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The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality

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INTRODUCTION

Finality. To the hopeful appellant before the New York State Court of Appeals, the word has implications bordering on the awesome. Only rarely does the court hand down a decision list that does not contain dismissals of appeals for lack of finality. The court no longer waits for reluctant respondents to suggest, by a motion, that the putative appeal wants for finality; with careful regard for its jurisdictional limits, the court will dismiss appeals from non-final determinations *sua sponte*. Indeed, the court requires an appellant to justify, by resort to "case, statutory or other authority," the claim that it has jurisdiction to entertain the appeal within 10 days of the time the appeal is taken. If an appellant is not sufficiently persuasive, the court, after inviting further comment from the parties, may dismiss the appeal on its own initiative.

To be sure, dismissal on finality grounds does not mean that

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2 *Rules of the Court of Appeals, §500.2, [1979] 22 N.Y.C.R.R. §500.2. For a review of the procedures followed by the court with respect to *sua sponte* consideration of jurisdictional issues, see 7 *Weinstein, Korn & Miller, New York Civil Practice*, ¶ 5601.03a (1979) [hereinafter cited as WK&M].
the appellant loses all opportunity to obtain a ruling on the merits of the appeal from the court of appeals. It does means, however, that the appeal may be delayed while further proceedings are held in the courts below or that an immediate appeal can be taken only with the permission of the same appellate division that issued the ruling which aggrieves the appellant. An attorney's incorrect belief on finality can have even more dire consequences. If counsel believes an order is not final and chooses not to appeal it, a later finding of finality will cost the appellant the appeal if the time to appeal has expired.

Ever since the concept of finality was first raised to constitutional magnitude in 1894, the distinction between final and non-final orders has been a "fruitful source of litigation." To this day, finality determinations can involve arcane, if not obscure, distinctions. The mystery is compounded by the relative scarcity of readily findable, reported judicial opinions on finality issues. The majority of finality decisions are not accompanied by explanation; typically the court provides only a terse statement of the result.

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6 See N.Y. Const. art. 6, § 3(b)(4); N.Y. Civ. Prac. Law § 5602(b)(1) (McKinney 1978).
7 See N.Y. Civ. Prac. Law § 5611, commentary at 544 (McKinney 1978). Although the Civil Practice Law and Rules (CPLR) provides a safety net to preserve the timeliness of a second attempt to appeal where the first attempt was made by the wrong method, N.Y. Civ. Prac. Law § 5514(a) (McKinney 1978), no such grace is afforded where an appeal was foregone in the belief, however sincere, that there was no appellate jurisdiction. Professor Siegel warns against this possibility in his practice commentary to CPLR 5611: "A dismissed appeal with leave to return at a later time is preferable to a later ejection with leave to return at an earlier time, a difficult feat to accomplish in the space-time continuum." N.Y. Civ. Prac. Law § 5611, commentary at 544 (McKinney 1978).
9 See, e.g., Feinstein v. Bergner, 48 N.Y.2d 234, 237 n.1, 397 N.E.2d 1161, 1162 n.1, 422 N.Y.S.2d 356, 357 n.1 (1979) (order setting aside service of process, standing alone, generally viewed as non-final, but if order also dismisses complaint, it is deemed final).
10 One reason for this scarcity is that most finality questions are resolved on pre-argument motions, and the results of these motions are not digested.
11 The court's workload simply does not allow the luxury of detailed explanations of preliminary rulings on matters of practice and jurisdiction. As one commentator has noted, the New York Constitution generally provides for such a mixture of factors to be encountered in court of appeals practice as to cause "innumerable complications, conditions, peculiarities and, finally, pitfalls . . . ." N.Y. Civ. Prac. Law § 5601, commentary at 491 (McKinney 1978). At one time in ruling on pre-argument motions to dismiss appeals or in announcing the outcome of the court's initial sua sponte investigation of a finality question, the court would issue entries which contained only such bare bones language as "motion to dismiss appeal denied" or "appeal dismissed on the ground that the order is non-final."
Appellate counsel, then, have comparatively few published opinions and authorities to employ as guides to assessing or arguing whether particular determinations are final or non-final.\(^\text{10}\)

