TOLEDO LAW
THE UNIVERSITY OF TOLEDO

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The Honorable Michael A. Chagares
United States Court of Appeals
U.S. Post Office and Courthouse
Two Federal Square, Room 357
Newark, NJ 07102-3513

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
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Subject: Proposed amendment to Federal Rule of Appellate Procedure 4(a)(2).

Dear Judge Chagares & Professor Hartnett:

I write to ask that the Advisory Committee on Appellate Rules consider amending Federal Rule of Appellate Procedure 4(a)(2).

Rule 4(a)(2) is supposed to give effect to notices of appeal filed before the district court enters a judgment or otherwise appealable order. But the courts of appeals are divided over when exactly Rule 4(a)(2) does so. They have also split on whether Rule 4(a)(2) supersedes the common law cumulative-finality doctrine that the rule (at least partially) codified. And courts do not just disagree with each other; several circuits have issued conflicting decisions on these matters. The Committee looked into these issues in 2010 and 2011 but ultimately decided to take no action. The intervening years have not made things any better.

I accordingly ask the Committee to look into this issue again. I recently published an article addressing these issues in depth: *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), a copy of which is attached. I use this letter to summarize my analysis in that article and propose a possible rule change. I first briefly discuss the history of cumulative finality up through the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, I describe the split among and within the circuits on the meaning of Rule 4(a)(2). Finally, I offer potential language for a rule amendment that would

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resolve the current cumulative-finality mess.

1. How We Got Here

Litigants normally must wait until the end of district court proceedings before filing a notice of appeal. But sometimes they file too early, before the district court has entered a judgment or other appealable decision. Problems can then arise if these litigants do not then file a second notice (or amend their first). No proper notice has been filed. And litigants that do not file a proper notice forfeit their right to appellate review.

To address this problem, courts and rulemakers developed the cumulative-finality doctrine, which allows subsequent events to save a premature notice of appeal.

Cumulative finality first emerged as a coherent doctrine in the 1960s and 70s. The courts of appeals developed the doctrine to save a variety of prematurely filed notices of appeal. *See* Lammon, *Cumulative Finality*, *supra*, at 781–87. Courts held, for example, that notices filed after a district court announced its decision were saved by the district court's subsequent entry of a judgment. *See, e.g.*, *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975). They held that notices filed after dismissal of a complaint (but not dismissal of the entire action) were saved by the later dismissal of the action. *See, e.g.*, *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965). Courts also held that notices filed after the district court resolved some (but not all) of the claims in a multi-claim action were saved by a subsequent judgment that resolved the remaining claims. *See, e.g.*, *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). And a few decisions from this time allowed subsequent events to save a notice of appeal filed after an order that did not even resolve a claim. *See, e.g.*, *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967) (holding that a notice of appeal filed after summary judgment on only liability was saved by a subsequent judgment that determined the amount of damages).

Rule 4(a)(2) was added to the Federal Rules of Appellate Procedure in 1979. As amended, the rule now provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The Notes state that the rule was meant "to avoid the loss of the right to appeal by filing the notice of appeal prematurely." The Notes also indicate that the Committee intended to codify an existing practice in the courts of appeals and cited to some the caselaw in this area.

But neither the Notes nor the rule itself specified what precisely was being codified or how the rule affected the then-existing common law cumulative-finality doctrine. And the post-Rule 4(a)(2) caselaw does not offer many hints. Despite the new rule, the courts of appeals continued to develop cumulative finality as a largely judge-made doctrine. *See* Lammon, *Cumulative Finality*, *supra*,

at 788–93.

Then came the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). *FirsTier* held that Rule 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss the case but before it formally entered the final judgment of dismissal on the docket. The Court echoed the Committee Notes on the rule's purpose and origins: Rule 4(a)(2) exists to prevent the loss of appellate rights when a late notice does not prejudice the appellee, and the rule codified an existing practice in the courts of appeals. But the Court added that Rule 4(a)(2) would not save every premature notice of appeal. The rule instead "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment."

2. The Current Split

FirsTier sowed the seeds for confusion in the courts of appeals; writing for the Tenth Circuit in *In re Woolsey*, 696 F.3d 1266, 1271 (10th Cir. 2012), then-Judge Gorsuch characterized *FirsTier*'s discussion of Rule 4(a)(2)'s limits as "cryptic and arguably tangential," and he noted that the opinion is "open to many different understandings." After *FirsTier*, the courts of appeals developed three approaches to cumulative finality. *See* Lammon, *Cumulative Finality*, *supra*, at 795–802. Some cases held that appeals only from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. *See, e.g.*, *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004). Other cases held that Rule 4(a)(2) will also save notices filed after decisions that could have been certified for an intermediate appeal under Rule 54(b). *See, e.g.*, *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161–62 (D.C. Cir. 2005) (Roberts, J.). Still other cases held that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment. *See, e.g.*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999).

The courts have also disagreed about the interaction between Rule 4(a)(2) and the common law doctrine that preceded it. Some courts hold that Rule 4(a)(2) is now the only source of law on cumulative finality. *See, e.g.*, *Outlaw*, 412 F.3d at 160. Others have concluded that the common law doctrine survived Rule 4(a)(2) and continues to exist alongside it. *See, e.g.*, *Lazy Oil*, 166 F.3d at 587.

The split is not just between the circuits; several circuits have issued internally inconsistent decisions on these matters. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14. The Eighth Circuit, for example, has one decision holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had ordered sanctions but before it determined the amount of those sanctions. *Hill v. St. Louis Uniersity*, 123 F.3d 1114, 1120–21 (8th Cir. 1997). But seven years later, the Eighth Circuit claimed to be unaware of any Eighth Circuit decision adopting the cumulative finality doctrine and held that neither the common law

cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding. *Miller*, 369 F.3d at 1035.

Until recently, the Federal Circuit has generally taken the narrowest approach to cumulative finality, holding in two unpublished cases that notices filed only after decisions resolving all outstanding issues can be saved by the entry of a final judgment. *See Stoney Point Prods., Inc. v. Underwood*, 15 F. App'x 828, 830–31 (Fed. Cir. 2001) (holding that an appeal from "a judgment disposing of only some asserted claims" was not saved by a subsequent final judgment); Meade Instruments Corp. v. Reddwarf Starware, LLC, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000) (same). That court has, however, taken a broader approach in an appeal from the Board of Contract Appeals. *See Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002). And just recently, the Federal Circuit allowed counsel to cure a premature notice by abandoning an unresolved counterclaim during oral argument. *See Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368 (Fed. Cir. 2020). But the recent decision did not reference any of the Federal Circuit's decisions in this context (or any other court's decisions), nor did it mention Rule 4(a)(2). *See* Bryan Lammon, "The Federal Circuit & Cumulative Finality," Final Decisions (Jan. 31, 2020), https://finaldecisions.org/the-federal-circuit-cumulative-finality.

The Fifth Circuit's caselaw is in what's probably the worst state. Even before *FirsTier*, the Fifth Circuit had issued a series of inconsistent decisions on how cumulative finality operates. *Compare Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165–66 (5th Cir. 1984) (holding that a subsequent decision on the amount of attorneys' fees saved a notice of appeal filed after the district court had determined liability, damages, and entitlement to attorney's fees), *and Tower v. Moss*, 625 F.2d 1161, 1164–65 (5th Cir. 1980) (holding that the subsequent dismissal of the sole outstanding claim saved a notice of appeal filed from an earlier order dismissing only some of the claims), *with United States v. Taylor*, 632 F.2d 530, 531 (5th Cir. 1980) (holding that the subsequent dismissal of a plaintiff's claims did not save the defendant's notice of appeal filed after the dismissal of its counterclaims). The Fifth Circuit's post-*FirsTier* decisions are a mess. That court first appeared to hold that Rule 4(a)(2) would save notices filed after decisions that could be certified for an intermediate appeal under Rule 54(b). *See Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 378–79 (5th Cir. 1996); *Riley v. Wooten*, 999 F.2d 802, 804–05 (5th Cir. 1993). But in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998), the Fifth Circuit held that *FirsTier* required the narrowest interpretation of Rule 4(a)(2)—only notices filed from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. (*Cooper* addressed the scope of then-Rule 4(b), now Rule 4(b)(2), which is the criminal analogue of Rule 4(a)(2). *Id.* at 962. The *Cooper* court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2). *Id.* at 962 n.1.) But *Cooper*'s limiting of Rule 4(a)(2) has not stuck, as some subsequent Fifth Circuit decisions reject it. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008) (holding that a premature notice of appeal filed after a partial

grant of summary judgment was saved by the later disposition of all outstanding issues); *Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (holding that a premature notice of appeal filed after the district court had granted summary judgment in favor of one defendant but before dismissing the claims against a second defendant was saved by the subsequent final judgment). *See also Swope v. Columbian Chemicals Co.*, 281 F.3d 185, 191–92 (5th Cir. 2002).

The Fifth, Eighth, and Federal Circuits are not alone. The First, Third, Ninth, and Tenth Circuits all have issued cumulative-finality decisions that are at least in tension (if not direct conflict) with prior panel decisions. *See* Lammon *Cumulative Finality*, *supra*, notes 226–231 & 239–51 and accompanying text.

3. A Better Cumulative-Finality Rule

Given the various approaches to cumulative finality, some litigants are losing their opportunities for appellate review by filing a notice of appeal too early. I find that troubling. The error here is a technical one. It is not as though a notice of appeal was not filed; it was just filed too early. And the proper time for filing a notice of appeal is not always clear, particularly to those who are not well versed in the intricacies of federal appellate procedure. Parties accordingly sometimes file too early.

Technicalities can be important, especially when dealing with procedure. But the punishment for a procedural misstep should fit the crime. The misstep here—filing a premature notice of appeal—generally does little (if any) harm. Similarly harmless is allowing subsequent events to save these notices. Early notices—unlike late ones—do not implicate any reasonable reliance interests on the finality of a judgment. Early notices create no risk of piecemeal appeals, as the district court must enter a judgment or appealable order before anyone can perfect the appeal. And no one should be surprised when a litigant who filed a premature notice of appeal wants to later obtain appellate review of the district court's decisions.

Granted, a more generous approach to saving premature notices of appeal could encourage litigants to file more premature notices. And when parties file a premature notice of appeal, there is some risk of bogging down litigation while the courts and parties determine the effect of the notice.

But a clearer rule could mitigate these problems. Premature notices that disrupt litigation already occur, due largely to uncertainty about what to do with them. A clearer cumulative finality rule—no matter its content—might largely solve this problem. And of the possible rules, the broadest approach is the most pragmatic. Indeed, courts rarely (if ever) conclude that giving effect to a premature notice causes any prejudice. What little harm a broader approach to cumulative finality might cause can be mitigated through a clear rule. And courts could develop internal procedures for handling the premature notices—placing the appellate docket in suspension, for example, and allowing the parties to reopen it once the district court has entered a judgment or appealable order.

As for language, I have a proposed starting point.. (The language I propose here is different from that proposed in the article, which is due to the proposed amendments to Rule 3(c).) Again, Rule 4(a)(2) currently reads:

> *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

One possible change would be the following:

> *Filing Before Entry of Judgment.* A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

The proposed language treats all premature notices the same; it no longer asks what kind of decision or order a notice was filed after. The language makes that notice effective at the entry of the judgment or order that would normally have been appealable. And given that notices of appeal are not supposed to define the scope of appellate review (as the proposed amendments to Rule 3(c) make clear), there is no need to address which judgment or order is entered. Upon the entry of a judgment or appealable order, a prior notice of appeal would spring into effect and allow the party to appeal any matters that would be within the scope of appellate review in an appeal from that judgment or order.

This is not the only way in which to amend Rule 4(a)(2) to cure its ills. But I hope it will provide a helpful jumping-off point for the Committee's work.

I appreciate your time and consideration of this issue. Please let me know if there is anything I can do to assist the Committee in its work.

Sincerely,

Bryan Lammon

CUMULATIVE FINALITY

Bryan Lammon[*]

A proper notice of appeal is a necessary first step in most federal appeals. But federal litigants sometimes file their notice of appeal early, before district court proceedings have ended. When those proceedings finally end and no new notice is filed, the law of cumulative finality determines what effect—if any—the premature notice has. Sometimes the notice is effective and the appeal proceeds as normal. Sometimes it's not, and litigants lose their right to appeal.

At least, that's how the law of cumulative finality looks from a distance. Up close, the courts of appeals are hopelessly divided on matters of cumulative finality. They disagree on what law governs cumulative finality issues—whether they are governed solely by Rule of Appellate Procedure 4(a)(2) or also by a common-law cumulative finality doctrine that preceded the rule—and under what conditions a premature notice of appeal is saved. Three distinct approaches to cumulative finality have emerged, resulting in a deep circuit split. To make matters worse, decisions within several of the circuits have applied different approaches, resulting in intra-circuit divides.

This Article offers a fix. Neither the text of the Rules of Appellate Procedure nor their history provide a clear cumulative finality rule. But looking to the practicalities of the issue suggests allowing a subsequent judgment to save any prematurely filed notice of appeal. Doing so imposes few costs while preserving litigants' right to appeal.

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[*] Associate Professor, University of Toledo College of Law. My thanks to Ken Kilbert, Andrew Pollis, Catherine Struve, and Evan Zoldan for their helpful comments. Thanks also to the University of Toledo College of Law for providing summer funding for this project. And special thanks to Nicole Porter.

The current cumulative finality mess illuminates a larger issue with the appellate jurisdiction literature and its attendant reform efforts. The literature has long maligned the unnecessary complexity and uncertainty of the entire federal appellate jurisdiction regime and advocated reform. But most of that literature focuses on only one part of that regime—appeals before a final judgment. Equally important are issues with determining when district court proceedings have ended and parties thus have a right to appeal. Cumulative finality is only one piece in this other aspect of appellate jurisdiction. There are more. Successful reform might require establishing a new, clearer point at which parties have a right to appeal. So this other aspect of appellate jurisdiction needs similar attention if reform is to succeed.

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I. INTRODUCTION

Most appeals in federal court begin with the filing of a notice of appeal.[1] As a general rule, litigants must wait until the end of district court proceedings—when all issues have been decided and the district court has entered a final judgment on the docket—before filing a notice.[2] But sometimes they jump the gun and file their notice after the district court has decided an issue but before the entry of a judgment.[3] These notices are premature and thus ineffective at the time they're filed.[4] Problems arise, however, if these litigants fail to file another notice once district court proceedings reach their end. As a technical matter, the party has not filed a proper notice of appeal. And parties that do not file a proper notice forfeit their right to appellate review.[5]

To address this problem, courts and rulemakers developed the cumulative finality doctrine.[6] This rule of appellate jurisdiction allows certain subsequent events to save a premature notice of appeal filed after certain district court decisions.

The general rule cannot be stated any more precisely, however, because the cumulative finality doctrine is currently a mess. The doctrine arose as a judge-made rule in the 1960s and 1970s before

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[1] *See* FED. R. APP. P. 3(a)(1).

[2] *See* 28 U.S.C. § 1291 (2012) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."); Catlin v. United States, 324 U.S. 229, 233 (1945) (defining a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"); *see also* FED. R. CIV. P. 54(a) (" 'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); FED. R. CIV. P. 58 (setting out the rules for entering a judgment).

[3] *See, e.g.*, Houck v. Substitute Tr. Servs., Inc., 791 F.3d 473, 477 (4th Cir. 2015); *In re* Woolsey, 696 F.3d 1266, 1268 (10th Cir. 2012).

[4] *See* FED. R. APP. P. 4(a)(1) (setting out the time for filing a notice of appeal in a civil case); FED. R. APP. P. 4(b)(1) (setting out the time for filing a notice of appeal in a criminal case).

[5] *See* Bowles v. Russell, 551 U.S. 205, 214 (2007) (holding that the timing requirements for filing a notice of appeal in a civil case are jurisdictional and that courts cannot create equitable exceptions to them).

[6] *See* 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, 402–05 (2017) [hereinafter Lammon, *Dizzying* Gillespie] (describing the development of the cumulative finality doctrine from the balancing approach established by *Gillespie v. U.S. Steel Corp.*).

it was codified in Federal Rule of Appellate Procedure 4(a)(2). But no one knows exactly which aspects of the common-law doctrine Rule 4(a)(2) codified. Nor does anyone know if Rule 4(a)(2) superseded and abrogated the common-law doctrine. Nor is anyone really sure what Rule 4(a)(2) means. The Supreme Court has interpreted it only once—in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*[7]—producing an opinion that then-Judge Neil M. Gorsuch once described as "cryptic."[8]

Despite this uncertainty, cumulative finality has gone largely unstudied (and often unnoticed) in the appellate jurisdiction literature.[9] In this Article, I tackle the current cumulative finality

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[7] 498 U.S. 269 (1991).

[8] *In re* Woolsey, 696 F.3d at 1271.

[9] I have discussed cumulative finality as an example of courts of appeals taking a balancing approach to appellate jurisdiction, though I only noted the current splits and uncertainty in the law and left their further exploration for this Article. *See* Lammon, *Dizzying* Gillespie, *supra* note 6, at 402–05. A student note from 2009 also tackled the subject. *See generally* Lexia B. Krown, Note, *Clarity as the Last Resort? Why Federal Rule of Appellate Procedure 4 Should and Could Stipulate Which Judgments Are "Final,"* 70 OHIO ST. L.J. 1481 (2009). I have a much different take on the state of the law and recommend a different resolution. After that (and as with many appellate jurisdiction issues), *Federal Practice and Procedure* probably contains the most in-depth discussion of cumulative finality. 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.9 (2d ed. 2017). The section describing cumulative finality focuses primarily on the separate-but-related issue of appeals taken after a series of district court decisions cumulatively resolve all issues in the case. *See id.* Its discussion of cumulative finality—that is, when subsequent events give effect to a premature notice of appeal—understates the current uncertainty in the courts of appeals. *See id.* The section addressing Rule of Appellate Procedure 4(a)(2) notes that courts have reached inconsistent decisions on cumulative finality issues, but it does not make obvious the problems in the current caselaw. *See* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.5 (4th ed. 2017). The *Federal Court of Appeals Manual* notes the disagreement in the caselaw in some depth but does not address any ways to fix the matter. *See* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 7:6 (6th ed. 2017). Other treatises give cumulative finality less attention and present the law as more settled than it currently is. *See* ERIC J. MAGNUSON & DAVID F. HERR, FEDERAL APPEALS: JURISDICTION & PRACTICE § 9.3 (2017 ed.); 20 MOORE'S FEDERAL PRACTICE § 304.12 (3d ed. 2017). As for the journals and law reviews (besides the aforementioned Note), the coverage has been minimal. *See* Katrina L. Smeltzer, Note, ADAPT of Philadelphia v. Philadelphia Housing Authority*: The Third Circuit Correctly Determined Prematurely Appealed Discovery Orders Could Not Later Ripen with Subsequent Entry of Final Judgment but Failed to Examine the Validity of the Criticized* Cape May Greene *Rule*, 40 CREIGHTON L. REV. 807 (2007); Peter R. Afrasiabi, *The Growing Circuit Split Over Whether Premature Notices of Appeal Preserve Appellate Review*, 55 FED. LAW., July 2008, at 42. The Advisory Committee on Appellate Rules considered cumulative finality after the Supreme Court denied certiorari in *CHF Industries, Inc. v. Park B. Smith Inc.* *See* Order Denying Certiorari, 558 U.S. 1023 (2009) (denying certiorari from Park B. Smith, Inc. v. CHF Indus., Inc., 309 F. App'x 411 (Fed. Cir. 209) (per curiam)). The Committee discussed possible action on cumulative finality at

mess. In doing so, I make three contributions to the law and literature in this area.

