive.' " Id. at 242, quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. Because this language paralles the first criterion of \textit{Abney}, it could be argued that the majority was applying a collateral order test. For a discussion of the first criterion of the \textit{Abney} test, see note 99 and accompanying text supra. Nevertheless, because the majority never indicated that it was applying a collateral order test, it would appear that the majority cited \textit{Cohen} for the purpose of applying a practical approach to finality under § 1291. See 567 F.2d at 242-43. The end result, therefore, was the creation of an impure analysis under § 1291 tainted by the use of collateral order considerations. See id.} In failing to apply the proper tests...
under section 1291, the *Brace* majority, although announcing its intention to apply a practical approach, actually applied a restrictive approach to determining finality under section 1291.132

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

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

131. See 567 F.2d at 243.
132. See id. at 245 (Rosenn, J., dissenting).
133. Id. at 240. Plaintiff had charged the Philadelphia Police Department with four counts of sex discrimination. Id.
134. Id. Counts I, II and IV of plaintiff's complaint alleged broad charges of sex discrimination. Id. Count III alleged specific harassment due to defendants' retaliatory conduct in response to plaintiff's charges. Id. Plaintiff neither consented nor objected to consolidation. Id.
135. See id. at 238-43. A "dismissal without prejudice" preserves "the right of the complainant to sue again on the same cause of action [and] the effect of the words 'without prejudice' is to prevent the decree of dismissal from operating as a bar to a subsequent suit." BLACK'S LAW DICTIONARY 421 (5th ed. 1979). Dismissal with prejudice has been defined as "[a]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause . . . [being] res judicata as to every matter litigated." Id.
136. 567 F.2d at 238-40. On June 4, 1976, the district court ordered that "[a]ll claims raised by Plaintiff, Penelope Brace in Counts I, II and IV of her complaint alleging discriminatory employment practices based on sex are dismissed without prejudice pending final decision in the related [Government civil suit]." Id. at 241, quoting *Brace* v. *O'Neill*, Nos. 74-339, 74-400, slip op. at 1 (E.D. Pa. June 4, 1976). (Footnote omitted).
137. 567 F.2d at 238, 243-44. The district court had ordered that "[o]n all remaining Counts . . . [j]udgment is to be entered in favor of the defendants against the plaintiff." Id. at 238, quoting *Brace* v. *O'Neill*, No. 74-339, slip op. at 1 (E.D. Pa. June 4, 1976).
138. See 567 F.2d at 240-44.
139. Id. at 240. On March 5, 1976, the district court ordered that it would retain jurisdiction in this matter for all purposes. The issues not addressed by this Order, including the issues of back pay, interest and other emoluments of office, if any, are deferred until twenty-four months from the date of this Order or until the results of the aforementioned study are presented to the Court, whichever is shorter. Id. (emphasis by the Third Circuit), quoting *Brace* v. *O'Neill*, Nos. 74-400, 74-339, slip op. at 1 (E.D. Pa. Mar. 5, 1976) (Footnote omitted). See note 140 infra.
140. 567 F.2d at 240. Although the district court ordered a further study of the matter, it also ordered interim relief, including the hiring and promotion of competent female police officers. Id. The trial judge also ordered defendants to report within twenty-four months on the progress of these employees. Id.
141. Id. at 241. The district court's ruling was part of a memorandum opinion and order filed on June 4, 1976. See id. For the text of the relevant portions of the court's order on this date, see notes 136 & 137 supra.
memorandum opinion accompanying this decision, the court confirmed its earlier order in which it had retained jurisdiction over the consolidated suits.\textsuperscript{142} In this same opinion and order, however, the court ordered the dismissal of the plaintiff's non-severed claims without prejudice, pending adjudication of the government's case.\textsuperscript{143} The district court subsequently entered a civil judgment in favor of the defendants in accordance with the "seemingly 'final'" memorandum opinion and order.\textsuperscript{144}

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

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


\textsuperscript{143} 567 F.2d at 241. For the text of this order, see note 136 supra.

\textsuperscript{144} 567 F.2d at 241. The \	extit{Brace} court ordered judgment for defendants without specifying which claim or claims the plaintiff had lost. \textit{See id}.

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

\textsuperscript{146} 567 F.2d at 242.