This Article is intended to assist the practitioner by reviewing the history, purpose, and policy of the finality rule in civil appellate practice,\(^\text{11}\) by explaining the standards employed to resolve finality questions,\(^\text{12}\) by identifying and discussing particular and frequently encountered finality problems,\(^\text{13}\) and by reviewing the methods by which final and non-final determinations can be properly brought to the New York State Court of Appeals for review.\(^\text{14}\)

**History, Constitution and Policy**

When the court of appeals dismisses an appeal for want of finality, its order of dismissal invariably states that dismissal is "upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution."\(^\text{15}\) The constitution of the state does indeed impose the general requirement that, in civil actions or proceedings, an appeal as of right to the court of appeals and an appeal by permission of the court of appeals can be taken only from a judgment or order en-

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\(^{10}\) The major treatise on the court of appeals is *The Powers of the New York Court of Appeals*, authored by Henry Cohen and Arthur Karger, a revised edition of which was published in 1952. Cohen and Karger provide a comprehensive review and analysis of all aspects of the court's jurisdiction, including finality. Even though there have been substantial statutory changes and caselaw developments since 1952, the most notable of which is the replacement of the Civil Practice Act with the Civil Practice Law and Rules in 1963, their work is extensively used and frequently cited by the court itself. Professor Siegel concludes that the continued relevance of the Cohen and Karger treatise "is a further testimonial to the staying power of some of the limitations on, and, occasionally, idiosyncracies of, Court of Appeals practice." *N.Y. Civ. Prac. Law* § 5601, commentary at 492 (McKinney 1978).

\(^{11}\) See notes 15-61 and accompanying text infra.

\(^{12}\) See notes 62-87 and accompanying text infra.

\(^{13}\) See notes 88-207 and accompanying text infra.

\(^{14}\) See notes 208-216 and accompanying text infra.

tered upon an appellate division determination which "finally determines" the action or proceeding.16

History

The issue whether a particular order or judgment is final "within the meaning of the Constitution" reaches to the foundation of the court's historical purpose. The finality requirement was not established out of whim or caprice; its framers had very definite conceptions of the role and functions the court of appeals should serve atop the state's judicial establishment. The court was not intended to serve as an additional—if final—forum for litigants dissatisfied with the results obtained in the court of original instance and in the court of first appeal. To the contrary, the four appellate divisions were envisaged as being the court of last resort for the majority of litigants.17 The court of appeals was to serve a more limited purpose: it would be the final arbiter of state-wide rules of law which would serve as a guide to the conduct of the general population. Thus, the impact of a court of appeals determination in a particular case was perceived as being less important, in a constitutional sense, than the promulgation of law which could be uniformly applied by other courts of the state to other litigants.18

The crucial point regarding finality is that the constitution reflects a fundamental decision to leave final responsibility for certain matters, such as those pertaining to practice, squarely in the courtrooms of the appellate division, subject to limited exceptions.19 As a result, whether a particular determination is final

16 N.Y. Const. art. 6, § 3(b)(1), (2), (6).
17 See notes 40-55 and accompanying text infra.
18 That an individual party to a case may benefit from a court of appeals' decision is, in theory, but most certainly not in actuality, incidental. As Benjamin Cardozo eloquently stated:

The Court exists, not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue, the wrongs of aggrieved suitors are only the algebraic symbols from which the Court is to work out the formula of justice.

19 See N.Y. Const. art. VI, § 3(b)(4) (permitting appeal to the court of appeals from non-final determinations of the appellate division on certified questions of law); N.Y. Civ. Prac. Law §§ 5601(d), 5602(a)(ii) (McKinney 1978) (permitting an appeal to the court of appeals from certain trial court, administrative agency or appellate division determinations where there is a prior non-final appellate division order "which necessarily affects" the judg-
RULE OF FINALITY

hinges, to a great degree, on whether the determination is on a preliminary issue over which the constitution intended to leave final authority in the appellate division. To state the matter in different terms, to ask if an order is final "within the meaning of the Constitution" is to ask whether the constitution intended to permit the court of appeals to review this type of determination on direct appeal.