First, building on an exhaustive study of the caselaw, I offer the first comprehensive account of the current cumulative finality mess. After studying over 200 court of appeals decisions on cumulative finality issues, I have identified deep inter-circuit splits and intra-circuit inconsistencies. Since *FirsTier*, appellate decisions are all over the map on which district court decisions subsequent events can save. Some hold that only appeals from final decisions—those that resolve all outstanding issues in the district court—can be saved by the entry of a final judgment.[10] I call this the "narrow" approach to cumulative finality. Some hold that appeals from other district court decisions—those that could be certified for an intermediate appeal under Rule 54(b)—can be saved by a subsequent judgment or Rule 54(b) certification.[11] I call this the "intermediate" approach. And some hold that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment.[12] I call this the "broad" approach. The courts also disagree about the interaction between Rule 4(a)(2) and the common-law doctrine that preceded it. Some courts hold that Rule 4(a)(2) is now the only source of law on cumulative finality.[13] Others have concluded that the common-law doctrine survived Rule 4(a)(2) and continues to exist alongside it.[14] This is no ordinary split. In addition to disagreement among the circuits in how to approach matters of cumulative finality, many of the circuits have issued

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four meetings, but eventually declined to address the issue. *See* Advisory Comm. on Appellate Rules, *Minutes of Fall 2011 Meeting*, *Item No. 10-AP-A (premature notices of appeal)* (October 13–14, 2011), http://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-10-2011.pdf; Advisory Comm. on Appellate Rules, *Minutes of Spring 2011 Meeting*, *Item No. 10-AP-A (premature notices of appeal)* (April 6–7, 2011), http://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-04-2011.pdf; Advisory Comm. on Appellate Rules, *Minutes of Fall 2010 Meeting*, *Item No. 10-AP-A (premature notices of appeal)* (October 7–8, 2010), http://www.uscourts.gov/sites/default/files/fr_import/AP10-2010-min.pdf; Advisory Comm. on Appellate Rules, *Minutes of Spring 2010 Meeting*, *Item No. 10-AP-A (premature notices of appeal)* (April 8–9, 2010), http://www.uscourts.gov/sites/default/files/fr_import/AP04-2010-min.pdf.

[10] *See, e.g.*, Miller v. Special Weapons, L.L.C., 369 F.3d 1033, 1035 (8th Cir. 2004).

[11] *See, e.g.*, Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161–62 (D.C. Cir. 2005).

[12] *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 587 (3d Cir. 1999).

[13] *See, e.g.*, *Outlaw*, 412 F.3d at 160.

[14] *See, e.g.*, *Lazy Oil*, 166 F.3d at 587.

decisions disagreeing with their own precedent. Litigants in these circuits thus have no guidance on which rules of cumulative finality govern them.

Second, I advocate a fix: reinterpreting or amending Rule 4(a)(2) to give effect to almost any notice of appeal filed before the entry of judgment. The current cumulative finality mess comes from the Supreme Court's decision in *FirsTier*. But *FirsTier* got Rule 4(a)(2)'s meaning wrong. The *FirsTier* Court overlooked the ambiguities in the rule's text and history, and the Court failed to understand that in nearly all cases a premature notice of appeal—and allowing a subsequent judgment to give effect to that notice—does no harm. Despite this minimal (if existent) harm, the narrow and intermediate approaches that *FirsTier* produced have allowed courts to dismiss appeals because of a minor procedural misstep. In other words, litigants are losing their opportunity to appeal for no good reason. The better approach is the broad one—to allow a subsequent judgment to save any prematurely filed notice of appeal. I ultimately argue that either the Supreme Court should correct its reading of Rule 4(a)(2) or the Committee on Rules of Practice and Procedure (which is often simply called the "Rules Committee") should amend Rule 4(a)(2) to clearly adopt the broad approach.

Third, I use the current cumulative finality situation to illustrate a gap in the appellate jurisdiction literature, namely the insufficient attention given to the problems of clearly defining when litigants can appeal after a final judgment. Most articles on appellate jurisdiction (my own included) focus on appeals before a final judgment.[15] To be sure, this attention is deserved. Appeals before

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[15] *See generally, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998); Thomas J. André, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041 (1980); Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165 (1984); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 L. & CONTEMP. PROBS. 157 (1984); Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999); Kristin B. Gerdy, *"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine*, 38 U.S.F. L. REV. 213 (2004); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175 (2001); Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267 (2017); Lammon, *Dizzying* Gillespie, *supra* note 6; Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CIN. L. REV. 1 (2016) [hereinafter Lammon, Perlman *Appeals*]; Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J.

a final judgment have been one of the most persistently vexing issues in federal procedure, and the law governing those appeals has been continually subject to criticism and a constant target of reform efforts.[16] But appeals before a final judgment are only one side of appellate jurisdiction. Appeals after a final judgment produce their own problems. Although litigants have a right to appeal once district court proceedings have ended,[17] it is not always easy to determine when the end has come. The issues with defining a final, appealable judgment merit consideration as well. And defining a final, appealable judgment should probably be part of any reform.

I proceed as follows. In Part II, I first provide background on federal appellate jurisdiction generally and the unique problems concerning the time for filing a notice of appeal.[18] I then describe the three major events in the history of cumulative finality that led

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423 (2013) [hereinafter, Lammon, *Rules, Standards, and Experimentation*]; Lawyers Conference Comm. on Fed. Courts & the Judiciary, *The Finality Rule: A Proposal for Change*, 19 JUDGES' J., no. 4, 1980, at 33; Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353 (2010); James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043 (2011); Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013) [hereinafter Pollis, *Rule 54(b)*]; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643 (2011) [hereinafter Pollis, *Multidistrict Litigation*]; Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733 (2006); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527 (2002); Brad D. Feldman, Note, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 GEO. L.J. 1717 (2011); Michael W. McConnell, Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450 (1978); John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200 (1994).

[16] *See, e.g.*, Lammon, *Dizzying* Gillespie, *supra* note 6, at 415–18; Martineau, *supra* note 15, at 770–87; Pollis, *Rule 54(b)*, *supra* note 15, at 757–60; Steinman, *supra* note 15, at 1276–88.

[17] FED. R. APP. P. 4(a).

[18] I focus entirely on cumulative finality in civil cases. Criminal cases can pose their own unique cumulative finality issues. But this matter arises largely in the civil context, so I confine my analysis to that.

to the current situation: (1) the courts of appeals' early decisions developing the common-law cumulative finality doctrine; (2) the 1979 addition of Rule 4(a)(2) to the Rules of Appellate Procedure; and (3) the Supreme Court's 1991 decision interpreting Rule 4(a)(2), *FirsTier*. In Part III, I explore the current state of affairs in the courts of appeals. I describe the three approaches to cumulative finality and the mess of decisions that the courts of appeals have produced. I then offer the fix in Part IV. I show where *FirsTier* went wrong and explain the best interpretation of Rule 4(a)(2), ultimately advocating that the Court overrule *FirsTier* or the Rules Committee amend Rule 4(a)(2) to clearly adopt the broad approach to cumulative finality. I end Part IV by briefly discussing the need for the appellate jurisdiction literature to explore the jurisdictional problems that arise in appeals after—rather than before—a final judgment. In Part V, I briefly conclude.

II. THE PROBLEM OF PREMATURE APPEALS AND THE DEVELOPMENT OF CUMULATIVE FINALITY

Before delving into the current state of affairs in the courts of appeals, some background is in order. In this Part I briefly introduce the general rules governing the timing of appeals in federal court, focusing particularly on when federal litigants might—and when they must—file a notice of appeal. I then turn to the development of cumulative finality, from its beginning as a common-law doctrine in the courts of appeals, to its apparent codification in Rule of Appellate Procedure 4(a)(2), to the Supreme Court's only decision on Rule 4(a)(2)'s scope, *FirsTier*.

A. A SKETCH OF FEDERAL APPELLATE JURISDICTION AND NOTICES OF APPEAL

As a general rule, federal litigants must wait until the end of district court proceedings—when all issues have been decided and all that remains is enforcing the judgment—before they can appeal. This is the federal final-judgment rule.[19] It stems from 28 U.S.C.

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[19] *See, e.g.*, Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867–68 (1994); Abney v. United States, 431 U.S. 651, 656–57 (1977); *see also* Petty, *supra* note 15, at 356–60 (discussing the final-judgment rule's history).

§ 1291, which gives the courts of appeals jurisdiction over only "final decisions" by the district courts.[20] A decision that resolves all outstanding issues in the district court is a "final decision."[21] For most federal litigants, their one and only appeal comes after this final judgment. Like any rule, the final-judgment rule has exceptions.[22] In fact, it has many exceptions.[23] Sometimes a litigant can appeal after the district court enters an order that resolves some—but not all—outstanding issues. I can ignore the intricacies of these exceptions (and they are intricate) for now. It's enough to say at this point that the courts of appeals lack jurisdiction over an appeal until a district court has entered a final judgment or other appealable order. And, again, most litigants' one and only appeal comes after a final judgment.

Most appeals in federal court begin with the filing of a notice of appeal.[24] A proper notice of appeal effectively transfers a case from the district court to the court of appeals. To be proper, a notice of appeal must satisfy essentially two requirements.

The first concerns the content of a notice, and it's largely straightforward. In most instances, the notice need only specify the appealing party, the order or judgment appealed from, and the court to which the party is appealing.[25] Although disputes as to the

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[20] *See* 28 U.S.C. § 1291 (2012).

[21] *See* Catlin v. United States, 324 U.S. 229, 233 (1945) (defining a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

[22] Some of these exceptions deem particular kinds of district court orders "final decisions" as that term is used in § 1291, even though those decisions don't mark the end of district court proceedings. Other exceptions allow the immediate appeal of certain district court decisions despite the order not qualifying as a "final decision." I have argued (and continue to believe) it's best to call any situation in which someone can appeal before a final judgment an "exception" to the final-judgment rule. *See* Lammon, Perlman *Appeals*, *supra* note 15, at 27–28; Lammon, *Rules, Standards, and Experimentation*, *supra* note 15, at 447 n.118.

[23] For more in-depth discussions of the exceptions to the final-judgment rule, see Glynn, *supra* note 15, at 185–201; Martineau, *supra* note 15, at 729–47; Petty, *supra* note 15, at 360–93; Pollis, *Multidistrict Litigation*, *supra* note 15, at 1652–59; Steinman, *supra* note 15, at 1244–72.

[24] *See* FED. R. APP. P. 3(a)(1). Not all appeals begin this way. Discretionary appeals, for example, begin with the filing of a petition for permission to appeal. *See* FED. R. APP. P. 5(a)(1). An appeal in post-conviction proceedings can begin with the filing of a request for a certificate of appealability. *See* FED. R. APP. P. 22(b).

[25] FED. R. APP. P. 3(c)(1).

adequacy of a notice sometimes arise, courts are to take a generous view of a notice's adequacy.[26]

The second requirement concerns timing. By both statute and rule, Congress has imposed certain deadlines for filing a notice of appeal.[27] In most civil cases, parties have thirty days after the entry of the order or judgment being appealed to file their notice.[28] When the United States is a party to a civil case, the time for filing is sixty days.[29] In most cases, complying with these deadlines for filing a notice of appeal is simple. But these seemingly straightforward deadlines sometimes prove problematic.

Parties occasionally file their notice after the period for doing so has expired. In *Bowles v. Russell*, the Supreme Court held that a late-filed notice in a civil case is ineffective.[30] The time limits for filing a notice of appeal in a civil case come from a statute—28 U.S.C. § 2107. The *Bowles* Court reasoned that this statutory period limited the courts of appeals' jurisdiction.[31] So the late-filed notice deprived the court of appeals of jurisdiction and required dismissing the appeal.[32]

Other times, parties file too early. As just mentioned, litigants must wait for the district court to enter a judgment or appealable order before the court of appeals has jurisdiction over their appeal.[33] But litigants don't always wait. They sometimes instead file a

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[26] *See* FED. R. APP. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal."); FED. R. APP. P. 3(c)(4) ("An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."); *see also* Smith v. Barry, 502 U.S. 244, 248 (1992) ("Courts will liberally construe the requirements of Rule 3.").

[27] *See* 28 U.S.C. § 2107 (2012); FED. R. APP. P. 4.

[28] FED. R. APP. P. 4(a)(1)(A).

[29] FED. R. APP. P. 4(a)(1)(B).

[30] Bowles v. Russell, 551 U.S. 205, 214 (2007). For an in-depth discussion of late-filed notices of appeal, see 16A WRIGHT ET AL., *supra* note 9, § 3950.5. *Bowles* was part of a larger Supreme Court effort to clarify which rules are jurisdictional (and thus not open to judge-made exceptions) and which are claims-processing rules (and thus open to waiver and judge-made exceptions). *See Bowles*, 551 U.S. at 210 ("[S]everal of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules . . . .").

[31] *Bowles*, 551 U.S. at 213.

[32] *Id.* at 214.

[33] FED. R. APP. P. 4(a)(1)(A).

notice of appeal after the district court makes a decision that is not a final judgment or appealable order. The notice is thus premature.

For purposes of this Article, I can separate into three groups the district court decisions that produce these premature appeals. These three categories oversimplify the reality of federal appellate jurisdiction, but additional detail and nuance are unnecessary for present purposes.

First are traditional final decisions. These district court decisions resolve all outstanding issues in a case. A district court might, for example, issue a written order dismissing a complaint with prejudice or granting a party summary judgment on all claims. Or a district court might announce these decisions orally at a hearing. In either case, district court proceedings are essentially done. All that remains is the formal entry of a judgment—a separate document whose entry on the docket marks the end of district court proceedings and begins the time for filing a notice of appeal.[34]

Technically speaking, a traditional final decision alone does not begin the time for filing an appeal; that time generally does not begin until entry of a judgment.[35] And for most traditional final decisions, entry of a judgment does not occur until the judgment is entered on the docket in a separate document.[36] But since the traditional final decision resolves all outstanding issues in the district court, that separate document is often forthcoming; there is rarely anything standing in its way. Even if no separate document is ever issued, the judgment is considered entered 150 days after the traditional final judgment is recorded on the docket.[37] And a would-be appellant can waive the separate-document requirement by filing a notice of appeal.[38] Still, until judgment is entered, the time for taking an appeal has not begun to run.

Second are interlocutory decisions. These decisions resolve fewer than all of the issues before a district court and are instead a step toward a final decision. And district courts can make dozens of them in the course of proceedings. Examples include orders denying a

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[34] *See generally* FED. R. CIV. P. 58; FED. R. APP. P. 4.
[35] *See* FED. R. APP. P. 4(a)(2).
[36] *See* FED. R. CIV. P. 58(a), (c).
[37] FED. R. CIV. P. 58(c)(2)(B).
[38] *See* FED. R. APP. P. 4(a)(7)(B).

motion to dismiss, discovery orders, and orders sanctioning attorneys.

Given the final-judgment rule, federal appellate courts do not have jurisdiction to immediately review interlocutory decisions. Litigants must wait until the end of district court proceedings—when the district court has made the just-discussed traditional final decision and entered the just-discussed judgment—before appealing any interlocutory decision. Interlocutory decisions merge into the final judgment and can be reviewed on an appeal from that judgment.[39] Again, there are some exceptions to this that allow for the immediate appeal of some interlocutory decisions.[40] But appellate review of the vast majority of interlocutory decisions must await a final judgment.

Third are what I call "certifiably final decisions." Unlike traditional final decisions, certifiably final decisions do not resolve all outstanding issues in a case. They are, at least initially, interlocutory. But so long as certain requirements are met, the district court can certify these decisions for an immediate appeal under Federal Rule of Civil Procedure 54(b). This rule allows a district court to certify for an immediate appeal an order deciding some (but not all) claims in a multi-claim or multi-party suit.[41] District courts should do so only when there is no good reason to delay an appeal of the order in question.[42] For example, a district court might certify an order dismissing the claims against one defendant in a multi-defendant suit.[43] The plaintiff can then immediately appeal that dismissal rather than wait until its claims against the other defendants are resolved. So long as the issues raised in the appeal are sufficiently different from those remaining

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[39] *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (noting that appeals are not permitted from decisions which "are but steps towards final judgment in which they will merge").

[40] *See supra* note 23.

[41] *See* FED. R. CIV. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.").

[42] *Id.*

[43] *See, e.g.*, Jewler v. District of Columbia, 198 F. Supp. 3d 1, 3 (D.D.C. 2016) (certifying an order dismissing all claims against certain individual defendants in a multi-defendant suit).

in the trial court, this will likely make some sense; the dismissed defendant would not need to wait until the other claims are resolved (which could take years) before a final appellate resolution of the plaintiff's claims against it. Once the district court makes the certification, judgment is entered on the decision and it can be immediately appealed.

A notice of appeal filed after any of these decisions—traditional final decisions, interlocutory decisions, and certifiably final decision—technically speaking, does not satisfy the timing requirements of Rule 4, as there was no final judgment (or other order) from which a proper appeal could be taken. The time for filing a notice of appeal has accordingly not started.[44]

By themselves, these premature notices do no real harm; they're a nullity and can be ignored. Problems arise, however, when the district court later enters an appealable order or a final judgment and the litigant fails to file a new notice of appeal. Appellate courts in this all-too-common situation are faced with a jurisdictional quandary. The appellant filed a notice of appeal before there was a final judgment, and that notice—absent a rule saving it—is technically ineffective because it was not filed within the specified time after entry of the order or judgment. The appellant also never filed a proper notice of appeal after the eventual entry of the order or judgment. The court arguably lacks appellate jurisdiction in this scenario.

To solve this problem, courts, and later rulemakers, developed the doctrine of cumulative finality.

B. CUMULATIVE FINALITY'S PAST

Three major events mark the history of the cumulative finality doctrine: (1) the courts of appeals' early decisions developing the common-law cumulative finality doctrine; (2) the 1979 addition of Rule 4(a)(2) to the Federal Rules of Appellate Procedure; and (3) the Supreme Court's 1991 decision interpreting Rule 4(a)(2), *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*[45]

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[44] *See, e.g.*, FED. R. APP. P. 4(a)(1)(A) ("In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.").

[45] 498 U.S. 269 (1991).

1. Early Cumulative Finality. A somewhat coherent doctrine on cumulative finality initially emerged from a series of courts of appeals decisions in the 1960s and 1970s. Most cumulative finality issues arose in three contexts: (1) appeals from district courts announcing their decisions but before entering a formal final judgment (that is, appeals from traditional final decisions), (2) appeals from orders dismissing a complaint but not an action, and (3) appeals from orders dismissing some—but not all—of the claims in a multi-claim or multi-party suit (that is, appeals from certifiably final decisions). But courts also applied the cumulative finality doctrine to appeals from interlocutory orders during this time.

a. Appeals From Announced Decisions. The first group of cases dealt with appeals from district court decisions before the formal entry of judgment, or traditional final decisions. In *Hodge v. Hodge*, for example, the Third Circuit held that a notice of appeal was effective even though it was filed before the district court memorialized its decision in a written judgment.[46] The appellant in *Hodge* filed his notice of appeal after the district court had orally announced its decision at a hearing but before the court entered a written judgment.[47] Because there was no final judgment when the notice was filed, the notice was premature and technically ineffective.[48] On appeal, the court reasoned that "[s]o long as the order [was] an appealable one and the non-appealing party [was] not prejudiced by the prematurity . . . , the court of appeals should proceed to decide the case on the merits, rather than dismiss on the basis of such a technicality."[49]

The Third Circuit reached the same conclusion in *Dougherty v. Harper's Magazine Co.*[50] The district court in *Dougherty* dismissed the plaintiff's claims, after which the plaintiff filed a notice of appeal.[51] The district court entered a written final judgment several months later.[52] The Third Circuit, noting that it initially did not

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[46] Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] 537 F.2d 758, 762 (3d Cir. 1976).

[51] *Id.* at 759.