\textsuperscript{147} \textit{Id.}, \textit{quoting} Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546. The dissent contended that court-imposed delays might adversely affect the plaintiff's rights if not deprive her of them. 567 F.2d at 247 (Rosenn, J., dissenting). The majority, however, dismissed the "danger of denying justice by delay," concluding that the mere prospect of delay cannot create appellate jurisdiction where no appropriate appealable district court order has been entered. We, too, are aware of the "danger of denying justice by delay," . . . but we are also cognizant that there are comparable if not greater dangers present were we to exercise appellate jurisdiction over nonappealable orders entered in live and continuing controversies. . . .

\textit{Id.} at 243 n.27a, \textit{quoting} Gillespie v. United States Steel Corp., 379 U.S. at 133.

\textsuperscript{148} 567 F.2d at 242. The \	extit{Brace} majority noted that "the district court provided that all parties may offer evidence on all claims (except \\textit{Brace's [individual] retaliation claim}) after the conclusion of the City's study." \textit{Id}. (emphasis in original) (footnote omitted).
adjudication. Furthermore, the non-severed claims were so similar that, according to the Brace court, a consistent disposition must have been intended. Lastly, a decision on all questions of liability and damages as to the non-severed claims had been postponed for the taking of additional evidence.

Turning to the plaintiff's individual claim of harassment, the court remarked that the district court's finding for the defendants constituted a dismissal with prejudice. Nevertheless, the court interpreted the dismissal as a stay, maintaining that the order was not final for purposes of appeal. The Brace court reasoned that, because the class which the plaintiff sought to represent had been the beneficiary of at least four district court orders for relief since the instant appeal was taken, the plaintiff's case was ongoing. The court further noted that the district court's retention of jurisdiction for the taking of additional evidence indicated that plaintiff's individual claim was not "suspended" or "comatose." Despite the majority's claim to have applied a practical approach to finality, Judge Rosenn, dissenting, concluded that the court had "erroneously given the requirement of finality a technical rather than a practical effect." Judge Rosenn first asserted that, because the district court had

149. Id.

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

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

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

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

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

155. Id.

156. Id.

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

158. Id. at 245 (Rosenn, J., dissenting). In summarizing the facts of Brace, Judge Rosenn paid close attention to the effect that the court's delay had upon the plaintiff's substantive rights and financial resources. See id. at 246-47 (Rosenn, J., dissenting). For a discussion of Judge Rosenn's previous views toward a practical approach to finality, see notes 55-59 and accompanying text supra.
explicitly dismissed the plaintiff's non-severed claims, the order was final and the plaintiff should have been granted the appeal since appeals "are taken from the orders of a court, not from its opinions." Alternatively, had the dismissal without prejudice been, in effect, a stay of the proceedings, Judge Rosenn would have found that, on balance, "the injustice of withholding immediate review outweighed the danger of piecemeal review." As to the plaintiff's individual claim of harassment, Judge Rosenn disputed the argument that the plaintiff's benefits from interim district court orders were enough evidence to deem plaintiff's claim not indefinitely delayed and, therefore, final. Judge Rosenn reasoned that, despite the district court's affirmative action, plaintiff could neither participate as a party in the government's case, nor demand interim relief.

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

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

III. A BRIEF SURVEY OF INCIDENTAL AVENUES OF APPEAL

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

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

169. See 567 F.2d at 245 (Rosenn, J., dissenting).
170. For a discussion of Fiumara, see notes 116-19 and accompanying text supra.
171. 605 F.2d at 118.
173. For a discussion of the Abney criteria for determining the appealability of collateral orders, see notes 97-101 and accompanying text supra.
175. See notes 83-85 and accompanying text supra.
176. See 28 U.S.C. § 1292(a) (1976). If the broader final decision test of § 1291 cannot be met, appellate jurisdiction under § 1292(a) is often sought. See Hoots v. Pennsylvania, 587 F.2d at 1346. For a discussion of the various types of interlocutory orders which are appealable under § 1292(a), see notes 177-80 and accompanying text infra.
178. Id. § 1292(a)(4). The courts of appeals have jurisdiction over "[j]udgments in civil actions for patent infringement which are final except for accounting." Id.
interlocutory orders and decrees relating to receiverships\textsuperscript{179} and admiralty issues.\textsuperscript{180}

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

Not surprisingly, the Third Circuit also applies section 1292(a)(1) restrictively,\textsuperscript{185} adopting the narrow construction applied by the Supreme Court.