Until 1846, there was no court of appeals. The early constitutions of this state placed ultimate judicial authority in the Court for the Trial of Impeachments and the Correction of Errors. This court was a "court" in name only; its members were the president of the state senate, all members of the senate, the chancellor, and the justices of the state supreme court. As might be anticipated, the Court for the Trial of Impeachments and the Correction of Errors eventually outlived its usefulness. The court, with a full complement of thirty-seven members, was unwieldy. Even more importantly, however, the presence of the members of the senate adversely affected the independence of the court since the senators, who possessed a numerical majority in the court, were apparently unwilling to free themselves of political influences. Moreover, the fact that a majority of the senate were laymen detracted from the respect accorded the court's judgments because they were not likely to have the finely honed legal skills expected of members of a court of last resort.


21 N.Y. Const. of 1777, art. XX; N.Y. Const. of 1821, art. III, § 7. The president of the Senate was the Lieutenant Governor. Curiously, there was considerable dispute whether the Lieutenant Governor could vote on decisions. See 1 C. Lincoln, The Constitutional History of New York 209 (1905); Lieutenant Governor's Claim, 2 Wend. 213, 216 (1829). The Lieutenant Governor prevailed by a vote of 23 to 5. Id.

22 N.Y. Const. of 1777, art. XXXII; N.Y. Const. of 1821, art. V, § 1; see H. Scott, The Courts of the State of New York 274, 293 (1909). Whenever a judgment of the supreme court was brought to the Court for the Trial of Impeachments and the Correction of Errors by a writ of error that raised a question of law, the supreme court justices were barred from voting. They were only permitted to "assign the reasons of such their judgment." N.Y. Const. of 1777, art. XXXII; see N.Y. Const. of 1821, art. V, § 1.

23 II C. Lincoln, The Constitutional History of New York 145-46 (1905). As an illustration, the Court for the Trial of Impeachments and the Correction of Errors declared only three statutes unconstitutional during its entire 70 years of existence. Id. at 146.

24 Id. at 145 (1906). See also A. Chester, The Legal and Judicial History of New York 381 (1911).

25 See II C. Lincoln, supra note 23, at 145.
The constitution of 1846 did away with the old Court for the Trial of Impeachments and the Correction of Errors.26 In its place was created a new eight-judge court of appeals. Four judges were elected by the voters; the other four were selected from the class of supreme court justices having the shortest time to serve.27 The 1846 constitution, however, did not elaborate on the jurisdiction afforded this new court.28

In 1869, the voters approved a new judiciary article which amended the 1846 constitution. The prime reform made by the 1869 amendments was to fix the membership of the court of appeals at seven (a chief judge and six associate judges), all of whom were elected by the people of the state. Although there was at least one proposal at the constitutional convention of 1867 to prescribe a method for constitutionally regulating the court's jurisdiction,29 the 1869 amendments did not address the nature and extent of the court's jurisdiction. As a result, the establishment of the jurisdiction of the court of appeals was left to the unfettered control of the state legislature.30

The legislature was extremely liberal in permitting appeals to the court of appeals.31 Under the Throop Code of 1876,32 for exam-
ple, the court was empowered to review final judgments of the general terms of the supreme court and of the superior city courts. Upon such appeal, the court could review any interlocutory judgments or intermediate orders that involved the merits and necessarily affected the final judgment. In addition, subject to certain exceptions, many non-final determinations could be appealed from the specified lower courts. An order affecting a substantial right and not made in an exercise of discretion could be appealed to the court of appeals if the order: (1) "in effect" determined the action and prevented entry of a final judgment; (2) discontinued the action; (3) granted or refused a new trial; (4) struck a pleading or a part thereof; (5) decided an "interlocutory" application or a "question of practice"; or (6) declared a state statute unconstitutional.

In large measure, the ready availability of appeals to the court of appeals, made the court unable to efficiently dispose of its caseload in the last quarter of the 19th Century. In fact, its caseload fell years behind. Temporary measures to reduce the logjam of cases included the creation of a Commission on Appeals in 1869 and of a second division of the court of appeals in 1889.

The creation of additional and co-equal tribunals to supplement

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33 H. Scott, supra note 22, at 253. The general term of the supreme court was the forerunner of our present day appellate division. Id.

34 Code of Civil Procedure, ch. 448, § 190(1), [1876] N.Y. Laws 35 (repealed 1909). The statute implicitly recognized three types of determinations: the first was a final judgment, the second an "interlocutory judgment" and the third an intermediate order. An interlocutory judgment was defined as "an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done." Cambridge Valley Nat'l Bank v. Lynch, 76 N.Y. 514, 516 (1879). Thus, a judgment which fixed liability but directed that an accounting be made or that damages be ascertained was viewed as "interlocutory"; a determination which sustained a demurrer to a complaint but granted leave to amend the challenged pleading was held not to be an interlocutory judgment—it being only an intermediate order. Id.