[52] *Id.* at 762 (noting that the notice of appeal was filed in May 1975, but that the district court's judgment wasn't officially entered until January 1976).

have jurisdiction, treated the early notice as if it had been filed from the later judgment.[53] "[T]o do otherwise," the court said, "would be a travesty of justice."[54]

And in *Sanchez v. Maher*, the Second Circuit held that the entry of a written judgment memorializing an earlier final decision saved a premature notice of appeal.[55] The appellant in *Sanchez* filed its notice after the district court announced its decision, but the formal judgment was not entered until after oral argument in the appeal.[56] The Second Circuit reasoned that the subsequent entry of a judgment, along with the lack of prejudice to appellees, rendered the notice effective.[57]

b. Appeals From Dismissals of Complaints. The second group of cases dealt with a notice of appeal filed after the district court had dismissed the complaint but before the court dismissed the action. Courts have generally distinguished between the complaint—the plaintiff's pleading—and the action—the plaintiff's claim against a defendant. Often the dismissal of a complaint coincides with the dismissal of an action. But not always. A district court can dismiss a complaint with leave to amend, giving the plaintiff the opportunity to correct whatever was wrong.[58] And a district court order dismissing only a complaint is not a final, appealable order; the action is still pending, and the plaintiff can keep the case alive (or at least try to) by filing an amended pleading. Finality comes only when the district court enters a judgment dismissing the entire action.

Plaintiffs sometimes file a notice of appeal after the district court dismisses a complaint but before the court dismisses the entire action. Today this situation poses little trouble; the rule is now firmly established that plaintiffs can signal their intent to rest on

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[53] *Id.*

[54] *Id. See also In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 376–77 (3d Cir. 1976) (holding that a notice of appeal was effective when it was filed after the district court had announced its decision but before formal entry of a written order); Markham v. Holt, 369 F.2d 940, 941–42 (5th Cir. 1966) (same).

[55] Sanchez v. Maher, 560 F.2d 1105, 1107 n.2 (2d Cir. 1977).

[56] *Id.*

[57] *Id.*

[58] *See* FED. R. CIV. P. 15(a)(2) (allowing the court to freely grant leave to amend when justice so requires).

the original pleading by filing a notice of appeal.[59] But several decades ago this situation led to litigation over appellate jurisdiction, with courts asked to dismiss appeals due to the prematurely filed notice.

Rather than dismiss the appeal, courts treated the early notice as having been filed after the eventual final judgment. In *Firchau v. Diamond National Corp.*, for example, the Ninth Circuit held that a premature notice of appeal was saved by the subsequently entered final judgment.[60] The plaintiffs in *Firchau* filed their notice of appeal after the district court had dismissed their complaint but three days before the court entered a final judgment dismissing the action.[61] The court treated the notice as filed from the subsequent final judgment and reasoned that the early filing was a mere technical error that did not prejudice anyone.[62] The Ninth Circuit reached a similar conclusion in *Ruby v. Secretary of the United States Navy*, where it stated—relying on *Firchau*—that "a notice of appeal directed to [a] non-appealable order will be regarded . . . as directed to the subsequently-entered final decision."[63] And in *Lanning v. Serwold*, the Ninth Circuit concluded that "special circumstances" gave it jurisdiction over an appeal from the dismissal of a complaint (but not an action); no amendment could have saved the defects in the plaintiff's complaint, so the order dismissing it was effectively final and appealable.[64]

c. Appeals From Resolutions of Some Claims in Multi-Claim or Multi-Defendant Suits. The final major group of early cumulative finality cases addressed notices filed after the district court made a certifiably final decision—one that resolved some (but not all) of the

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[59] *See, e.g.*, Shott v. Katz, 829 F.3d 494, 496 (7th Cir. 2016) (holding that "when a judge conditionally dismisses a suit, but gives the plaintiff time to fix the problem that led to dismissal . . ., the order becomes an appealable 'final decision' once the time for correction has expired, whether or not the court enters a final judgment" (quoting Davis v. Advocate Health Ctr. Patient Care Express, 523 F.3d 681, 683 (7th Cir. 2008))).

[60] Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 271 (9th Cir. 1965).

[61] *Id.* at 270.

[62] *Id.* at 271 ("[W]e regard the notice of appeal here in question as directed to the final judgment of dismissal, overlooking as a technical defect not affecting substantial rights, the premature filing of that notice.").

[63] Ruby v. Sec'y of U.S. Navy, 365 F.2d 385, 389 (9th Cir. 1966).

[64] Lanning v. Serwold, 474 F.2d 716, 717 n.1 (9th Cir. 1973).

claims in a multi-claim or multi-party suit.[65] In one of the leading early cumulative finality decisions, *Jetco Electronics Industries, Inc. v. Gardiner*, the Fifth Circuit held that a notice of appeal filed after only some defendants had been dismissed was saved by the later entry of a final judgment.[66] *Jetco* was a multi-defendant suit, and the plaintiffs filed their only notice of appeal after the district court had dismissed the claims against only one of the defendants.[67] The Fifth Circuit recognized that the plaintiffs had appealed from a non-final order, and there was no Rule 54(b) certification that would have permitted the appeal.[68] But the court refused to "exalt form over substance" and held that the premature notice of appeal, "under the circumstances of [the] case," was sufficient to grant appellate jurisdiction.[69]

Many other cases followed *Jetco*'s lead. In *Richerson v. Jones*, the Third Circuit held "that a premature appeal taken from an order which is not final but which is followed by an order that is final may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party."[70] And in *Merchants & Planters Bank of Newport v. Smith*, the Eighth Circuit held that it had jurisdiction to review an order granting summary judgment in favor of a defendant even though the defendant's counterclaims were outstanding at the time the notice of appeal was filed.[71] It wasn't until after oral argument in the court of appeals that the defendant voluntarily dismissed its counterclaims.[72] But once those counterclaims were dismissed, "all the claims [had] been disposed of in the district court, and that court's order [was] a final appealable one."[73]

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[65] In addition to the subsequently cited cases, see, for example, *Morris v. Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247, 1250 (10th Cir. 1971).

[66] Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973).

[67] *Id.*

[68] *Id.*

[69] *Id. See also* Huckeby v. Frozen Food Express, 555 F.2d 542, 547 (5th Cir. 1977) (noting that *Jetco* would have saved a premature notice of appeal filed from the dismissal of some claims in a multi-party suit if the other claims had been finally resolved by the time of the appeal).

[70] Richerson v. Jones, 551 F.2d 918, 922 (3d Cir. 1977); *see also* Plummer v. United States, 580 F.2d 72, 74 (3d Cir. 1978).

[71] Merchants & Planters Bank of Newport v. Smith, 516 F.2d 355, 356 n.3 (8th Cir. 1975) (per curiam).

[72] *Id.*

[73] *Id.*

Along these same lines, several early cumulative finality decisions held that the subsequent entry of a Rule 54(b) certification saved a premature notice of appeal.[74] So long as the order was certified before the appeal was decided, the premature notice was effective. In *Tilden Financial Corp. v. Palo Tire Service, Inc.*, the Third Circuit held that a subsequent Rule 54(b) certification saved a prematurely filed notice of appeal.[75] The defendant in *Tilden Financial* filed its notice of appeal after the district court had granted summary judgment against it on the plaintiff's claims but before the defendant's third-party complaint against a third-party defendant was resolved.[76] After the notice was filed but before disposition on appeal, the defendant obtained a Rule 54(b) certification.[77] The Third Circuit determined that the reasoning of its decision in *Richerson* applied similarly to certified orders because "a Rule 54(b) certification creates a final order under § 1291."[78] Since there was no prejudice from doing so, the court treated the premature appeal as an appeal from the certified order.[79]

Similarly, the Second Circuit held in *Gumer v. Shearson, Hammill & Co.* that a notice was effective even though the plaintiff had appealed before the district court certified the appeal under Rule 54(b).[80] The court noted that it was technically without jurisdiction since no Rule 54(b) certification had been made when the notice of appeal was filed, and the district court lacked jurisdiction to enter a certification without the appellate court's permission.[81] The Second Circuit decided to "pass over this

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[74] In contrast, some decisions from this time held or suggested that the district court could not certify a decision under Rule 54(b) after the notice of appeal had been filed. *See, e.g.*, Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1169 (5th Cir. 1978); Williams v. Bernhardt Bros. Tugboat Serv., Inc., 357 F.2d 883, 884 (7th Cir. 1966). These cases have subsequently been rejected. *See, e.g.*, Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988) (en banc); *see also* 16A WRIGHT ET AL., *supra* note 9, § 3950.5 ("The weight of authority holds that an appeal from a clearly non-appealable order fails to oust district court authority; older cases holding to the contrary have been rejected." (footnotes omitted)).

[75] Tilden Fin. Corp. v. Palo Tire Serv., Inc., 596 F.2d 604, 607 (3d Cir. 1979).

[76] *Id.* at 606.

[77] *Id.*

[78] *Id.* at 607.

[79] *Id.*; *see also* Dawson v. Chrysler Corp., 630 F.2d 950, 955 n.4 (3d Cir. 1980).

[80] Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 285 (2d Cir. 1974).

[81] *Id.*

technical defect," however, since it could be easily cured on remand.[82]

d. Other Early Cumulative Finality Decisions. Not every early cumulative finality decision fit into one of these categories. Some decisions allowed subsequent events to save a notice of appeal filed from a clearly interlocutory order. In *Curtis Gallery & Library, Inc. v. United States*, the Ninth Circuit held that a notice of appeal from a grant of summary judgment was effective even though the computation of damages remained outstanding.[83] The district court in *Curtis Gallery* had determined liability but left open the question of damages, noting that it would hold a hearing to determine any amounts due.[84] But before that hearing the plaintiffs filed their notice of appeal, and the district court entered a final judgment several months later.[85] A decision on liability but not damages is interlocutory—the appeal must await the damages determination so that both can be addressed in a single appeal. Applying *Ruby v. Secretary of the United States Navy*, however, the Ninth Circuit treated the notice of appeal as premature but ultimately effective.[86] Both the court and the appellee knew from the plaintiffs' filings that they intended to appeal the eventual final judgment.[87] There was thus no harm in treating the notice as if it had been filed after the final judgment.

Similarly, in *Eason v. Dickson*, the Ninth Circuit held that a notice of appeal filed from an order refusing to convene a three-judge panel was effective to appeal from a later final judgment dismissing the plaintiff's claims.[88] Like the order in *Curtis Gallery*, this decision was interlocutory. But the Ninth Circuit thought its cumulative finality decisions "suggested that the test was one of prejudice or its absence; that if the premature notice did not adversely 'affect substantial rights' of the prevailing adversary the appeal was saved."[89] Given that there was no suggestion of

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[82] *Id.*
[83] Curtis Gallery & Library, Inc. v. United States, 388 F.2d 358, 360 (9th Cir. 1967).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Eason v. Dickson, 390 F.2d 585, 588 (9th Cir. 1968).
[89] *Id.* (quoting Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 271 (9th Cir. 1965)).

prejudice to the appellant in *Eason*, the court deemed the premature notice effective.[90]

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As *Eason* illustrates, most early cumulative finality cases focused on prejudice to the appellee: so long as there was no harm from doing so, the later entry of a judgment saved the prematurely filed notice of appeal.[91] Courts often noted that to do otherwise would be needlessly technical and would violate the Supreme Court's admonition that issues of finality be treated practically.[92] Not every decision from this time agreed.[93] But the trend in the caselaw seemed to be towards a broad concept of cumulative finality.

2. Rule 4(a)(2). The second major development in cumulative finality was the addition of Federal Rule of Appellate Procedure 4(a)(2) in 1979. It now provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."[94]

The new rule's purpose, according to the Advisory Committee Notes, was "to avoid the loss of the right to appeal by filing the notice of appeal prematurely."[95] The Notes also indicated that the Committee thought that it was codifying an existing practice in the

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[90] *Id.*

[91] *See id.*; *see also* Tilden Fin. Corp. v. Palo Tire Serv., Inc., 596 F.2d 604, 607 (3d Cir. 1979) (holding that a premature notice of appeal was saved by subsequent events and noting the lack of prejudice to the appellee); Yaretsky v. Blum, 592 F.2d 65, 66–67 (2d Cir. 1979) (same); Plummer v. United States, 580 F.2d 72, 74 (3d Cir. 1978) (same); Sanchez v. Maher, 560 F.2d 1105, 1107 n.2 (2d Cir. 1977) (same); Richerson v. Jones, 551 F.2d 918, 922–23 (3d Cir. 1977) (same); *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 377 (3d Cir. 1976) (same); Morris v. Uhl & Lopez Eng'rs, Inc., 442 F.2d 1247, 1250 (10th Cir. 1971) (same).

[92] *See, e.g.*, Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973). This admonition comes from the Supreme Court's decisions in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and *Gillespie v. United States Steel Co.*, 379 U.S. 148, 152 (1964).

[93] *See, e.g.*, Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1169 (5th Cir. 1978) (dismissing an appeal despite a subsequent Rule 54(b) certification because the district court lacked jurisdiction to certify its order after the notice of appeal had been filed); Williams v. Bernhardt Bros. Tugboat Serv., Inc., 357 F.2d 883, 885 (7th Cir. 1966) (same).

[94] FED. R. APP. P. 4(a)(2). In its original form, Rule 4(a)(2) stated: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." 20 MOORE'S FEDERAL PRACTICE, *supra* note 9, § 304App.02.

[95] FED. R. APP. P. 4(a) advisory committee's note to 1979 amendment.

courts of appeals, stating that even without a rule courts had generally allowed subsequent events to save a premature notice of appeal.[96] As examples of this practice, the Notes cited four of the cases just discussed[97]—*In re Grand Jury Empaneled January 21, 1975*,[98] *Hodge v. Hodge*,[99] *Ruby v. Secretary of the United States Navy*,[100] and *Firchau v. Diamond National Corp*.[101]

Beyond mentioning these cases, however, the Notes did not specify exactly how the new rule affected the existing common-law cumulative finality doctrine. And the caselaw from this time does not offer many hints. Despite the new rule, the courts of appeals continued to develop cumulative finality as a largely judge-made doctrine.

Most of the decisions from this era addressed whether a subsequent judgment or Rule 54(b) certification could save a notice filed after a certifiably final decision. And most of those decisions held that they could.[102] There were some outliers, such as the Fifth Circuit's decision in *United States v. Taylor*.[103] Before *Taylor*, the

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[96] *Id.* ("Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective.").

[97] *Id.*

[98] *See supra* note 54.

[99] *See supra* notes 46–49 and accompanying text.

[100] *See supra* note 63 and accompanying text.

[101] *See supra* notes 60–62 and accompanying text.

[102] For cases holding that the subsequent resolution of all remaining claims saved a notice filed after a certifiably final decision, see generally *Simmons v. Willcox*, 911 F.2d 1077 (5th Cir. 1990); *Lovellette v. Southern Railway Co.*, 898 F.2d 1286 (7th Cir. 1990); *Smith v. Pinner*, 891 F.2d 784 (10th Cir. 1989) (per curiam); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988); *Dowling v. City of Philadelphia*, 855 F.2d 136 (3d Cir. 1988); *Sacks v. Rothberg*, 845 F.2d 1098 (D.C. Cir. 1988); *Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581 (11th Cir. 1987); *Govern v. Meese*, 811 F.2d 1405 (11th Cir. 1987) (per curiam); *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150 (3d Cir. 1986); *Knight v. Brown Transport Corp.*, 806 F.2d 479 (3d Cir. 1986); *Hanlin v. Mitchelson*, 794 F.2d 834 (2d Cir. 1986); *Rivers v. Washington County Board of Education*, 770 F.2d 1010 (11th Cir. 1985) (per curiam); *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252 (5th Cir. 1985); *Gillis v. United States Department of Health & Human Services*, 759 F.2d 565 (6th Cir. 1985); *Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105 (3d Cir. 1984); *Baker v. Limber*, 647 F.2d 912 (9th Cir. 1981); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980); *Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980). For cases holding that a subsequent Rule 54(b) certification saved notice filed from a certifiably final judgment, see generally *McLaughlin v. City of LaGrange*, 662 F.2d 1385 (11th Cir. 1981); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980). *See also* Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645–46 (10th Cir. 1988) (en banc) (holding that under Rule 4(a)(2) a subsequent judgment or Rule 54(b) certification will save a notice filed after a certifiably final decision and overturning prior Tenth Circuit cases holding to the contrary).

[103] United States v. Taylor, 632 F.2d 530, 531 (5th Cir. 1980).

Fifth Circuit had issued several decisions holding that subsequent events would save a notice filed after a certifiably final decision, including *Jetco*, discussed above.[104] But one decision—*Kirtland v. J. Ray McDermott & Co.*—held to the contrary.[105] Citing to *Kirtland* but not *Jetco* (or any other prior Fifth Circuit decision on the matter), *Taylor* held that the subsequent dismissal of all outstanding claims did not save the notice filed after only some of the outstanding claims had been dismissed.[106] But the clear majority of these cases gave effect to the premature notices.

When it came to appeals from interlocutory orders, the decisions were more mixed. Some decisions disagreed, for example, about whether the subsequent calculation of damages saved a notice filed after a determination of liability. In *Alcorn County v. U.S. Interstate Supplies, Inc.*, the Fifth Circuit suggested that it could.[107] The notice in *Alcorn County* was filed after the district court had determined liability, damages, and entitlement to attorney's fees.[108] But it came before the amount of those fees was determined.[109] On appeal, the Fifth Circuit first determined that outstanding issues regarding the amount of attorney's fees prevented a judgment from being final.[110] But by the time the Fifth Circuit heard the appeal, the district court had decided the amount of fees.[111] Relying on its

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[104] *See supra* notes 66–69 and accompanying text; *see also* Tower v. Moss, 625 F.2d 1161, 1165 (5th Cir. 1980).

[105] Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166, 1168–69 (5th Cir. 1978) (holding that a subsequent Rule 54(b) certification was ineffective and did not save a notice filed after the district court had dismissed one defendant in a multi-defendant suit).

[106] *Taylor*, 632 F.2d at 531. For other outliers from this time, see *United States v. Ettrick Wood Prods., Inc.*, 916 F.2d 1211, 1217 (7th Cir. 1990) (addressing the propriety of a Rule 54(b) certification even though all claims had been resolved by the time of the appeal); *Bode v. Clark Equipment Co.*, 807 F.2d 879, 881 (10th Cir. 1986) (per curiam) (holding that subsequent entry of a final judgment resolving all claims did not save a notice filed from an order apportioning settlement proceeds; " '[t]he finality requirement of 28 U.S.C. § 1291 must have been satisfied as of the date a notice of appeal is filed.' " (quoting Century Laminating, Ltd. v. Montgomery, 595 F.2d 563, 567 (10th Cir. 1979))); *Seattle-First Nat'l Bank v. Bluewater P'ship*, 772 F.2d 565, 569 (9th Cir. 1985) (declining to apply "the rule that subsequent events may cure premature notices of appeal").

[107] Alcorn Cty. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165–66 (5th Cir. 1984).

[108] *Id.* at 1163.

[109] *Id.*

[110] *Id.* at 1165.

[111] *Id.* at 1165–66.

pre-Rule 4(a)(2) decision in *Jetco*, the court concluded that this subsequent decision saved the premature notice.[112]

In *General Television Arts, Inc. v. Southern Railway Co.*, however, the Eleventh Circuit held that the subsequent determination of a damages award did not save a notice of appeal filed after a determination of liability.[113] The district court in *General Television Arts* had granted summary judgment for the plaintiff on the issue of liability but left open the amount of damages.[114] Shortly after the defendant filed its notice of appeal, the district court determined that amount.[115] On appeal, the court noted that Rule 4(a)(2) "was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment."[116] Citing *Taylor*, the court determined that the final judgment did not save the premature notice.[117]

Regardless of their outcomes, these cases are significant in their ignorance of the new Rule 4(a)(2). Many decisions from this era did not even mention it, relying instead on prior cumulative finality decisions that often pre-dated Rule 4(a)(2).[118] These decisions include leading cumulative finality cases from this period that are still cited today. *Anderson v. Allstate Insurance Co.*, for example, became a leading Ninth Circuit decision on cumulative finality.[119] *Anderson* held that a notice of appeal from an order dismissing only

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[112] *Id.* at 1166.