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

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


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

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


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

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

\textit{16 C. WRIGHT & A. MILLER, supra, § 3920, at 6.}

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

\textsuperscript{185} See Hoots v. Pennsylvania, 587 F.2d at 1348-51. For a discussion of the Third Circuit's restrictive approach in cases involving section 1291, see notes 51-66 & 128-56 and accompanying text supra.
and the Second Circuit. In *Hoots v. Pennsylvania*, for example, the Third Circuit recently outlined two criteria for appealability under section 1292(a)(1): 1) "the original or prior order must have been injunctive in character," and 2) "that injunction must have been modified in some respect by the order from which the appeal has been taken." Finding that it was not bound by "[t]he literal characterization of an order as an injunction" the *Hoots* court concluded that an order commanding preparation of a remedial school desegregation plan did not constitute an injunction under section 1292(a)(1). Alternatively, the *Hoots* court concluded that, even if the order in question were an injunction, the later order denying defendants' motion for approval of a desegregation plan, filed pursuant to the original order, did not modify that original order and, thus, was not appealable.

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

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

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

188. 587 F.2d at 1348.

189. *Id.*

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


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

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

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

C. Mandamus: An Extraordinary Avenue of Review

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

195. Id. Section 1292(b) provides:

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

Id. (emphasis in original).
196. See id.
197. See Cooper & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978) (party seeking § 1292(b) appealability faces harsh burden in light of congressional restrictions). See also Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 745-46 (1976) (application to court of appeals must be made within 10 days and all § 1292(b) criteria must be complied with in a strict fashion); Tidewater Oil Co. v. United States, 409 U.S. 151, 164-74 (1972) (§ 1292(b) does not establish appellate jurisdiction over certain government civil antitrust cases).
199. See Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (writ of mandamus not to be used as substitute for appeal, but appropriate for clear abuses of discretion); Ex parte Fahey, 332 U.S. 258, 260 (1947) (writ of mandamus reserved for extraordinary cases, not mere substitute for appeal). See also Hoots v. Pennsylvania, 587 F.2d at 1346. The Hoots court noted that the "jurisdiction of the courts of appeals normally is confined to the review of final orders . . . or to the classes of interlocutory orders described in 28 U.S.C. § 1292(a) (1976)." Id. (footnote omitted).
200. The power of the federal courts to grant mandamus was "given a statutory basis by the All Writs Act." Rapp v. Van Dusen, 350 F.2d 806, 811 (3d Cir. 1965) (footnote omitted). See 28 U.S.C. § 1651(a) (1976). Under the All Writs Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law." Id.
appropriate when a district judge fails to lawfully exercise the authority that is vested in the district court when it is necessary to effectuate a remedy to which a party is entitled in an extraordinary case where the potential for irreparable harm is plainly apparent. The Supreme Court has repeatedly cautioned, however, that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."

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

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

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

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


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


206. Fed. R. Civ. P. 54(b). Rule 54(b) provides in pertinent part:

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

Id.

207. Id.
decision of all claims; to effecuate the policy of the Federal Rules of Civil Procedure in permitting "the liberal joinder of claims in multiple claims actions" without seriously prejudicing any party.

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

210. Sears, Roebuck & Co. v. Mackey, 351 U.S. 435 (1956). The Sears Court noted:
To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate time when each "final decision" upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal.

211. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956). In Sears, the Court noted:
The District Court cannot, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions.

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

IV. Conclusion

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

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

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

\textit{Gary A. Rome}

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

\textsuperscript{215} See notes 185-94 and accompanying text \textit{supra}.

\textsuperscript{216} See notes 198-99 and accompanying text \textit{supra}.

\textsuperscript{217} See notes 203-06 and accompanying text \textit{supra}.

\textsuperscript{218} 100 S. Ct. 1460 (1980), \textit{vacating and remanding} 597 F.2d 35 (3d Cir. 1979) (per curiam).

\textsuperscript{219} See notes 213-15 and accompanying text \textit{supra}.

\textsuperscript{220} See notes 110-27 and accompanying text \textit{supra}.

\textsuperscript{221} See notes 157-76 and accompanying text \textit{supra}.

\textsuperscript{222} See notes 157-76 and accompanying text \textit{supra}.

\textsuperscript{223} See notes 40-50 and accompanying text \textit{supra}.

\textsuperscript{224} See notes 93-101 and accompanying text \textit{supra}.