36 See H. Cohen & A. Karger, supra note 1, at 18.

37 N.Y. Const. of 1869, art. VI, § 4; see H. Cohen & A. Karger, supra note 1, at 21. As Lincoln points out, the judiciary article of the constitution of 1869 was the only portion of the constitution to be accepted. II C. Lincoln, supra note 23, at 464. On the proposals preceding the creation of the temporary commission, see II C. Lincoln, supra note 23, at 262-64.

38 N.Y. Const. of 1890, art. VI, § 7. See H. Cohen & A. Karger, supra note 1, at 22; II C. Lincoln, supra note 23, at 585-86.
the court of appeals, however, soon led to unsatisfactory inconsistencies between rulings of the court and the supplemental tribunals. Meaningful and permanent reform was required.

The state’s entire appellate system was overhauled in the constitution of 1894. The fundamental purposes of the 1894 constitution were to improve the quality of appellate justice rendered in the old general terms, which were renamed appellate divisions; to foster respect for the appellate division determinations by making these decisions final in the majority of cases; and to limit the court of appeals to the function of providing ultimate and certain exposition of the law of the state.

The judiciary committee to the 1894 convention expressed the view that the state was required “to give to its citizens one trial of their controversies and one review of the rulings and results of the trial by a competent and impartial appellate tribunal”; the committee members perceived “no consideration, either of public duty or of the private interests involved in litigation, which requires a second appeal and a second review.” The committee recognized, however, that the great “volume of business” prevented creation of a single appellate court to review all decisions of the courts of the first instance. As three or four courts would be needed to administer the appellate caseload, and the opinions of these courts were “certain to vary, differ or conflict,” the law could only be settled if these separate tribunals were controlled by a higher authority. The committee, in an authoritative explanation of the purpose of the court of appeals, declared:

The public interests demand that the law should be settled; that it should be the same for the whole State; that it should be a

39 II A. Chester, supra note 26, at 315.
40 See Judiciary Committee Report, supra note 32, at 1, 4-6; H. Cohen & A. Karger, supra note 1, at 22-25. See generally II A. Chester, supra note 26, at 319-20. The revisions made by the 1894 constitution established the basic framework for the appellate system which exists today. See notes 56-61 and accompanying text infra.
41 Judiciary Committee Report, supra note 40, at 463-64.
42 Id. at 464.
43 Id. Elihu Root, the chairman of the judiciary committee, explained the need for a single court which would finally determine the law of the state:

It is necessary, in order that the law shall be settled, shall be clear, shall be harmonious, shall be known, and shall be a guide for the conduct of all the people of the State, that some one supreme authority shall overrule and supervise the decisions of these various courts of original appeal, and once and for all declare what is the law. That is the sole reason for the existence of the Court of Appeals.

II Revised Record, supra note 32, at 893.
consistent and harmonious system; that it should be declared clearly and authoritatively by some supreme power, in order not merely that litigants may have their right, but that the whole people may know what is the law, by which their contracts and conduct shall be regulated, and by the observance of which they may, if possible, keep out of litigation.

The occasion which gives rise to a second single appellate tribunal marks the limit of its proper and necessary function to settle and make certain the law, not only for litigants, but for all the people. Whatever limitations upon its jurisdiction or the scope of its action, and whatever provisions regarding its constitution and procedure are consistent with the full and effective exercise of that function, are permissible. Whatever interferes with the exercise of that function should be by all means avoided.44

According to the committee, review by the general terms was not effective because, in part, the “[w]ant of finality in their judgments decreases the respect for their authority and their sense of responsibility.”45 Moreover, the committee observed that “the disposition to take a second appeal grows and the legislature constantly enlarges the opportunity,” and as a result, “the Court of Appeals is overloaded with work, a very considerable portion of which is wholly outside of its proper and necessary function of settling the law.”46