[113] Gen. Television Arts, Inc. v. S. Ry. Co., 725 F.2d 1327, 1331 (11th Cir. 1984).

[114] *Id.* at 1329–30.

[115] *Id.* at 1330.

[116] *Id.* at 1330–31.

[117] *Id.* at 1331.

[118] *See, e.g.*, Simmons v. Willcox, 911 F.2d 1077, 1080 (5th Cir. 1990) (relying on Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973)); Lovellette v. S. Ry. Co., 898 F.2d 1286, 1289 (7th Cir. 1990) (citing King v. Gibbs, 876 F.2d 1275 (7th Cir. 1989)), and Baker v. Limber, 647 F.2d 912 (9th Cir. 1981)); Ethridge v. Harbor House Rest., 861 F.2d 1389, 1402 (9th Cir. 1988) (relying on Anderson v. Allstate Ins. Co., 630 F.2d 677 (9th Cir. 1980)); Dowling v. City of Philadelphia, 855 F.2d 136, 138 (3d Cir. 1988) (relying on Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977)); Sacks v. Rothberg, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (relying on, among other cases, Gillis v. U.S. Dep't of Health & Human Servs., 759 F.2d 565 (6th Cir. 1985), Alcorn Cty. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984), Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3d Cir. 1983), and Pireno v. N.Y. State Chiropractic Ass'n, 650 F.2d 387 (2d Cir. 1981)); Matarese v. LeFevre, 801 F.2d 98, 105 (2d Cir. 1986) (relying on, among other cases, Yaretsky v. Blum, 592 F.2d 65 (2d Cir. 1979)); Dawson v. Chrysler Corp., 630 F.2d 950, 955 n.4 (3d Cir. 1980) (relying on Tilden Fin. Corp. v. Palo Tire Serv., 596 F.2d 604 (3d Cir. 1979)).

[119] *See* Anderson v. Allstate Ins. Co., 630 F.2d 677 (9th Cir. 1980).

some of the defendants in a multi-defendant suit was saved by the dismissal of the remaining claims.[120] Citing to several pre-Rule 4(a)(2) cumulative finality cases, the Ninth Circuit concluded that these subsequent events saved the premature appeal.[121] The court also noted that "[t]hese cases provide clear examples of giving a practical rather than a technical construction to the finality rule, without sacrificing the considerations underlying that rule."[122] Argued and decided in 1980, the court never mentioned Rule 4(a)(2).[123]

Similarly, in *Pireno v. New York State Chiropractic Association*—which has become a leading Second Circuit decision—the Second Circuit held that the subsequent dismissal of the lone remaining defendant saved a notice filed after dismissal of the other defendants.[124] Citing *Jetco*, the Second Circuit concluded that the earlier order became final and appealable on the date of the second order, and the court treated the early notice of appeal as having been timely filed thereafter.[125] Decided in 1981, the court never mentioned Rule 4(a)(2).[126]

When courts mentioned Rule 4(a)(2), no consensus emerged on its relation to the common-law doctrine. In *Cape May Greene, Inc. v. Warren*—the leading Third Circuit case from this period—the Third Circuit apparently thought that Rule 4(a)(2) existed alongside the cumulative finality doctrine.[127] *Cape May Greene* held that the subsequent dismissal of an outstanding cross-claim saved a notice

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[120] *Id.* at 680.

[121] *Id.* at 680–81 (citing, among other cases, Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973); Ruby v. Sec'y of the U.S. Navy, 365 F.2d 385, 389 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 271 (9th Cir. 1965)).

[122] *Id.* at 681.

[123] To be fair, it is not clear that *Anderson* should have applied Rule 4(a)(2). The new rule took effect on August 1, 1979, and the Supreme Court ordered that it "shall govern all appellate proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." 441 U.S. 971 (1979). Although it is not clear from the *Anderson* opinion when the notice in that case was filed, it may have been as early as 1978. *See Anderson*, 630 F.2d at 680. My thanks to Catherine Struve for pointing this out.

[124] Pireno v. N.Y. State Chiropractic Ass'n, 650 F.2d 387, 389 n.4 (2d Cir. 1981).

[125] *Id.*

[126] The notice in *Pireno* was filed on April 18, 1979. *Id.* Like *Anderson*, this was before Rule 4(a)(2)'s effective date, and so it is not clear that *Pireno* should have applied the new rule. *See supra* note 123.

[127] Cape May Greene, Inc. v. Warren, 698 F.2d 179, 185 (3d Cir. 1983).

filed from the dismissal of the plaintiff's claims.[128] Relying on *Pireno* and *Jetco*, as well as its prior decision in *Richerson*, the Third Circuit held that the premature notice of appeal became effective when the cross-claim was dismissed.[129] *Cape May Greene*'s brief mention of Rule 4(a)(2) was confined to the discussion of whether a recent Supreme Court decision—*Griggs v. Provident Consumer Discount Co.*[130]—had abrogated these earlier cumulative finality decisions.[131] The court concluded that it had not.[132]

The Eleventh Circuit's decision in *Robinson v. Tanner* also suggested (albeit without much explanation) that the common-law cumulative finality continued to coexist alongside Rule 4(a)(2).[133] In *Robinson*, the Eleventh Circuit tried at some length to reconcile its various cumulative finality decisions (which included Fifth Circuit decisions issued before the 1981 division into the Fifth and Eleventh Circuits).[134] The *Robinson* court ultimately listed its prior decisions (including *Jetco*) and Rule 4(a)(2) as distinct rules governing different kinds of premature notices.[135] *Jetco* and other decisions applied to notices "filed from an order dismissing a claim or party and followed by a subsequent final judgment," while Rule 4(a)(2) applied to notices "filed after the announcement of a decision or order but before entry of the judgment or order."[136]

In *Lewis v. B.F. Goodrich Co.*, the Tenth Circuit suggested that Rule 4(a)(2) codified the common-law doctrine.[137] *Lewis* held that a subsequent judgment or Rule 54(b) certification would save a notice

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[128] *Id.* at 184–85.

[129] *Id.* (citing Pireno v. N.Y. State Chiropractic Ass'n, 650 F.2d 387 (2d Cir. 1981); Richerson v. Jones, 551 F.2d 918, 922 (3d Cir. 1977); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973)).

[130] 459 U.S. 56 (1982).

[131] *Cape May Greene*, 698 F.2d at 185. *Griggs* had interpreted Rule 4(a)(4), which at the time provided that a notice of appeal was ineffective if filed while certain post-trial motions were pending; the notice was considered "a nullity," as if "no notice of appeal were filed at all." 459 U.S. at 61. According to the *Cape May Greene* court, Rule 4(a)(2), when read alongside Rule 4(a)(4), meant that "the prohibition against giving effect to premature notices of appeal [is] confined to the specific instances cited in Rule 4(a)(4)." 698 F.2d at 185.

[132] 698 F.2d at 185.

[133] Robinson v. Tanner, 798 F.2d 1378, 1385 (11th Cir. 1986).

[134] *See id.* at 1382–85.

[135] *Id.* at 1385.

[136] *Id.*

[137] Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645 (10th Cir. 1988).

of appeal filed after a certifiably final judgment.[138] The *Lewis* court saw Rule 4(a)(2) as authority for this holding, and it cited to many cases that, as the court noted, reached the same conclusion without relying on Rule 4(a)(2).[139]

Finally, the Fifth Circuit's decision in *Alcom Electronic Exchange, Inc. v. Burgess* suggested that Rule 4(a)(2) abrogated the common-law cumulative finality doctrine, retaining only the rule that would give effect to a notice filed after a traditional final decision.[140] The *Alcom Electronic* court stated that Rule 4(a)(2)—not pre-Rule 4(a)(2) decisions like *Jetco*—governed the effect of a premature notice of appeal.[141] Rule 4(a)(2), the court thought, gave effect only to notices filed after a traditional final judgment.[142] The court seemed to recognize that although the *Jetco* decision would reach the same result on a traditional final judgment, it would also save many other premature notices that Rule 4(a)(2) would not.[143] Indeed, were *Jetco* still good law, the court thought that it would render Rule 4(a)(2) unnecessary.[144] The *Alcom Electronic* court concluded, however, that it was bound by the Fifth Circuit's post-Rule 4(a)(2) decision holding that *Jetco* was still good law.[145] But it was not alone in suggesting that Rule 4(a)(2) abrogated the common-law cumulative finality doctrine.[146]

So in the decade after the addition of Rule 4(a)(2), no one quite knew how to reconcile it with the common-law cumulative finality doctrine. Then came *FirsTier*.

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[138] *Id.*

[139] *Id.* (citing Finn v. Prudential-Bache Sec., Inc., 821 F.2d 581, 585 (11th Cir. 1987); Gillis v. U.S. Dep't of Health & Human Servs., 759 F.2d 565, 569 (6th Cir. 1985); Pireno v. N.Y. State Chiropractic Ass'n, 650 F.2d 387, 389–90 n.4 (2d Cir. 1981); Anderson v. Allstate Ins. Co., 630 F.2d 677, 680–81 (9th Cir. 1980); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973)).

[140] Alcom Elec. Exch., Inc. v. Burgess, 849 F.2d 964, 968–69 (5th Cir. 1988).

[141] *Id.* at 968.

[142] *Id.* ("Looking at the terms of [Rule 4(a)(2)], it provides for the postponement of a premature notice's effective date *only* where that notice is filed *after* announcement of final judgment but before entry of that judgment.").

[143] *Id.*

[144] *Id.* at 968–69.

[145] *See id.* at 969 (discussing Alcorn Cty. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984)).

[146] *See generally* Fadem v. United States, 42 F.3d 533 (9th Cir. 1994) (Wiggins, J., dissenting).

3. FirsTier. In 1991, the Supreme Court decided *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[147] its only decision interpreting Rule 4(a)(2). The *FirsTier* Court held that Rule 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss a case but before it formally entered the final judgment of dismissal on the docket.[148] During a hearing on the *FirsTier* defendant's motion for summary judgment, the district court announced that it was granting the motion and asked the defendant to submit proposed findings of fact and conclusions of law.[149] But before the district court entered any findings or conclusions (or a final judgment) the plaintiff filed its notice of appeal.[150] About a month later, the district court finally entered its findings and conclusions and issued a written final judgment.[151] The plaintiff never filed a new notice of appeal.

The issue for the Supreme Court, then, was whether Rule 4(a)(2) saved the *FirsTier* plaintiff's premature notice of appeal.[152] In interpreting the rule, the Court first recognized that the rule "codif[ied] a general practice in the courts of appeals of deeming certain premature notices of appeal effective."[153] The Court also noted the rationale for this general practice—namely, the lack of prejudice to the appellee.[154] Relying on *Firchau*, *Ruby*, and other pre-Rule 4(a)(2) cases, the Court reasoned that "Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment."[155] Given that the plaintiff in *FirsTier* filed its notice of appeal after the announcement of a decision that would have been final if immediately followed by the entry of judgment—and given the reasonableness of the appellant's mistaken belief that

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147 498 U.S. 269 (1991).
148 *Id.* at 270, 277.
149 *Id.* at 270–71.
150 *Id.* at 272.
151 *Id.*
152 *Id.*
153 *Id.* at 273.
154 *See id.* ("The Rule recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.").
155 *Id.* at 276.

it had filed a proper notice—the Supreme Court concluded that Rule 4(a)(2) saved the plaintiff's premature notice of appeal.[156]

The Supreme Court was careful, however, to say that Rule 4(a)(2) would not necessarily save a notice of appeal filed from *any* order; the Court listed discovery rulings and sanctions as examples of orders Rule 4(a)(2) would not save.[157] The rule instead "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment."[158]

FirsTier thus established that Rule 4(a)(2) would save a notice filed after the announcement of a decision that would end district court proceedings but before the formal entry of judgment. The question remained, however, of what other orders could be saved by Rule 4(a)(2) or a more general doctrine of cumulative finality. On that issue, the courts quickly split.

III. CUMULATIVE FINALITY IN THE COURTS OF APPEALS

After *FirsTier*, the courts of appeals developed three approaches to cumulative finality. First is a narrow approach that limits the cumulative finality doctrine to the scenario addressed in *FirsTier*, i.e., notices filed after the district court announces a traditional final decision but before formal entry of a written final judgment.[159] Second is a broad approach much like what existed in many courts before Rule 4(a)(2) and *FirsTier*.[160] Under this broad approach, subsequent events can save premature appeals from a variety of district court decisions. The third, intermediate approach falls somewhere in between, allowing subsequent events to save a notice filed after a certifiably final order—an order deciding some (but not all) of the claims in a multi-claim or multi-defendant suit. Under this intermediate approach, so long as the order appealed from could have been certified for an immediate appeal under Rule 54(b), the subsequent entry of an appealable judgment saves the premature notice.[161]

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156 *Id.* at 277.
157 *Id.* at 276.
158 *Id.*
159 *See infra* Part III.A.
160 *See infra* Part III.C.
161 *See infra* Part III.B.

This Part surveys these three approaches and their prevalence in the courts of appeals. As will be seen, each approach has at least one circuit that adheres to it. And several circuits have, on different occasions, applied different approaches to cumulative finality.

A. THE NARROW APPROACH

One line of cases holds that Rule 4(a)(2) applies only in the specific situation addressed in *FirsTier*: a district court announces a decision that resolves all outstanding issues in a case and all that remains is the entry of a written final judgment. This approach rests on two premises. First, a notice of appeal filed before a final judgment can be saved only as specified in Rule 4(a)(2)—that rule abrogated whatever common-law cumulative finality doctrine preceded it, and it now provides the sole means of saving a premature notice. Second, when the *FirsTier* Court said that Rule 4(a)(2) saved only those decisions that would be appealable if immediately followed by a final judgment, the Court meant only decisions that resolve all outstanding issues in a case—traditional final decisions.

So, for example, in *Miller v. Special Weapons, L.L.C.*, the Eighth Circuit held that neither the cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding.[162] The plaintiff in *Miller* filed his notice after the district court had granted summary judgment for the defendant on the plaintiff's claims but before the court decided the defendant's counterclaim.[163] On appeal, the Eighth Circuit concluded that the premature notice was ineffective. The court rejected the cumulative finality doctrine, claiming to be unaware of any Eighth Circuit decision adopting the doctrine and "persuaded that such experiments with 'pragmatic' application of the final judgment rule are unwise."[164] The court also held that Rule 4(a)(2) did not save the notice.[165] *FirsTier*, the Eighth Circuit noted, held that Rule 4(a)(2) "saves a premature appeal 'only when a district court announces a decision that *would be* appealable if immediately

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[162] Miller v. Special Weapons, L.L.C., 369 F.3d 1033, 1035 (8th Cir. 2004).

[163] *Id.* at 1033–34.

[164] *Id.* at 1035. *But see infra* notes 202–207 and accompanying text (discussing the Eighth Circuit's history with cumulative finality).

[165] *Miller*, 369 F.3d at 1035.

followed by the entry of judgment.' "[166] As the court saw it, there was no such decision in *Miller*. The plaintiff in *Miller* had filed his notice while an unresolved counterclaim was pending; because the case was not yet over, the district court could not have entered a final judgment.[167] The summary judgment order thus would not have been appealable if followed by entry of a final judgment, and Rule 4(a)(2) accordingly did not apply.[168]

Similarly, in *United States v. Cooper*, the Fifth Circuit rejected its earlier cumulative finality decisions and limited Rule 4(a)(2) to the situation addressed in *FirsTier*.[169] The defendant in *Cooper* filed a notice of appeal after a magistrate judge had issued a report and recommendation but before the district court adopted the recommendation.[170] The Fifth Circuit held that the subsequent adoption of the report and recommendation did not save the premature notice.[171] *FirsTier*, the court reasoned, "allows premature appeals only where there has been a final decision, rendered without a formal judgment."[172] A recommendation is not a final decision, so the notice was beyond saving.[173] And in reaching this conclusion, the Fifth Circuit concluded that its earlier cumulative finality decisions—allowing subsequent events to save premature notices in a variety of situations—were abrogated by *FirsTier*.[174]

The narrow approach has little going for it. Its reading of *FirsTier* fails to appreciate that there is more than one type of appealable judgment. To be sure, *FirsTier* limited Rule 4(a)(2)'s application to

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[166] *Id.* (quoting FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 276 (1991)).

[167] *Id.* ("The infirmity in Mr. Miller's appeal, however, does not lie in the fact that the district court had failed to issue its final order on the summary judgment that it announced but rather in the fact that there was an unresolved claim pending in the district court when Mr. Miller filed his notice of appeal.").

[168] *Id.*

[169] United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998). *Cooper* addressed the scope of then-Rule 4(b) (now Rule 4(b)(2)), which is nearly identical to Rule 4(a)(2) except that Rule 4(a)(2) applies in civil cases and Rule 4(b) applies in criminal cases. *See id.* at 962. The court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2), including the Supreme Court's interpretation of Rule 4(a)(2) in *FirsTier*. *See id.* at 962, 962 n.1.

[170] *Id.* at 961.

[171] *Id.* at 963.

[172] *Id.*

[173] *Id.*

[174] *Id.*

decisions "that *would be* appealable if immediately followed by the entry of judgment."[175] A traditional final decision certainly qualifies under this rule.

But so too does an order that could be certified for an immediate appeal under Rule 54(b). That rule expressly allows the district court to "direct entry of a final judgment" as to fewer than all of the claims or parties.[176] Once certified, the decision can be immediately appealed. So orders that could be certified for an immediate appeal under Rule 54(b) "*would be* appealable if immediately followed by the entry of judgment" and should thus qualify under *FirsTier*. To limit Rule 4(a)(2) to only traditional final decisions thus misunderstands the meaning of the term "judgment."

B. THE INTERMEDIATE APPROACH

A second line of cases holds that Rule 4(a)(2) saves a premature notice of appeal when the order appealed is either a traditional final decision or an order that could be certified under Rule 54(b)—that is, a certifiably final decision. Like the narrow approach, this approach sees Rule 4(a)(2) as the sole source of cumulative finality in civil cases; the rule superseded the common-law doctrine. But unlike the narrow approach, these cases read *FirsTier*'s reference to decisions "that *would be* appealable if immediately followed by the entry of judgment"[177] to include more than traditional final decisions. It also encompasses certifiably final orders. As just discussed, an order so certified is a judgment, and that judgment can be immediately appealed. So if an order could be certified under Rule 54(b), it *would be* appealable if immediately followed by entry of the certification, which would act as a judgment. This holds true even if the order was never actually certified.

So in *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, the D.C. Circuit—in an opinion by now-Chief Justice Roberts—held that a notice filed from an order granting summary judgment for some (but not all) defendants was saved by the later resolution of all outstanding claims.[178] The inquiry, the *Outlaw* court thought,

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[175] FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 276 (1991).
[176] FED. R. CIV. P. 54(b).
[177] 498 U.S. at 276.
[178] Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 162 (D.C. Cir. 2005).

was a hypothetical one: would the order have been appealable *if* immediately followed by entry of a judgment?[179] A Rule 54(b) certification is a type of judgment.[180] An order that could be certified under Rule 54(b) is thus an order that would be appealable if followed by the entry of judgment. The D.C. Circuit concluded that so long as there was some judgment—either a Rule 54(b) certification or a final judgment—before the appeal was heard, Rule 4(a)(2) would save the premature notice of appeal.[181]

In contrast, this approach does not save appeals from interlocutory orders that could not qualify for Rule 54(b) certification. Several cases have held, for example, that notices filed from a magistrate judge's report and recommendation are not saved by the district court's subsequent adoption of the recommendation.[182] The report and recommendation does not decide a separate claim. It instead recommends a decision to the district court, and it accordingly cannot be certified under Rule 54(b). Similarly, several cases have held that notices filed after orders determining liability for damages, attorney's fees, or sanctions are not saved by the subsequent determination of the amount of those damages, attorney's fees, or sanctions.[183] An order

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[179] *Id.* at 162.

[180] *Id.* at 161.

[181] *Id.* at 161–62.

[182] *See, e.g.*, Turner v. Perry, 651 F. App'x 178, 180 (4th Cir. 2016) ("Because the magistrate judge's recommendation was interlocutory and could not have been certified under Rule 54(b), the doctrine of cumulative finality does not apply here."); Burnside v. Jacquez, 731 F.3d 874, 875–76 (9th Cir. 2013) ("Rule 4(a)(2) does not apply to appeals from a magistrate judge's report and recommendation."); Demorest v. Ryan, 156 F. App'x 931, 932 (9th Cir. 2005) (same); Perez-Priego v. Alachu Cty. Clerk of Court, 148 F.3d 1272, 1273 (11th Cir. 1998) (holding that a magistrate's report and recommendation was neither final nor appealable); Serine v. Peterson, 989 F.2d 371, 372 (9th Cir. 1993) (dismissing an appeal because the "magistrate judge's order was not a final judgment").

[183] *See, e.g.*, Feldman v. Olin Corp., 692 F.3d 748, 758–59 (7th Cir. 2012) (holding a notice of appeal ineffective because the order appealed from "explicitly reserved the calculation of fees"); Flynn v. Ohio Bldg. Restoration, Inc., 162 F. App'x 3, 4 (D.C. Cir. 2005) (noting that the district court resolved "only the issue of liability, expressly requesting submissions from the parties as to damages"); Holland v. Williams Mountain Coal Co., No. 04-7092, 2004 WL 2713122, at *1 (D.C. Cir. Nov. 23, 2004) (holding that the order appealed from was not final because it did not establish the amount of damages or attorney's fees); Lazorko v. Pa. Hosp., 237 F.3d 242, 248 (3d Cir. 2000) ("An award of sanctions is not a final order, and thus not appealable, until the district court determines the amount of the sanction."); *cf.* Duma v. Comm'r of Internal Revenue, 534 F. App'x 4, 5 (D.C. Cir. 2013) (holding that a notice of appeal was untimely because it was filed before the court determined an amount owed to the government).

deciding liability but not damages decides only part of a single claim, not a separate claim. The Supreme Court has accordingly held that such an order cannot be certified under Rule 54(b).[184] The order determining liability is thus not one that would be appealable if followed immediately by entry of a judgment.

The intermediate approach is probably the best reading of *FirsTier*. If *FirsTier* definitively set the scope of Rule 4(a)(2) (and, as we'll see, there's some question whether it did), then Rule 4(a)(2) applies only when a decision would be appealable if immediately followed by entry of a judgment. Unlike the narrow approach, the intermediate approach recognizes that there is more than one kind of judgment. District court orders resolving some (but not all) claims in a multi-claim or multi-party suit *would be* appealable if immediately followed by a Rule 54(b) certification because that certification produces an appealable judgment.

The problem with the intermediate approach (and, for the same reasons, the narrow approach) is that it's still too narrow. As discussed further below, the intermediate approach unnecessarily denies appellate review to parties that file a notice of appeal, albeit an early one. Parties lose their right to appeal for a minor error that rarely causes any harm.

C. THE BROAD APPROACH

The broader approach to cumulative finality is much like the earlier, pre-Rule 4(a)(2), pre-*FirsTier* approach: a premature notice of appeal is effective so long as (1) the district court has entered an appealable order by the time the appeal is heard and (2) there is no prejudice to the appellant. Indeed, under this approach, the addition of Rule 4(a)(2) in 1979 did little, if anything, to the cumulative finality doctrine; the doctrine continues to exist alongside the rule. So *FirsTier*'s interpretation of Rule 4(a)(2) placed few (if any) limits on the broader cumulative finality doctrine.

The Third Circuit's decision in *Lazy Oil Co. v. Witco Corp.* best illustrates this broader approach.[185] In *Lazy Oil*, objectors to a class action settlement filed their notice of appeal after the district court

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[184] *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742–44 (1976).

[185] Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999).

had approved the settlement but before the court approved the allocation plan for the settlement proceeds.[186] Relying on its pre-*FirsTier* decision in *Cape May Greene*, the Third Circuit concluded that the subsequent allocation and final judgment saved the premature notice.[187] The district court had entered a final judgment before the Third Circuit decided the case, and no party claimed any prejudice. Under the *Cape May Greene* approach, the premature notice was both harmless and effective.[188]

The *Lazy Oil* court recognized, however, that its decision—and its earlier decision in *Cape May Greene*—could not be squared with *FirsTier* and its interpretation of Rule 4(a)(2).[189] The district court's decision in *FirsTier* would have been final and appealable if followed by entry of a final judgment, while the district court order in *Lazy Oil* would not—the district court still needed to approve an allocation plan before it could enter a final judgment.[190] So Rule 4(a)(2) could not be the tool for saving the notice of appeal in *Lazy Oil*.

To resolve this tension, the *Lazy Oil* court concluded that subsequent events could save a premature notice of appeal in a variety of situations, and Rule 4(a)(2) addressed only one of them.[191] The broader approach to cumulative finality addressed others. To hold otherwise, the court thought, would elevate a procedural

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[186] *Id.* at 585.

[187] *Id.* at 585–86. For a discussion of *Cape May Greene*, see *supra* notes 127–132 and accompanying text.

[188] *Lazy Oil Co.*, 166 F.3d at 585–86.

[189] *Id.* at 586.

[190] *Id.* at 585–86.

[191] *Id.* at 587 ("*FirsTier* simply limited the reach of Rule 4(a)(2)'s proviso. It did not hold that the Rule 4(a)(2) situation—announcement of a final decision followed by notice of appeal and then entry of the judgment—is the *only* situation in which a premature notice of appeal will ripen at a later date. . . . Thus, in a number of factual situations, a premature notice of appeal will become effective at a later date."); *see also* Khan v. Att'y Gen. of U.S., 691 F.3d 488, 494 n.2 (3d Cir. 2012); DL Res., Inc. v. FirstEnergy Solutions Corp., 506 F.3d 209, 215 (3d Cir. 2007) (noting that "Rule 4 does not exclusively govern every 'situation in which a premature notice of appeal will ripen at a later date' " (quoting *Lazy Oil Co.*, 166 F.3d at 587)). The *Lazy Oil* court gave Rule 4(a)(4) as another situation in which subsequent events save a premature notice of appeal. *See Lazy Oil Co.*, 166 F.3d at 587. Rule 4(a)(4) provides that if a notice of appeal is filed while certain post-trial motions are pending, the notice is treated as if it was filed when the district court decides the last outstanding motion. *See* FED. R. APP. P. 4(a)(4).

"technicality" over the importance of resolving a case on its merits.[192]

As I discuss momentarily, the broader approach makes the most sense as a policy matter. But it's difficult to reconcile with *FirsTier*. The broader approach requires concluding either that *FirsTier* did not mean what it said or that Rule 4(a)(2) is superfluous (and thus it was unnecessary for the Court to decide the rule's scope in *FirsTier*). But neither of those explanations is very good.

First, although *FirsTier* is not clear, the Supreme Court likely meant at least some of what it said. And some of what it said is inconsistent with the broad approach. The Court said, for example, that Rule 4(a)(2) would not save a notice filed from a discovery or sanction order.[193] The broader approach, in contrast, would save those notices, so long as district court proceedings had ended by the time the appeal was heard and there was no prejudice to the appellee. So the *FirsTier* Court probably meant to reject, at least implicitly, the broader approach.

Second, courts should probably not render Rule 4(a)(2) superfluous. And the current broader approach would do so. The order at issue in *FirsTier* would have been just as easily saved by a broad common-law doctrine as it was by Rule 4(a)(2). If the two co-exist, as the Third Circuit has suggested, any decision on Rule 4(a)(2)'s scope was unnecessary. Indeed, the rule itself would be unnecessary, as a broad common-law doctrine would take care of every situation in which it would apply. But rules generally mean something. So we can't treat Rule 4(a)(2) as a narrow codification of a broader doctrine that continues to exist alongside it.

D. THE STATE OF THE CIRCUITS

FirsTier and the decisions interpreting it have left a mess in the courts of appeals: three different approaches, none all that satisfying. But that's not all. The circuits themselves are deeply divided. Not only have they created three different approaches—and thus a split among the circuits—but they have also issued

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[192] *Lazy Oil Co.*, 166 F.3d at 587 ("For us to decline jurisdiction in this appeal would elevate a mere technicality above the important substantive issues here involved, as well as the right of the parties in this case to have their dispute resolved on its merits.").

[193] FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 276 (1991).

inconsistent, irreconcilable opinions within several of the circuits themselves.

Some generalizations can be made. The narrow approach exists primarily in the Eighth and Federal Circuits.[194] Most circuits—the First,[195] Fourth,[196] Fifth,[197] Sixth,[198] Seventh,[199] Ninth,[200] Tenth,[201] Eleventh,[202] and D.C. Circuits[203]—generally apply the intermediate approach. As for the broader approach, it exists primarily in the Second and Third Circuits.[204]

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[194] The Eighth Circuit adopted the narrow approach in *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004), and regularly applies it. *See* Kramer v. Cash Link Sys., 652 F.3d 840, 842 (8th Cir. 2011); Carter v. Ashland, Inc., 450 F.3d 795, 797 (8th Cir. 2006); Elnashar v. Speedway SuperAmerica, LLC, 446 F.3d 796, 798 n.1 (8th Cir. 2006); Dieser v. Continental Cas. Co., 440 F.3d 920, 924 (8th Cir. 2006). Most Federal Circuit decisions apply the narrow approach, too. *See* Stoney Point Prods., Inc. v. Underwood, 15 F. App'x 828, 831 (Fed. Cir. 2001); Meade Instruments Corp. v. Reddwarf Starware,, LLC, No. 99-1517, 2000 WL 987268 , at *3 (Fed. Cir. June 23, 2000). *But see* Fireman's Fund Ins. Co. v. England, 313 F.3d 1344, 1348 (Fed. Cir. 2002) (applying an intermediate-like approach to an appeal from the Board of Contract Appeals).

[195] *See* Barrett *ex rel.* Estate of Barrett v. United States, 462 F.3d 28, 35 (1st Cir. 2006); Clausen v. Sea-3, Inc., 21 F.3d 1181, 1187 (1st Cir. 1994).

[196] *See* Houck v. Substitute Tr. Servs., Inc., 791 F.3d 473, 478–79 (4th Cir. 2015); *In re* Bryson, 406 F.3d 284, 287–89 (4th Cir. 2005); Equip. Fin. Grp., Inc. v. Traverse Comput. Brokers, 973 F.2d 345, 347–48 (4th Cir. 1992).

[197] *See* Miller v. Gorski Wladyslaw Estate, 547 F.3d 273, 277 n.1 (5th Cir. 2008); Boudreaux v. Swift Transp. Co., 402 F.3d 536, 539 n.1 (5th Cir. 2005); Cousin v. Small, 325 F.3d 627, 631 (5th Cir. 2003); Young v. Equifax Credit Info. Servs., Inc., 294 F.3d 631, 634 n.2 (5th Cir. 2002); Barrett v. Atl. Richfield Co., 95 F.3d 375, 379 n.5 (5th Cir. 1996); Riley v. Wooten, 999 F.2d 802, 804–05 (5th Cir. 1993).

[198] *See* Rutherford v. Columbia Gas, 575 F.3d 616, 618 (6th Cir. 2009); Bonner v. Perry, 564 F.3d 424, 429 (6th Cir. 2009); Good v. Ohio Edison Co., 104 F.3d 93, 96 (6th Cir. 1997); Gillis v. U.S. Dep't of Health & Human Servs., 759 F.2d 565, 569 (6th Cir. 1985).

[199] *See* Brown v. Columbia Sussex Corp., 664 F.3d 182, 189 (7th Cir. 2011); Runyon v. Applied Extrusion Techs., Inc., 619 F.3d 735, 739 (7th Cir. 2010); A. Bauer Mech., Inc. v. Joint Arbitration Bd. of Plumbing Contractors' Ass'n & Chi. Journeymen Plumbers' Local Union 130, U.A., 562 F.3d 784, 789 (7th Cir. 2009).

[200] *See* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 691 (9th Cir. 2010); Fadem v. United States, 42 F.3d 533, 535 (9th Cir. 1994); Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992); Anderson v. Allstate Ins. Co., 630 F.2d 677, 680 (9th Cir. 1980).

[201] *See* Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1111 (10th Cir. 2007); Ruiz v. McDonnell, 299 F.3d 1173, 1179 (10th Cir. 2002); Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645 (10th Cir. 1988) (en banc).

[202] *See* Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1306–07 (11th Cir. 2011); Martin v. Campbell, 692 F.2d 112, 114 (11th Cir. 1982).

[203] *See* Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 223 (D.C. Cir. 2011); Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 162 (D.C. Cir. 2005).

[204] *See* Berlin v. Renaissance Rental Partners, LLC, 723 F.3d 119, 128 (2d Cir. 2013); DL Res., Inc. v. FirstEnergy Sols. Corp., 506 F.3d 209, 215–16 (3d Cir. 2007); Swede v. Rochester

But these generalizations do not capture the current state of affairs. Consider the Eighth Circuit. Several years after *FirsTier*, the Eighth Circuit held in *Hill v. St. Louis University* that Rule 4(a)(2) saved a notice of appeal filed after the district court had ordered sanctions but before it determined the amount of those sanctions.[205] Citing Rule 4(a)(2) (but not mentioning *FirsTier*), the court concluded that the notice was effective once the district court determined the amount.[206] This conclusion required the broadest approach to cumulative finality; the initial order, which did not determine the amount of sanctions, was neither a traditional final judgment nor a certifiably final judgment.[207]

But seven years later, in the previously discussed *Miller v. Special Weapons, L.L.C.*, the Eighth Circuit claimed to be unaware of any Eighth Circuit decision adopting the cumulative finality doctrine and held that neither the cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding.[208] This conclusion required the narrowest approach to cumulative finality; the order could have been certified for an immediate appeal under Rule 54(b) and so the notice would have been effective under the intermediate or broad approach. Since *Miller*, the Eighth Circuit has consistently refused to apply Rule 4(a)(2) to anything but traditional final decisions.[209] But *Hill*

Carpenters Pension Fund, 467 F.3d 216, 220 (2d Cir. 2006); Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 585–87 (3d Cir. 1999).

[205] Hill v. St. Louis Univ., 123 F.3d 1114, 1120–21 (8th Cir. 1997).

[206] *Id.* at 1120.

[207] *Id.*

[208] Miller v. Special Weapons, L.L.C., 369 F.3d 1033, 1035 (8th Cir. 2004).

[209] *See* Kramer v. Cash Link Sys., 652 F.3d 840, 841–42 (8th Cir. 2011) (holding that a notice of appeal filed after the dismissal of only one defendant in a multi-defendant suit was not saved by the later liquidation of the remaining defendant); Carter v. Ashland, Inc., 450 F.3d 795, 797 (8th Cir. 2006) (holding that Rule 4(a)(2) did not save a notice of appeal filed after a dismissal order that left open the amount of sanctions but before the district court determined the dollar amount); Elnashar v. Speedway SuperAmerica, LLC, 446 F.3d 796, 798 n.1 (8th Cir. 2006) (holding that the court lacked appellate jurisdiction when the plaintiff filed a notice of appeal after the district court had denied motions to compel but before it granted summary judgment against the plaintiff); Dieser v. Cont'l Cas. Co., 440 F.3d 920, 924 (8th Cir. 2006) (holding that a premature notice of appeal filed after several determinations of liability but before the calculation of pre-judgment interest was not saved by the later entry of a final judgment); *see also* Detherage v. Barnhart, 91 F. App'x 520, 521–22 (8th Cir. 2004) (holding, in a pre-*Miller* decision, that Rule 4(a)(2) did not save a notice of appeal filed after the district court refused to remand a suit to the Social Security Administration but before entering a final judgment).

has not been overturned.[210] It nominally remains good law and is thus a source of potential confusion for litigants in the Eighth Circuit.

The Fifth Circuit's cumulative finality caselaw is probably the worst among the circuits.[211] Even before *FirsTier*, the Fifth Circuit had issued a series of inconsistent decisions. In *Alcorn County v. U.S. Interstate Supplies, Inc.*, for example, the Fifth Circuit held that a subsequent decision on the amount of attorney's fees saved a notice of appeal filed after the district court had determined liability, damages, and entitlement to attorney's fees.[212] This decision seemed to adopt the broadest approach. In *Tower v. Moss*, the court held that the subsequent dismissal of the sole outstanding claim saved a notice of appeal filed from an earlier order dismissing only some of the claims, which makes sense under either the broad or intermediate approach.[213] But in *United States v. Taylor*, the Fifth Circuit held that the subsequent dismissal of a plaintiff's claims did not save the defendant's notice of appeal filed after the dismissal of its counterclaims.[214] This decision required rejecting the broad and intermediate approaches and instead applying the narrowest.[215]

Matters did not improve after *FirsTier*. The Fifth Circuit first issued several decisions that seemed to adopt the intermediate approach. In *Barrett v. Atlantic Richfield Co.*, the Fifth Circuit held that Rule 4(a)(2) saved a notice of appeal filed after the claims of

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[210] The closest the Eighth Circuit has ever come was a parenthetical "but see" citation to *Hill* after citing a string of decisions rejecting the cumulative finality doctrine. *See Dieser*, 440 F.3d at 925.

[211] Of course, some Fifth Circuit decisions would have reached the same outcome regardless of what approach the court applied. *See, e.g.*, Lopez Dominguez v. Gulf Coast Marine & Assocs., Inc., 607 F.3d 1066, 1072 (5th Cir. 2010) (holding that Rule 4(a)(2) saved a notice of appeal filed after the defendants agreed to a district court-proposed stipulated dismissal on forum non conveniens grounds but before the court formally dismissed the case); Estrada v. City of San Benito, 397 F. App'x 4, 6 (5th Cir. 2010) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had dismissed some claims and announced that it would dismiss the remaining for failure to prosecute unless good cause was shown). These decisions create no issues for the Fifth Circuit's caselaw.

[212] Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165–66 (5th Cir. 1984).

[213] Tower v. Moss, 625 F.2d 1161, 1164–65 (5th Cir. 1980).

[214] United States v. Taylor, 632 F.2d 530, 531 (5th Cir. 1980).

[215] *See also* United States v. Perez, 736 F.2d 236, 237–38 (5th Cir. 1984) (holding that that a notice of appeal was ineffective when it was filed after a magistrate judge's report and recommendation but before the district court's adoption of the report and recommendation).

two groups of plaintiffs (out of three total groups of plaintiffs) were dismissed.[216] These groups then filed their notice of appeal, but they did not file a new one after the district court dismissed the remaining group of plaintiffs and entered a final judgment.[217] The Fifth Circuit held that Rule 4(a)(2), as interpreted in *FirsTier*, applied—the district court's order "would have been appealable if immediately followed by the entry of judgment pursuant to Federal Rule of Civil Procedure 54(b)."[218] In a footnote, the court noted that it had previously taken a "more expansive" approach that allowed appeals from clearly interlocutory orders, though it framed this as an application of Rule 4(a)(2).[219] Because this case fell under the more narrow *FirstTier* decision, the court did not address whether its broader rule applied.[220]

Then, in *United States v. Cooper*, the Fifth Circuit apparently adopted the narrow approach, concluding that *FirsTier* abrogated its earlier cumulative finality decisions.[221] Since *Cooper*, some Fifth Circuit decisions have adhered to the narrow approach. In *McLaughlin v. Mississippi Power Co.*, for example, the Fifth Circuit held that Rule 4(a)(2) did not save a notice of appeal filed after the district court had dismissed some but not all claims in consolidated cases but before the subsequent dismissal of the remaining claims.[222] But other decisions have applied the intermediate approach (often without even mentioning *Cooper*). In *Miller v. Gorski Wladyslaw Estate*, the Fifth Circuit held that a premature

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[216] Barrett v. Atl. Richfield Co., 95 F.3d 375, 378–79 (5th Cir. 1996).

[217] *Id.* at 378.

[218] *Id.* at 379.

[219] *Id.* at 379 n.5.

[220] *Id.*; *see also* Koehler v. United States, 153 F.3d 263, 265 n.1 (5th Cir. 1998) (holding that the resolution of all outstanding claims saved a notice of appeal filed after only some of those claims had been dismissed); Riley v. Wooten, 999 F.2d 802, 804–05 (5th Cir. 1993) (holding that the subsequent dismissal of the last remaining defendant saved a premature notice of appeal).

[221] United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998). *Cooper* addressed the scope of then-Rule 4(b) (now Rule 4(b)(2)), which is nearly identical to Rule 4(a)(2) except that Rule 4(a)(2) applies in civil cases and Rule 4(b) applies in criminal cases. *Id.* at 962. The court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2), including the Supreme Court's interpretation of Rule 4(a)(2) in *FirsTier*. *Id.* at 962, 962 n.1.

[222] McLaughlin v. Miss. Power Co., 376 F.3d 344, 351, 351 n.2 (5th Cir. 2004) (per curiam); *see also* Star Ins. Co. v. Livestock Producers Inc., 34 F. App'x 151, 151 (5th Cir. 2002) (holding that Rule 4(a)(2) did not save a notice of appeal filed after the district court had denied leave to file an amended complaint (the motion was moot because partial summary judgment had already been granted) and given the parties 30 days to reach an agreement on fees).

notice of appeal filed after a partial grant of summary judgment ripened at the later disposition of all outstanding issues.[223] And in *Boudreaux v. Swift Transportation Co.*, the Fifth Circuit held that a premature notice of appeal filed after the district court had granted summary judgment in favor of one defendant but before dismissing the claims against a second defendant was saved by the subsequent final judgment.[224]

These decisions cannot be reconciled. *Cooper* and subsequent cases taking the intermediate approach would be consistent if *Cooper* were read to adopt the intermediate approach; some language in the case suggests as much,[225] and the outcome would have been the same since a magistrate judge's report and recommendation is not a decision that could be certified for immediate appeal under Rule 54(b). But the same cannot be said for the decision in *McLaughlin*, which required application of the narrow approach. All of these cases are ostensibly still good law within the Fifth Circuit, so litigants in that circuit are left wondering what rule will govern their particular case.

Some of the other circuits that generally follow the intermediate approach have their own outlier decisions. The First Circuit, for example, generally adheres to the intermediate approach.[226] But it

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[223] Miller v. Gorski Wladyslaw Estate, 547 F.3d 273, 277 n.1 (5th Cir. 2008).

[224] Boudreaux v. Swift Transp. Co., 402 F.3d 536, 539 n.1 (5th Cir. 2005); *see also* Cousin v. Small, 325 F.3d 627, 631 (5th Cir. 2003) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court dismissed claims against some (but not all) defendants but before the district court certified that decision under Rule 54(b)); Young v. Equifax Credit Info. Servs., Inc., 294 F.3d 631, 634 n.2 (5th Cir. 2002) (holding that a premature notice was saved by the subsequent disposition of outstanding claims and parties when the order appealed from would have been appealable if certified under Rule 54(b)).

[225] Early in the *Cooper* opinion, the court said that an "appeal is proper where notice is filed after the district court rules from the bench but before the disposition is entered as a final judgment," citing with seeming approval *Barrett v. Atlantic Richfield Co.*. *Cooper*, 135 F.3d at 962. The court also said that "[a]lthough an appeal need not be from a final *judgment*, still it must be from a final *decision*." *Id.* And the *Cooper* court rejected the statement in *Alcorn County v. U.S. Interstate Supplies, Inc.* that it "may consider a premature appeal in those cases where judgment becomes final prior to disposition of the appeal." *Cooper*, 135 F.3d at 963 (quoting Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1166 (5th Cir. 1984)). One could read this as a rejection of only the broad approach.

[226] *See* Barrett *ex rel.* Estate of Barrett v. United States, 462 F.3d 28, 34–35 (1st Cir. 2006) (holding that a premature notice of appeal filed after claims against only some of the defendants in a multi-defendant suit were dismissed was saved by the later entry of a final judgment); Clausen v. Sea-3, Inc., 21 F.3d 1181, 1186–87 (1st Cir. 1994) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court decided several claims but before the district court certified those claims under Rule 54(b)).

has applied the broader approach to appeals in the bankruptcy context.[227] Similarly, the Tenth Circuit generally adheres to the intermediate approach.[228] But not always.[229] The same goes for the Ninth Circuit. It's post-*FirsTier* decisions generally follow the intermediate approach.[230] But at least one decision required

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[227] *See In re* Watson, 403 F.3d 1, 6 (1st Cir. 2005) (holding that an appeal filed from a bankruptcy court's order denying a confirmation plan was saved by the bankruptcy court's later order dismissing the case); *see also In re* Parque Forestal, Inc., 949 F.2d 504, 508–09 (1st Cir. 1991) (holding that an appeal filed from a bankruptcy court's order directing the payment of certain expenses was saved by the later resolution of the bankruptcy proceedings).

[228] *Compare* Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1111 (10th Cir. 2007) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had granted summary judgment in favor of all served defendants but before it dismissed the unserved defendants), Jackson v. Volvo Trucks N. Am., Inc. 462 F.3d 1234, 1238 (10th Cir. 2006) (holding that the subsequent resolution of all outstanding claims saved a notice of appeal filed after the district court had decided only some of the claims), Ruiz v. McDonnell, 299 F.3d 1173, 1179–80 (10th Cir. 2002) (same), Old Republic Ins. Co. v. Durango Air Serv., Inc., 283 F.3d 1222, 1225 (10th Cir. 2002) (same), Sanchez v. Denver Pub. Sch., 164 F.3d 527, 529 n.2 (10th Cir. 1998) (same), *and* United States v. Hardage, 982 F.2d 1491, 1494–95 (10th Cir. 1993) (holding that a subsequent Rule 54(b) certification—although filed outside the time the court gave to seek the certification—saved a premature notice), *with* Reed v. McKune, 153 F. App'x 511, 514 (10th Cir. 2005) (holding that Rule 4(a)(2) did not save a notice of appeal filed after the district court had denied motions for appointment of counsel and service of process but before the district court dismissed the plaintiff's claims), *and* Judd v. Univ. of N.M., 204 F.3d 1041, 1043 (10th Cir. 2000) (holding that Rule 4(a)(2) did not save a notice of appeal filed after the district court had entered an order proposing filing restrictions but before those restrictions were actually imposed).

[229] *See* Clementson v. Countrywide Fin. Corp., 464 F. App'x 706, 709 (10th Cir. 2012) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had adopted a magistrate judge's report and recommendation but before it ruled on a claim for injunctive relief); Smith v. Veterans Admin., 636 F.3d 1306, 1309 n.1 (10th Cir. 2011) (holding that a premature notice of appeal filed after the district court had denied the plaintiff *in forma pauperis* status was saved by the later dismissal of his complaint for not paying the filing fee); Commodity Futures Trading Comm'n v. Brockbank, 316 F. App'x 707, 710–11 (10th Cir. 2008) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had imposed a permanent injunction but before it set the scope of the injunction); Harbert v. Healthcare Servs. Grp., Inc., 391 F.3d 1140, 1144–46 (10th Cir. 2004) (holding that a subsequent final judgment fixing damages saved a notice of appeal filed after the district court had determined liability); *In re* Interwest Bus. Equip., Inc., 23 F.3d 311, 314–15 (10th Cir. 1994) (holding that the subsequent approval of a bankruptcy saved a notice of appeal filed from a bankruptcy court order denying approval of counsel's appointment due to a conflict of interest); Dodd Ins. Servs. Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1154 n.1 (10th Cir. 1991) (holding that a premature notice filed from an order imposing Rule 11 sanctions was saved by the later entry of a final judgment).

[230] *Compare* Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 691 (9th Cir. 2010) (holding that the subsequent resolution of all outstanding claims saved a notice of appeal filed after the district court had decided only some of the claims), Fadem v. United States, 42 F.3d 533, 534–35 (9th Cir. 1994) (holding that the subsequent resolution of outstanding consolidated cases saved a premature notice of appeal from the resolution of

application of the broader approach.[231] Most Federal Circuit decisions apply the narrow approach.[232] But that court has applied something that looks like the intermediate approach in appeals from the Board of Contract Appeals.[233] The Fourth,[234] Sixth,[235]

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some (but not all) of the consolidated cases), Rano v. Sipa Press, Inc., 987 F.2d 580, 584 (9th Cir. 1993) (holding that a notice of appeal filed after an order granting summary judgment against plaintiff on federal claims was saved by the later entry of a final order dismissing remaining pendent state claims), *and* Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992) (holding that the subsequent resolution of all outstanding claims saved a notice of appeal filed after the dismissal of claims against only some of the defendants), *with* Hajro v. U.S. Citizenship & Immigration Servs., 811 F.3d 1086, 1097–98 (9th Cir. 2015) (concluding there was no jurisdiction to review a permanent injunction when the notice of appeal was filed before the terms of the injunction were set), Burnside v. Jacquez, 731 F.3d 874, 875–76 (9th Cir. 2013) (holding that a notice of appeal filed from a magistrate judge's report and recommendation was not saved by the subsequent adoption of that recommendation), Kennedy v. Applause, Inc., 90 F.3d 1477, 1482–83 (9th Cir. 1996) (holding that a notice of appeal was ineffective to appeal an award of attorneys' fees when it was filed before the amount of fees was determined), *In re* Jack Raley Constr., Inc., 17 F.3d 291, 294–95 (9th Cir. 1994) (holding that a subsequent final judgment did not save a notice of appeal filed from an order granting summary judgment but leaving open the issue of pre-judgment interest), *and* Serine v. Peterson, 989 F.2d 371, 372–73 (9th Cir. 1993) (holding that the subsequent dismissal of a case did not save a notice of appeal filed after a magistrate judge's report and recommendation).

[231] *See In re* Eastport Assocs., 935 F.2d 1071, 1075 (9th Cir. 1991) (holding that entry of a final judgment saved an appeal from an order declining to abstain in a bankruptcy proceeding; the court quoted its pre-*FirsTier* decision *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980), for the proposition that "once a final judgment is entered, an appeal from an order that otherwise would have been interlocutory is then appealable.").

[232] *See, e.g.*, Stoney Point Prods., Inc. v. Underwood, 15 F. App'x 828, 830–31 (Fed. Cir. 2001) (holding that an appeal from "a judgment disposing of only some asserted claims" was not saved by a subsequent final judgment); Meade Instruments Corp. v. Reddwarf Starware, LLC, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000) (same).

[233] *See* Fireman's Fund Ins. Co. v. England, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002).

[234] *Compare* Houck v. Substitute Tr. Servs., Inc., 791 F.3d 473, 478 (4th Cir. 2015) (holding that the subsequent resolution of all outstanding claims saved a notice of appeal filed after the district court had decided only some of the claims), *In re* Bryson, 406 F.3d 284, 289 (4th Cir. 2005) (same), Equip. Fin. Grp., Inc. v. Traverse Comput. Brokers, 973 F.2d 345, 347 (4th Cir. 1992) (same), *and* Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530, 532 (4th Cir. 1991) (holding that a subsequent Rule 54(b) certification saved a premature notice of appeal), *with* Turner v. Perry, 651 F. App'x 178, 180 (4th Cir. 2016) (holding that a notice of appeal from a magistrate judge's report and recommendation could not be saved by the district court's subsequent acceptance of that recommendation).

[235] *See* Rutherford v. Columbia Gas, 575 F.3d 616, 618 (6th Cir. 2009) (holding, without a discussion of Rule 4(a)(2), that the defendant's relinquishment of all outstanding claims during oral argument saved the notice of appeal filed after resolution of the plaintiff's claims but before resolution of the defendant's counterclaims); Bonner v. Perry, 564 F.3d 424, 429 (6th Cir. 2009) (holding that a notice of appeal filed after claims against one defendant had been dismissed but before claims against a second defendant were addressed was saved by the later adjudication of all issues); Good v. Ohio Edison Co., 104 F.3d 93, 95–96 (6th Cir.

Seventh,[236] Eleventh,[237] and D.C. Circuits,[238] in contrast, have been relatively consistent in their use of the intermediate approach.

1997) (holding that a premature notice of appeal was saved by a belated Rule 54(b) certification).

[236] *Compare* Brown v. Columbia Sussex Corp., 664 F.3d 182, 189 (7th Cir. 2011) (holding that a notice of appeal filed after only some of the plaintiffs in a multi-plaintiff case had been dismissed became effective after a subsequent Rule 54(b) certification), Runyon v. Applied Extrusion Techs., Inc., 619 F.3d 735, 739 (7th Cir. 2010) (holding that Rule 4(a)(2) saved a notice of appeal filed after the court entered judgment in favor of one defendant but before dismissing the other defendant), A. Bauer Mech., Inc. v. Joint Arbitration Bd., 562 F.3d 784, 789 (7th Cir. 2009) (holding that a notice of appeal filed after the district court had decided several counterclaims for attorneys' fees, but before it decided the plaintiff's claims, ripened when the court later decided all outstanding issues), Garwood Packaging, Inc. v. Allen & Co., 378 F.3d 698, 701 (7th Cir. 2004) (holding that Rule 4(a)(2) saved a notice of appeal filed after claims against one defendant were dismissed but before the plaintiff voluntarily dismissed its claims against the remaining defendant), *and* McCoy v. Harrison, 341 F.3d 600, 604 (7th Cir. 2003) (holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had dismissed claims against one defendant but before it dismissed claims against other defendants), *with* Feldman v. Olin Corp., 692 F.3d 748, 758–59 (7th Cir. 2012) (holding that Rule 4(a)(2) does not save a notice of appeal filed after the district court granted a motion for sanctions but reserved the calculation of fees).

[237] *Compare* Schippers v. United States, 715 F.3d 879, 884–85 (11th Cir. 2013) (holding that a notice of appeal filed after the district court dismissed only some plaintiffs' complaints in a consolidated case was saved by the other plaintiffs' claims being resolved), *and* Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1306–07 (11th Cir. 2011) (holding that the entry of a Rule 54(b) certification after a notice of appeal had been filed from the order in question cured the premature notice of appeal), *with* Perez-Priego v. Alachu Cty. Clerk of Court, 148 F.3d 1272, 1273 (11th Cir. 1998) (holding that Rule 4(a)(2) did not save a notice of appeal filed after a magistrate judge had issued its report and recommendation but before the district court adopted it).

[238] *Compare* Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 221–23 (D.C. Cir. 2011) (holding that a notice of appeal filed after only third-party claims had been resolved and other parties' claims remained was saved by a subsequent final judgment), *and* Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 159–63 (D.C. Cir. 2005) (holding that a notice of appeal filed from an order granting summary judgment for some (but not all) defendants was saved by the subsequent resolution of all outstanding claims), *with* Flynn v. Ohio Bldg. Restoration, Inc., 162 F. App'x 3, 4 (D.C. Cir. 2005) (holding that a premature notice of appeal filed after the district court had determined liability but before it calculated damages was not saved by the subsequent final judgment), *and* Holland v. Williams Mountain Coal Co., No. 04-7092, 2004 WL 2713122, at *1, *1 (D.C. Cir. 2004) (holding that Rule 4(a)(2) did not save a notice of appeal filed after the district court had ordered the payment of costs and fees but before it determined the amount of those costs and fees). *Cf.* Duma v. Comm'r of Internal Revenue, 534 F. App'x 4, 5 (D.C. Cir. 2013) (in an appeal from the Tax Court, holding that the court lacked jurisdiction when a party filed a notice of appeal after the Tax Court had found the party liable but before it determined the amount of liability; although Rule 4 did not apply to appeals from the Tax Court, "the court decline[d] to exercise any discretion it might have because [the appellant's] case was not close to a final judgment at the time she filed her notice of appeal").

The Third Circuit, which generally adheres to the broader approach, has also produced some inconsistent decisions and uncertainty for litigants.[239] Many Third Circuit decisions hold that the subsequent entry of a judgment can save notices filed after a variety of district court orders so long as there is no prejudice to the appellees.[240] But some Third Circuit decisions decline to apply the broader approach on what often seem like arbitrary grounds. In *ADAPT of Philadelphia v. Philadelphia Housing Authority*, the Third Circuit held that notices of appeal filed after the entry of discovery orders were not saved by a later final judgment.[241] The *ADAPT* court first concluded that Rule 4(a)(2) did not apply because *FirsTier* classified discovery orders as clearly interlocutory orders that Rule 4(a)(2) would not save.[242] It went on to acknowledge that the Third Circuit's broader approach had saved notices of appeal that Rule 4(a)(2) would not and made "no distinction between

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[239] Because it applies the broadest approach, some of the Third Circuit's decisions would of course reach the same result under the intermediate or narrow approach. *See, e.g.*, Marshall v. Comm'r Pa. Dep't of Corr., 840 F.3d 92, 93 (3d Cir. 2016) (per curiam) (holding that a notice of appeal filed before the district court ruled on an issue was not saved by the subsequent ruling); *In re* Asbestos Prods. Liab. Litig.(No. VI), 574 F. App'x 203, 205 n.4 (3d Cir. 2014) (holding that the subsequent resolution of all outstanding claims saved a notice filed after only some claims were resolved); *In re* Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II), 751 F.3d 150, 155–56 (3d Cir. 2014) (holding that a subsequent Rule 54(b) certification saved a premature notice of appeal); Cherys v. United States, 552 F. App'x 162, 165–67 (3d Cir. 2014) (holding that the subsequent entry of a final memorandum and order saved a notice of appeal filed after the district court had orally denied relief); Gen. Ceramics Inc. v. Firemen's Fund Ins. Cos., 66 F.3d 647, 651 (3d Cir. 1995) (holding that the subsequent dismissal of remaining defendants saved a prematurely filed notice of appeal); Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 n.5 (3d Cir. 1992) (holding that the conclusion of a period for amending a complaint saved a notice of appeal filed before the conclusion of that period); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1178 (3d Cir. 1991) (holding that a notice of appeal filed before the district court addressed a defendant's crossclaims was saved by the subsequent rejection of the crossclaims); Tiernan v. Devoe, 923 F.2d 1024, 1031 (3d Cir. 1991) (holding that a promise at oral argument not to pursue claims dismissed without prejudice saved a notice of appeal filed after some claims had been dismissed with prejudice but others had been dismissed without).

[240] *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 584 (3d Cir. 1999) (holding that the subsequent distribution of class settlement proceeds saved a premature notice of appeal filed after the district court had approved the settlement but before it allocated proceeds); *In re* Emerson Radio Corp., 52 F.3d 50, 53 (3d Cir. 1995) (holding that the subsequent dismissal of an ancillary bankruptcy proceeding saved a notice of appeal filed from an order transferring a case); *cf.* Khan v. Att'y Gen. of U.S., 691 F.3d 488, 494 (3d Cir. 2012) (applying the Third Circuit's cumulative finality approach in an appeal from the Board of Immigration Appeals).

[241] ADAPT of Phila. v. Phila. Hous. Auth., 433 F.3d 353, 365 (3d Cir. 2006).

[242] *Id.* at 364.

unalterably interlocutory (discovery) orders and orders that would be final upon entry of judgment."[243] But it held that *ADAPT* was different because the orders in question were discovery orders.[244]

Similarly, in *Adams v. Ford Motor Co.*, the Third Circuit held that it lacked jurisdiction when a sanctioned attorney filed a notice of appeal after the sanctions order but before the entry of a final judgment.[245] According to the *Adams* court, Rule 4(a)(2) did not save the premature notice because of the Supreme Court's statement in *FirsTier* that Rule 4(a)(2) does not permit "a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanctions order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from a final judgment."[246] The court also declined to apply its broader cumulative finality approach, noting that it has held "that the doctrine reflected in this line of cases does not authorize permitting a premature notice of appeal from a clearly interlocutory order such as a sanction order to ripen upon the entry of a final judgment on the merits."[247]

But several Third Circuit decisions have allowed subsequent events to save notices filed after clearly interlocutory orders. Several cases have held, for example, that notices filed after a determination of liability were saved by a subsequent calculation of damages.[248] And in *Lazy Oil*, the Third Circuit held that a notice of appeal filed after the district court had approved a class settlement—but before it approved a plan for allocating the settlement proceeds—was saved by the subsequent approval of an

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[243] *Id.*

[244] *Id.* at 364–65. The court thought that applying its broader approach to discovery orders would invite piecemeal appeals. *Id.* at 364. But the entry of a final judgment renders this reasoning questionable.

[245] Adams v. Ford Motor Co., 319 F. App'x 113, 115 (3d Cir. 2009).

[246] *Id.* (quoting FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 276 (1991)).

[247] *Id.*

[248] *See* DL Res., Inc. v. FirstEnergy Sols. Corp., 506 F.3d 209, 213–16 (3d Cir. 2007); Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 311 n.3 (3d Cir. 2001); *see also* Ragan v. Tri-County Excavating, Inc., 62 F.3d 501, 505–06 (3d Cir. 1995) (holding that a subsequent calculation of attorneys' fees saved a premature notice of appeal filed after the district court entered judgment). *But see* Lazorko v. Pa. Hosp., 237 F.3d 242, 248 (3d Cir. 2000) (holding that Rule 4(a)(2) did not save a notice of appeal filed after the district court had awarded Rule 11 sanctions but before the court determined the amount of sanctions; the opinion did not discuss the Third Circuit's broader approach to cumulative finality).

allocation plan.[249] These are indisputably interlocutory decisions that cannot be certified for an immediate appeal under Rule 54(b).[250] The distinction drawn in *ADAPT* and *Adams* between interlocutory and non-interlocutory orders doesn't hold. The only remaining reason for these Third Circuit outliers is that the Supreme Court mentioned discovery and sanction orders in *FirsTier*.[251]

The Second Circuit, in contrast, has adhered consistently to the broader approach.[252] Like the Third Circuit, the Second Circuit's decisions generally allow subsequent events to save a premature notice of appeal so long as (1) the district court has entered an appealable judgment by the time the appeal is heard and (2) there is no prejudice to the appellee.[253] It does not matter whether the decision appealed from resolved all outstanding issues or could have been saved by a Rule 54(b) certification. So in *Berlin v. Renaissance Rental Partners, LLC*, the Second Circuit held that a notice of appeal filed before the amount of attorneys' fees was determined was saved by a later judgment setting the fees amount.[254] Similarly, in *Community Bank, N.A. v. Riffle*, the court held that a notice of appeal filed from a district court order affirming the bankruptcy

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[249] Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 585–87 (3d Cir. 1999).

[250] *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742–46 (1976) (holding that a decision on liability but leaving open the calculation of damages could not be certified for an immediate appeal under Rule 54(b)).

[251] FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 276 (1991).

[252] Like the Third Circuit, the Second Circuit's general adherence to the broader approach means that several of its decisions would reach the same result under the intermediate or narrow approach. *See* Slayton v. Am. Express Co., 460 F.3d 215, 223–25 (2d Cir. 2006) (holding that Rule 4(a)(2) saved a notice of appeal filed after the court had dismissed a complaint with leave to replead but before the subsequent order dismissing the complaint); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054–55 (2d Cir. 1993) (holding that a notice of appeal filed after the district court had dismissed the claims against some (but not all) defendants was saved by the later entry of a final judgment); Welch v. Cadre Capital, 923 F.2d 989, 992 (2d Cir. 1991) (holding that a notice of appeal filed after the dismissal of the plaintiff's federal claims was saved by the subsequent dismissal of the plaintiff's remaining state claims).

[253] *See, e.g.*, Berlin v. Renaissance Rental Partners, LLC, 723 F.3d 119, 128 (2d Cir. 2013); Cmty. Bank, N.A. v. Riffle, 617 F.3d 171, 173–74 (2d Cir. 2010); Swede v. Rochester Carpenters Pension Fund, 467 F.3d 216, 220 (2d Cir. 2006); Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 172 (2d Cir. 2002).

[254] *Berlin*, 723 F.3d at 127–28. In a footnote, the court stated that while Rule 4 did "not address this precise situation," it was "consistent with treating a premature notice of appeal, filed after the entry of a judgment but before the judgment is amended to account for the specific fee award, as effective once the judgment is amended to account for the fees amount." *Id.* at 128 n.12. There was no discussion of *FirsTier*.

court's denial of a motion to dismiss a bankruptcy petition ripened upon the subsequent confirmation of the Chapter 13 bankruptcy plan.[255] And in *Swede v. Rochester Carpenters Pension Fund*, the Second Circuit held that a premature notice of appeal filed after a determination of liability but before a calculation of damages was cured by the later disposition of all outstanding issues.[256]

The courts of appeals are thus all over the map with cumulative finality. In addition to disagreeing with each other, they often disagree with themselves. And still the courts have not determined the interaction between Rule 4(a)(2) and the common-law cumulative finality doctrine. All of this demands a fix.

IV. FIXING CUMULATIVE FINALITY

As things currently stand, none of the approaches to cumulative finality is satisfactory. The broader approach makes the best sense, practically speaking, but it cannot be squared with the Supreme Court's interpretation of Rule 4(a)(2) in *FirsTier*. The narrow and intermediate approaches are more consistent with *FirsTier*, but they fail to save premature notices of appeal—and thus deny any opportunity for appellate review—when doing so would be harmless. Add to these unsatisfactory approaches the current mess in the courts of appeals' caselaw, and the current state of cumulative finality is unacceptable.

At the root of both of these problems—the unsatisfactory approaches and the inconsistent caselaw—is *FirsTier*. That decision probably got the meaning of Rule 4(a)(2) wrong. Although the rule's text is ambiguous and its historical purpose is unclear, the best reading of Rule 4(a)(2) is one that allows a subsequent judgment to save a premature notice filed after any district court decision. So one of two things should happen: (1) the Supreme Court should overrule *FirsTier*, or (2) the Rules Committee should amend Rule 4(a)(2).

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[255] *Riffle*, 617 F.3d at 173–74.

[256] *Swede*, 467 F.3d at 219–20; *see also* Sahu v. Union Carbide Corp., 475 F.3d 465, 468 (2d Cir. 2007) (holding that a notice filed after a partial grant of summary judgment was ineffective because the district court had not entered an appealable judgment by the time the appeal was heard); McManus v. Gitano Grp., Inc., 59 F.3d 382, 383–84 (2d Cir. 1995) (holding that the subsequent entry of a final judgment saved a notice of appeal filed from an order denying the plaintiff's request for attorneys' fees).

I spend much of this Part explaining why Rule 4(a)(2) should be changed, either through judicial decision or rule amendment. But ultimately, this cumulative finality situation is a symptom of a larger problem. Uncertainty persists about when federal litigants can appeal. Part of this uncertainty stems from the various times at which litigants might be able to appeal before a final judgment. The literature predominantly addresses this aspect of appellate jurisdiction (though there is still much more to address). But this uncertainty also stems from the difficulties in identifying when district court proceedings have ended. This aspect of appellate jurisdiction also needs some attention. And any reform efforts—reform being the primary focus of the appellate jurisdiction literature—must address the difficulty of defining a final, appealable judgment. I accordingly end this Part with how cumulative finality—its history, its issues, and the solution I recommend—can contribute to that aspect of reform.

A. THE MISTAKES OF *FIRSTIER*

The Supreme Court made mistakes in deciding *FirsTier*. The ultimate outcome was correct—the district court announced a traditional final decision and the appellant filed its notice of appeal before formal entry of the final judgment.[257] The Court rightly held that the entry of the final judgment saved the premature notice, whatever the approach to cumulative finality issues.[258] The Court also recognized that Rule 4(a)(2) meant to codify an existing practice in the courts of appeals.[259] And the Court correctly understood that a premature notice of appeal often does no harm and thus should rarely be the basis for refusing to hear an appeal.[260]

But the Court made some missteps in its reasoning. The Court first speculated that unskilled litigants were the intended beneficiaries of Rule 4(a)(2). This speculation stemmed from the several cases cited in the Advisory Committee Notes to Rule

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[257] FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 272 (1991).

[258] *Id.* at 277.

[259] *Id.* at 273.

[260] *Id.* ("[U]nlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and . . . the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.").

4(a)(2).[261] According to the Supreme Court, these citations "suggest that Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment."[262] Given this intention, the Court then stated that the focus of the inquiry should be on the unskilled litigant's reasonable-but-mistaken belief that the decision appealed from was a final judgment.[263]

Immediately after mentioning unskilled litigants and their mistaken-but-reasonable beliefs, the Court noted that Rule 4(a)(2) would not save a notice of appeal from *every* order, giving discovery and sanction rulings as examples.[264] A notice from these orders, the Court thought, would not "serve as a notice of appeal from the final judgment" because "[a] belief that such a decision is a final judgment would *not* be reasonable."[265] That is, Rule 4(a)(2) would not apply to appeals from interlocutory discovery or sanction orders because no reasonable litigant could think those orders are final judgments. The focus, it then seemed, was on whether a litigant might reasonably think the order appealed from was a final judgment.

The Court's line of thought—from unskilled litigants, to reasonable-but-mistaken beliefs, to final judgments—narrowed Rule 4(a)(2)'s application to appeals from decisions that look like a final judgment. And it produced the line often quoted as *FirsTier*'s holding: "Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment."[266] Given all this attention to whether a party might reasonably believe that the order appealed from was a final judgment, it's no surprise that *FirsTier* has been commonly read to reject the broader approach to cumulative finality.

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[261] *Id.* at 275.
[262] *Id.* at 276.
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*

But this reasoning is questionable from its start. It's not at all clear from the cited cases that Rule 4(a)(2) was intended to protect what the Court characterized as "unskilled litigants." Only one of the cited cases involved an appellant proceeding pro se.[267] The rest appear to have involved appellants represented by counsel.[268] One case involved a $1.5 million contract dispute (in early-1960s dollars).[269] Another involved an appeal by a lawyer, represented by outside counsel, attempting to quash a subpoena issued to his firm.[270] While there's no way of knowing how experienced the litigants in these cases (or their counsel) were, it's not at all obvious that they were amateurs.

And even if they were, it's also not clear from these cases that Rule 4(a)(2) addressed only appeals from what litigants mistakenly thought was a final judgment. Admittedly, the cases cited deal with situations in which the appellants might have thought they were appealing from a final judgment. But these cases were given only as examples. Other cases from this era gave effect to notices filed from orders that were nowhere close to a final judgment.[271] There's no evidence that the Advisory Committee meant to reject these decisions.

Perhaps this is all too critical of the *FirsTier* decision. After all, the Court correctly answered the dispute before it, and it's not entirely clear that the Court intended *FirsTier* to be the final and definitive say on what Rule 4(a)(2) means. Then-Judge Gorsuch, writing for the Tenth Circuit in *In re Woolsey*, has suggested as much.[272] He characterized *FirsTier*'s discussion of Rule 4(a)(2)'s limits as "cryptic and arguably tangential" and noted that the opinion is "open to many different understandings."[273] Gorsuch also suggested that the Supreme Court's statements about "clearly

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[267] *See generally* Ruby v. Sec'y of U.S. Navy, 365 F.2d 385 (9th Cir. 1966).

[268] *See generally In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976); Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1975); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965).

[269] *Firchau*, 345 F.2d at 270.

[270] *Grand Jury*, 541 F.2d at 376.

[271] *See supra* Part II.B.*1*.

[272] *In re* Woolsey, 696 F.3d 1266, 1271 (10th Cir. 2012).

[273] *Id.*

interlocutory orders" like discovery and sanction orders were not necessary to the holding and thus dicta.[274]

Whatever the Supreme Court meant to do in *FirsTier*, the decision has resulted in the current mess.

B. THE BETTER INTERPRETATION OF RULE 4(A)(2)

So what should *FirsTier* have said? The meaning of Rule 4(a)(2) is not obvious. The Advisory Committee intended to capture some part of the common-law cumulative finality doctrine that existed in 1979—that much is clear from the Committee's Notes,[275] as the Supreme Court acknowledged in *FirsTier*.[276] But neither the text nor history of the rule clearly define Rule 4(a)(2)'s scope.

Starting with the text, it alone does not answer the question. The rule says only that a notice "filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."[277] The problem is that it doesn't specify *which* decisions or orders it applies to, or what precisely it means by entry of a "judgment or order."[278] And the rule can be read multiple ways.

Let's put aside for a moment the rule's two uses of the word "order" and focus only on the terms "decision" and "judgment." One plausible reading of these two terms is that they refer to substantively identical actions, differing only in that the "decision" is oral and the "judgment" is written. Judgments normally mark the resolution of all outstanding issues in the district court. So a substantively identical decision would resolve all outstanding issues in the district court. In other words, "decision" would refer to a traditional final decision. This interpretation would support the narrow approach to cumulative finality.

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[274] *Id.* (citing Gonzales v. Texaco, Inc., 344 F. App'x 304, 307 (9th Cir. 2009) (suggesting that the same language is dicta)); *see also* 16A WRIGHT ET AL., *supra* note 9, § 3950.5 ("Perhaps the FirsTier Court's statement can be read merely as warning that a notice designating a challenge to a Rule 11 sanction will not be read to encompass other matters that are ultimately included in the final judgment . . . .").

[275] FED. R. APP. P. 4(a) advisory committee's note to 1979 amendment (noting that "the courts of appeals quite generally have held premature appeals effective").

[276] FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 273 (1991).

[277] FED. R. APP. P. 4(a)(2).

[278] *See* Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 161 (D.C. Cir. 2005) (noting that *FirsTier* left a "vast middle ground of uncertainty" about the orders to which Rule 4(a)(2) applies).

Or one could read "judgment" a bit more broadly to include those decisions that could be certified under Rule 54(b). Otherwise, sticking with the previous interpretation would mean that the decision and the subsequent judgment would still be substantively identical. So if a judgment could mark the resolution of some (but not all) claims in a multi-claim or multi-party suit, the substantively identical decision would be what resolves those claims. The decision resolving the claims would be interlocutory until certified, at which point there is an appealable judgment. This reading would, of course, support the intermediate approach.

Or the terms could plausibly be read more broadly. "Decision" could mean any decision the district court makes in the course of litigation—interlocutory or otherwise. "Judgment" would then refer to the final judgment that ends district court proceedings. Under such a reading, the decision and the judgment would not need to be substantively identical; a judgment embodies all prior district court decisions, so it conceptually includes the decisions appealed from (and all other decisions). Under this reading, an appeal filed after any district court decision would be treated as filed after the entry of a final judgment. This reading would support the broad approach.

Adding the two uses of "order" to the mix only further muddies Rule 4(a)(2)'s text. Much like the terms "decision" and "judgment," it's not clear whether the two "orders" must be substantively identical. One interpretation would be that they must; the first "order" refers to an oral decision by the district court while the second refers to the entry of a written order on the docket. But this interpretation doesn't make much sense. Most orders are entered before a judgment, and they are not immediately appealable; litigants must wait until a final judgment before appealing. So treating a notice filed after the announcement of an order as if filed after entry of the written order would still often result in a notice filed before a final judgment. In other words, the notice would still be premature. Under this reading, the only time these terms would do any work is when an exception to the final-judgment rule allows an order to be immediately appealed. These exceptions are relatively rare, however, so these terms would have limited application.

The two uses of "order" could also be read more broadly. The first two terms—"decision" and the first use of "order"—could refer to any

decision the district court makes before entering a judgment or an appealable order. The second two—"judgment" and the second use of "order"—could refer to the entry of that judgment or appealable order. This reading of Rule 4(a)(2) would mean that any notice of appeal filed before entry of a judgment or an appealable order would be saved by the later entry of that judgment or order.

We can get even more technical and minute (and probably needlessly complicated) by studying the articles that come before the two groups of terms—the rule first speaks of "a" decision or order being announced, followed by entry of "the" judgment or order.[279] But the point is made. Rule 4(a)(2) does not specify precisely when it applies or what it's supposed to do. It's ambiguous. So the text does not give Rule 4(a)(2) a clear meaning.

As for the rule's history, it at least suggests the possibility of the broader approach, though it is hardly conclusive. As detailed in Part II, Rule 4(a)(2) was added to the rules against a backdrop of courts developing the cumulative finality doctrine,[280] and the Advisory Committee intended to capture at least some parts of that developing doctrine.[281] But there was no single, definitively established cumulative finality doctrine in 1979. Some early cumulative finality decisions addressed the now-settled matter of notices filed after the dismissal of a complaint but before the dismissal of an action.[282] Others addressed the announcement of a decision that resolves all outstanding issues and leaves only the entry of a final judgment (the specific situation in *FirsTier* and the scope of the current narrow approach).[283] Other early decisions

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[279] FED. R. APP. P. 4(a)(2). As to the terms "order" and "judgment," the articles reveal little. One could just as easily interpret the phrase "the" judgment to refer back to the decision, meaning that the actions are substantively identical. Or, since a district court often makes many decisions but only one judgment, the use of "a" before "decision" could encompass all district court decisions in the course of litigation, and the use of "the" before "judgment" could refer to the final judgment. Again, adding the "orders" to the mix further complicates the analysis. Because they are the same word, one could read the use of "the order" to refer back to the previous use of the word "order." Such a reading would support the argument that the orders must be substantively identical, with one orally announced and the other entered.

[280] *See supra* Part II.B.*1*.

[281] *See* FED. R. APP. P. 4(a) advisory committee's note to 1979 amendment.

[282] *See* Lanning v. Serwold, 474 F.2d 716, 717 n.1 (9th Cir. 1973); Ruby v. Sec'y of U.S. Navy, 365 F.2d 385, 387, 389 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 270–71 (9th Cir. 1965).

[283] *See* Sanchez v. Maher, 560 F.2d 1105, 1107 n.2 (2d Cir. 1977); *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 376–77 (3d Cir. 1976); Dougherty v. Harper's

addressed orders that could have been certified for an immediate appeal under Rule 54(b) (the scope of the current intermediate approach).[284] And still others applied the cumulative finality doctrine to clearly interlocutory decisions (the scope of the current broad approach).[285]

So it's not clear what exactly the Advisory Committee intended to codify. The Committee's Notes to Rule 4(a)(2) cited five examples of courts giving effect to premature notices of appeal.[286] Those examples, which came from three of the four just-discussed groups of cases, shed only some light on the Committee's intent:

- *Ruby v. Secretary of the U.S. Navy* and *Firchau v. Diamond National Corp.* both held that a notice of appeal was effective when it was filed after the dismissal of a complaint but before dismissal of the action.[287]
- *In re Grand Jury Impaneled January 21, 1975* and *Hodge v. Hodge* both held that a notice of appeal was effective when it was filed after the district court announced its decision but before formal entry of a written order.[288]
- *Song Jook Suh v. Rosenberg* held that a notice of appeal filed while a motion for a new trial was pending became effective when that motion was denied.[289]

Magazine Co., 537 F.2d 758, 762 (3d Cir. 1976); Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975); Markham v. Holt, 369 F.2d 940, 941–42 (5th Cir. 1966).

[284] *See* Tilden Fin. Corp. v. Palo Tire Serv., Inc., 596 F.2d 604, 607 (3d Cir. 1979); Merchs. & Planters Bank of Newport v. Smith, 516 F.2d 355, 356 n.3 (8th Cir. 1975) (per curiam); Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 285–86 (2d Cir. 1974); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973).

[285] *See* Yaretsky v. Blum, 592 F.2d 65, 66–67 (2d Cir. 1979); Song Jook Suh v. Rosenberg, 437 F.2d 1098, 1101 (9th Cir. 1971); Eason v. Dickson, 390 F.2d 585, 588 (9th Cir. 1968); Curtis Gallery & Library, Inc. v. United States, 388 F.2d 358, 360 (9th Cir. 1967).

[286] *See* FED. R. APP. P. 4(a) advisory committee's note to 1979 amendment.

[287] Ruby v. Sec'y of U.S. Navy, 365 F.2d 385, 387–89 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 270–71 (9th Cir. 1965).

[288] *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d at 376–77; Hodge v. Hodge, 507 F.2d 87, 89 (3d Cir. 1975).

[289] *Song Jook Suh*, 437 F.2d at 1099–1101.

The first four of these cases would have reached the same outcome under the current narrow or intermediate approaches to cumulative finality. In all of them, district court proceedings had essentially reached their end; the complaint was dismissed or the district court had announced a decision resolving all outstanding claims. The subsequent event—the dismissal of the action or formal entry of a final judgment (or both)—was relatively insignificant, marking the formal end of a proceeding that had effectively already reached that point.

Song Jook Suh, however, was different. In *Song Jook Suh*, the plaintiff filed his notice while a motion for a new trial was pending.[290] When *Song Jook Suh* was decided in 1971, a motion for a new trial terminated the running of the time for filing a notice of appeal, and the full time for filing a notice commenced upon the denial of the motion.[291] Had the district court granted the motion, its grant of summary judgment would not have been appealable.[292] So at the time the plaintiff in *Song Jook Suh* filed his notice of appeal, the case was not essentially over. More than a formality remained. But on appeal, the court determined that the motion for a new trial, since it was not ultimately granted, merely delayed the time by which the notice of appeal needed to be filed.[293] The notice referred to the only judgment, and "[t]o hold, under such circumstances, that the notice of appeal [was] void, and that [the court] ha[d] no jurisdiction, would be technical in the extreme."[294]

The citation to *Song Jook Suh* thus suggests a broader approach to cumulative finality than that of the narrow and intermediate approaches. Although the specific situation faced in *Song Jook Suh* cannot now recur—current Rule of Appellate Procedure 4(a)(4) addresses what happens to a notice of appeal filed while a motion for a new trial is pending[295]—the situation was one that could not have been saved under the narrow or intermediate approaches. That being said, *Song Jook Suh* only suggests, rather than

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290 *Id.* at 1099.

291 *Id.* (quoting a prior version of Rule 4(a)).

292 *Id.*

293 *Id.*

294 *Id.*; *see also* Yaretsky v. Blum, 592 F.2d 65, 66–67 (2d Cir. 1979) (holding that a premature notice of appeal was saved by the subsequent denial of an outstanding Rule 59(e) motion, given that there was no prejudice to the appellee).

295 *See* FED. R. APP. P. 4(a)(4).

articulates, a broader approach, and so one cannot place too much significance on its citation.

Similarly, as for the Committee's use of a "for example" citation, it only leaves open the possibility that the Committee intended a broader approach. The courts of appeals had issued several other cumulative finality decisions by 1979. Some of them applied the broader approach. But not all of them. Without an idea of what other examples the Committee might have referred to, the Advisory Committee Notes leave the question of Rule 4(a)(2)'s scope unanswered.

What remains, then, is to ask what interpretation of the rule makes the most sense as a policy matter. On that front, the broader approach comes out ahead.

The problem with the narrow and intermediate approaches is that they deprive litigants of their opportunity for appellate review. The right to appeal is widely regarded as a valuable one, and deprivation of it can leave district court errors uncorrected and parties deprived of the relief they're due. The narrow and intermediate approaches sometimes deny the opportunity for appellate review on a highly technical error. It's not as if the party did not file a notice of appeal at all. The notice was filed, but it was filed at the wrong time. This means pro se litigants might lose their chance to appeal even though they filed a notice. Even lawyers are not always sure about the proper time for filing a notice of appeal, as illustrated by the many cases in which a premature notice creates an issue. These mistakes might sometimes seem unreasonable to those versed in the intricacies of federal appellate procedure. But they happen. And these mistakes are depriving parties of appellate review on a technicality.

Technicalities can be important, particularly in the procedural context. But the punishment for a procedural misstep should generally fit the crime.[296] The misstep here—filing a premature notice of appeal—generally does little (if any) harm. Similarly harmless is allowing subsequent events to save them. Indeed, of the four potential harms of premature notices of appeal, only one has any real merit.

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[296] *See* Davis v. Ruby Foods, Inc., 269 F.3d 818, 820–21 (7th Cir. 2001) (stating that "the punishment should be fitted to the crime" in a case involving a complaint that did not meet the technical requirements of Federal Rule of Civil Procedure 8).

First, an early notice of appeal does not cause the problems of a late one. The timing requirements make perfect sense insofar as they limit how long *after* a final judgment a party can file a notice. These limits create reasonable and beneficial reliance interests; once the time for appealing a judgment has passed, the parties can rely on the finality of the district court's decision and move on with their lives. These limits also ensure that federal litigation moves at an acceptable pace; parties must make the decision to appeal relatively quickly, which gets the appeal moving and the dispute closer to a final resolution.

An early notice, in contrast, rarely implicates these concerns. An early notice of appeal does not disrupt any settled expectations of finality. The district court's decision is not even final, so no one should have any reliance interests to upset. Nor does an early notice risk slowing down the pace of litigation by dragging out the time between district court and appellate proceedings.

Second, an early notice of appeal generally does not allow appellants to dispute subsequent orders. A notice of appeal's primary purpose is to give notice (hence the name) of a litigant's intention to appeal. Rule of Appellate Procedure 3(c) requires that a notice specify the decision or decisions being appealed.[297] If a decision is not fairly presented in the notice, the appellant is deemed to have forfeited the matter for appeal.[298] So parties are generally limited to disputing the decisions specified in the notice. This requirement makes perfect sense insofar as it informs the court and parties of the issues relevant to the appeal.

Premature notices create no unique problems because this requirement applies to them with equal force. Courts in cumulative finality cases have generally limited parties to disputing only the decisions specified in the notice; parties cannot dispute district court decisions made after the notice unless they file a new one.[299]

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[297] FED. R. APP. P. 3(c)(1)(B) ("The notice of appeal must . . . designate the judgment, order, or part thereof being appealed . . . .").

[298] *See* 16A WRIGHT ET AL., *supra* note 9, § 3949.4 (noting that care should be taken when complying with Rule 3 "because failure to do so can forfeit appellate review").

[299] *See, e.g.*, Bonner v. Perry, 564 F.3d 424, 429 (6th Cir. 2009) (limiting appellate review to the dismissal of only one defendant when the notice of appeal was filed after the dismissal of that defendant); Warfield v. Fidelity & Deposit Co., 904 F.2d 322, 325–26 (5th Cir. 1990) ("Where the appellant notices the appeal of a specified judgment only or a part thereof . . . this

So cumulative finality cases should present no surprises for the court or the parties of what is at issue in the appeal. Premature notices thus fulfill their notice-providing purpose just as much as those that come shortly after a final judgment. There should be no worry that, as one judge doubting the wisdom of cumulative finality once put it, "a plaintiff [would] file[ ] his notice of appeal as an appendage to his original complaint" and be able to appeal from a later judgment.[300]

Third, premature notices of appeal do not create risks of piecemeal review. The final-judgment rule generally limits federal litigants to a single appeal in which all issues can be addressed. Litigants cannot seek review of individual issues in a series of separate appeals—what are known as piecemeal appeals.[301] And rightfully so. Federal appellate courts are busy enough deciding a single appeal per case; allowing multiple appeals from a single case risks greatly enhancing their workload. And often it's more efficient to hear all issues at once—the issues can be decided by the same panel of judges, who need to become familiar with the case only once.[302]

A broad approach to cumulative finality does not increase the risk of piecemeal appeals. Under any approach to cumulative finality, the district court must have entered an appealable order before the appeal is decided.[303] Normally this means the district court has issued a final judgment, resolving all outstanding issues in the case. And if district court proceedings have reached a final judgment, there's no risk of any additional appeals from that case—the only matter the parties sought to appeal is now before the court of appeals, and everything else has been left as decided in the district court. Indeed, in the only instance when district courts have

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court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal . . . .").

[300] Ruby v. Sec'y of U.S. Navy, 365 F.2d 385, 389 (9th Cir. 1966) (Chambers, J., concurring); *see also* United States v. Hansen, 795 F.2d 35, 38 (7th Cir. 1986) ("The taxpayers, anticipating defeat, might as well have filed the notice of appeal simultaneously with the filing of their counterclaims or their answer to the government's complaint.").

[301] *See, e.g.*, Sears, Roebuck & Co. v Mackey, 351 U.S. 427, 438 (1956) (describing the "historic federal policy against piecemeal appeals").

[302] *See, e.g.*, Will v. Hallock, 546 U.S. 345, 350 (2006); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987).

[303] *See, e.g.*, Marshall v. Comm'r Pa. Dep't of Corr., 840 F.3d 92, 96 (3d Cir. 2016) (holding that a notice of appeal filed before the district court had made *any* decision on the disputed issue could not be saved by subsequent events).

not reached a final judgment—when the district court certifies an order for appeal under Rule 54(b)—the certification is what creates the potential for multiple appeals, not any application of the cumulative finality doctrine.

Fourth and finally, although there is some risk of bogging down litigation while the courts and parties determine the effect of a premature notice, a clearer rule would probably obviate that issue. As the law currently stands, premature notices can cause some disruption in the district court and court of appeals. Normally, the filing of a proper notice of appeal transfers the case from the district court to the court of appeals and deprives the district court of jurisdiction to proceed. If the parties are unsure whether a premature notice is proper, they and the courts might spend time and energy figuring the matter out. A broader approach to cumulative finality does not discourage early filings of notices of appeal. So a broader approach is likely to result in more premature notices. These could disrupt proceedings as the parties and the court figure out what to do with them.

But the problem is not with the broader approach. This disruption already occurs. And it stems from uncertainty about what to do with a premature notice. A clearer cumulative finality rule—no matter its content—would largely solve this problem.

Thus, as many early cumulative finality decisions noted, giving effect to premature notices does little harm.[304] That's why courts so rarely (if ever) determine that giving effect to a premature notice causes any prejudice. The broad approach to cumulative finality thus does little harm. What little harm it might cause can be reduced through a clear rule governing this situation. Given this minimal harm, the narrow and intermediate approaches are unnecessarily harsh. Rule 4(a)(2) should be read to adopt the broader approach.

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[304] Although cumulative finality has not been extensively examined in the appellate jurisdiction literature until now, others have noted that giving effect to a premature notice of appeal often causes minimal (if any) harm. *See, e.g.*, 15A WRIGHT ET AL., *supra* note 9, § 3914.9 ("The results reached in these cases are surely right. The premature appeal has not in fact interfered with the progress of the case in the district court; the court of appeals need not worry that it will have to become familiar with the case again, decide an issue that might be mooted by further trial court proceedings, or decide an issue that might be better illuminated by further trial proceedings; the parties have full notice of the intention to appeal.").

C. FIXING RULE 4(A)(2)

The solution to the cumulative finality problem, then, is to fix Rule 4(a)(2). This could happen two ways.

First, the Supreme Court could take an appropriate case and overrule *FirsTier*. The Court could then interpret Rule 4(a)(2) to adopt the broader approach, which is its best reading. Although the courts of appeals might be able to fix this problem on their own, the amount of work that would take—and the number of cases that would be overturned—probably makes it most efficient to go through the Supreme Court.

Second, the Rules Committee could amend Rule 4(a)(2) to clearly adopt the broader approach. The current rule reads:

> (2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.[305]

As amended, the new rule might read:

> (2) *Filing Before Entry of Judgment.* A notice of appeal filed before the court enters the judgment or appealable order that would allow review of the appealed decision is treated as filed on the date of and after the entry of that judgment or order.

Such a rule would unambiguously adopt the broader approach. It would apply to any notice filed before a party could appeal. And that notice would be saved by the subsequent entry of a judgment or appealable order.

D. DEFINING A FINAL JUDGMENT

The current cumulative finality mess is only one of several in the current federal appellate jurisdiction regime. By most accounts,

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[305] FED. R. APP. P. 4(a)(2).

that entire system is a mess;[306] it's simply too complicated and confusing for the average litigant.[307] Part of this complexity comes from the variety of rules governing when a party can appeal. As already mentioned, the final-judgment rule is only a general rule. It has many exceptions that allow litigants to appeal before a final judgment. Some exceptions are in statutes.[308] Others are in rules of procedure.[309] And some come from judicial decisions.[310] Some apply only to specific types of orders,[311] while others can conceivably

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[306] *See* Lammon, *Rules, Standards, and Experimentation*, *supra* note 15, at 423; Steinman, *supra* note 15, at 1238–39.

[307] *See* Carrington, *supra* note 15, at 165–66 (noting "the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next"); Cooper, *supra* note 15, at 157 ("The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity."); Eisenberg & Morrison, *supra* note 15, at 291 (calling the current system "arcane and confusing"); Lammon, Perlman *Appeals*, *supra* note 15, at 2 (stating that the exceptions to the final-judgment rule "creat[e] an immense, complex, and confusing web of appellate jurisdiction"); Pollis, *Multidistrict Litigation*, *supra* note 15, at 1651 (noting the "labyrinthian conglomeration of jurisdictional rules"); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS., Summer 1984, at 171, 172 ("The existing federal finality-appealability situation is an unacceptable morass."); Waters, *supra* note 15, at 556 (noting the "dizzying array of statutory and judicially-created [finality] exceptions").

[308] 28 U.S.C. § 1292(a)(1), for example, gives the courts of appeals jurisdiction over appeals from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1) (2012). The Federal Arbitration Act permits immediate appeals from interlocutory orders involving arbitration. *See* 9 U.S.C. § 16(a) (2012). And a district court can certify for immediate review an interlocutory order in a civil case under 28 U.S.C. § 1292(b) so long as the order involves "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance . . . the litigation." 28 U.S.C. § 1292(b) (2012).

[309] Federal Rule of Civil Procedure 23(f) allows for immediate appeals from district court orders granting or denying class certification. FED. R. CIV. P. 23(f). And Federal Rule of Civil Procedure 54(b) authorizes a district court to enter a final judgment for some (but not all) of the claims or parties in a case "if the court expressly determines that there is no just reason for delay," thereby allowing an immediate appeal from orders that would otherwise have to wait for a final judgment. FED. R. CIV. P. 54(b).

[310] The major judge-made exception to the final-judgment rule is the collateral order doctrine. *See* Lammon, *Rules, Standards, and Experimentation*, *supra* note 15, at 431 (calling the collateral order doctrine "the most common and most maligned exception to the final judgment rule"). Although the exact requirements of that doctrine can vary from case to case, it generally allows immediate appeals from types of orders that are conclusively decided in the district court, separate from the merits of the trial court proceedings, and effectively unreviewable after a final judgment. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

[311] *See, e.g.*, 9 U.S.C. § 16(a) (allowing appeals of certain orders regarding arbitration); FED. R. CIV. P. 23(f) (allowing appeals of orders regarding class-action certification).

apply to any order.[312] Some exceptions provide an appeal as of right.[313] Others give the courts of appeals discretion over whether to hear the appeal.[314]

The current state of affairs—a general final-judgment rule and a motley crew of exceptions—has been a regular target of criticism and reform efforts (including my own).[315] Those reform efforts have largely focused on two issues: (1) what types of orders should be appealable before a final judgment,[316] and (2) what form rules governing those appeals should take.[317]

But there's another side to the current appellate jurisdiction mess. Despite efforts to make it clear when the time for filing a notice of appeal begins, litigants continue to make mistakes. Appeals at the end of district court proceedings—and specifically, identifying when those proceedings have ended—raise their own issues. The current cumulative finality mess is only one illustration of this aspect of appellate jurisdiction. And this aspect of appellate jurisdiction has received much less attention in the literature than appeals before a final judgment.

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[312] Extraordinary writs are available in essentially all cases. *See* 28 U.S.C. § 1651 (2012). Other exceptions apply relatively broadly, such as those for appeals regarding injunctive relief and certified appeals. *See id.* § 1292(a)(1) (allowing appeals of interlocutory orders regarding injunctions); *id.* § 1292(b) (allowing district judges to certify orders for appeal in civil cases).

[313] 28 U.S.C. § 1292(a)(1), for example, gives litigants the right to appeal orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). Under the collateral order doctrine, government officials have a right to appeal the denial of qualified immunity to the extent the denial turns on an issue of law. *See* Behrens v. Pelletier, 516 U.S. 299, 311 (1996); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). That doctrine also gives a right to appeal in several other situations, including the denials of state sovereign immunity, immunity under the fifth amendment's double jeopardy clause, and immunity under the Constitution's speech or debate clause. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (state sovereign immunity); Helstoski v. Meanor, 442 U.S. 500, 506–07 (1979) (speech or debate clause immunity); Abney v. United States, 431 U.S. 651, 659–60 (1977) (double jeopardy).

[314] *See* 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f).

[315] *See* sources cited *supra* note 16.

[316] *See generally, e.g.*, Lammon, Perlman *Appeals*, *supra* note 15 (discussing appeals of orders regarding the disclosure of allegedly privileged information); Pollis, *Multidistrict Litigation*, *supra* note 15 (discussing appeals of decisions in multidistrict litigation cases).

[317] *See generally, e.g.*, Glynn, *supra* note 15 (advocating rules-based reform for the law of federal appellate jurisdiction); Martineau, *supra* note 15 (arguing for discretionary appellate jurisdiction); Steinman, *supra* note 15 (arguing largely for a system of appellate jurisdiction with some mandatory appeals).

The literature—and the concomitant reform efforts—should pay more attention to this other side of federal appellate jurisdiction. Indeed, a key piece of any successful reform will be redefining a final, appealable judgment. For example, I have suggested a system based on the structure of the hearsay rules in the Federal Rules of Evidence: a general rule about when litigants can appeal as of right coupled with a series of exceptions that allow appeals at other points in district court proceedings.[318] This could even be capped with a catchall provision, like Evidence Rule 807, that gives the courts of appeals guided discretion to hear an interlocutory appeal.[319] Under this system, appellants must identify the rule that gives the court of appeals jurisdiction over the case.

None of this would work, however, without a baseline rule—a relatively clear and easily identifiable point in district court proceedings when parties have a right to appeal. I do not yet have the answer for when this point would be. The old Rule 58, which required entry of a written judgment before the time for filing a notice of appeal began, might be worth considering.[320] But this side of appellate jurisdiction must be explored if a new, workable baseline is to exist.

V. CONCLUSION

The current cumulative finality situation is unacceptable. The Supreme Court or the Rules Committee should fix it. I have used this Article to explain how. The best way to approach matters of cumulative finality is to allow a subsequent judgment to save any prematurely filed notices of appeal. Doing so will cause little harm (if any) and will avoid depriving parties of their opportunity for appellate review.

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[318] Lammon, *Dizzying* Gillespie, *supra* note 6, at 415–16.

[319] *Id.*

[320] *See* FED. R. APP. P. 58 advisory committee's note to 2002 amendment (explaining changes to the old Rule 58 with respect to entering the judgment and the time to appeal under Rule 4(a)).