44 Judiciary Committee Report, supra note 32, at 464. See H. COHEN & A. KAISER, supra note 1, at 23.
45 Judiciary Committee Report, supra note 32, at 5; see III C. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 356-57 (1905); see generally II A. CHESTER, supra note 26 at 320-21.
As Mr. Root noted in an address to the convention, the 1867 constitution presumed that the court of appeals would review all decisions of the general terms and that the “General Terms would so sift out the appeals which came to them that only so many would go to the Court of Appeals as it should be able to take care of.” II REVISED RECORD, supra note 32, at 893-94. Even after several years, however, little sifting occurred. According to Mr. Root, this was due to two factors. First, the general terms, consisting of three members, were too small for proper deliberation. Second, the general term justices, in addition to their appellate duties, were also required to do a full share of trial work. Cases would be heard and decided by only two justices, the general term justices often sat in review of each other’s decisions below, and the press of work led to the shortening of arguments, leaving litigants “feeling dissatisfied and [with the feeling] that they had not had an opportunity for the full presentation of their cases.” Id. at 894.
46 Judiciary Committee Report, supra note 32, at 465. See also Reed v. McCord, 160 N.Y. 330, 335-37, 54 N.E. 737, 738-39 (1899). Constant enlargement of the scope of appeal from general term to the court of appeals “opened doorway after doorway, through which constantly additional kinds of questions could be taken up to the Court of Appeals, so that the finality of the judgment of the General Term has been constantly decreased, and, there-
The purpose of the revised constitution was plainly stated:

Our purpose is to draw the line distinctly around the questions which the Court of Appeals, and that court alone, ought to determine finally; to leave all other questions to the court first reviewing the cause; and to make that court fully competent to protect satisfactorily every right of a litigant.47

To accomplish this end, the committee fixed upon a requirement that appeals to the court of appeals be generally limited to appeals from final determinations.48 Elihu Root, the chairman of the judiciary committee, stated that in framing the article, the committee "endeavored to follow a clear line of logical distinction between the proper functions of this Court of Appeals and the courts of first review, a line of distinction marked out by the very definition of the proper function of a court of second appeal."49

The "line of logical distinction" required that the court of appeals be limited to "the function of settling and declaring the law."50 Regarding the review of questions of fact, it was decided that where the trial court found a fact to be established, and the

fore, respect for their decisions has been decreased, and their own sense of responsibility has been decreased." II Revised Record, supra note 32, at 895.

47 Judiciary Committee Report, supra note 32, at 465.

48 Id. The committee considered and rejected a number of other proposals. The concepts of splitting the court into two divisions and of having many judges rotate in service on the court were rejected. The committee opined that division of the court or rotation of its members would impair the "unity of the Court," would prevent "consistent harmony of its views upon the fundamental questions which underlie the determination of causes," and would make the law uncertain. Id. at 466.

The committee found in favor of the abolishment of a monetary limit. "Important cases of law arise in small cases, as well as in large ones." Id. "[The] great majority of the people have only small cases to be determined, and this should be their court, if they choose to avail themselves of it, as well as the court of their wealthy fellow-citizens." Id. at 466.

Chairman Root drew applause from the members of the convention when he stated that the court of appeals should be "the people's court"—"the court of the poor man, so that he may feel that he may go there if he wants to, with his question of law . . . ." II Revised Record, supra note 32, at 898. Not only did the committee believe that no monetary limit should be added, it also provided "that the limit now existing should be taken off, and that no such limit shall ever be imposed." Id.

Nor did the committee see wisdom in limiting appeals to specified classes of cases. Human foresight could not prevent mistakes from being made in a permanent constitution. The committee reasoned: "[T]here is an element of unfairness toward those citizens who are interested in the particular classes of cases excluded from the enumeration; and . . . similar questions of law arise in different classes of cases, so that there would be different courts of last resort passing on the same questions." Judiciary Committee Report, supra note 32, at 466.

49 II Revised Record, supra note 32, at 896.

50 Id.
five justices of the appellate division unanimously agreed, the controversy about that fact should stop.51 Mr. Root's comments on questions of law relating specifically to practice bear directly on many issues that the court today would declare non-final in nature: "Why should this court, which is to declare the law for all the people, be bothered about petty questions of practice, which can as well be settled by the appellate tribunal which we now constitute, as by the Court of Appeals?"52

To implement these policies, the 1894 constitution provided that appeals could be taken as of right to the court of appeals "only from judgments or orders entered upon decisions of the appellate division of the supreme court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them."53 A small loophole, however, was appended: the appellate division in any department could permit an appeal "upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals."54

The finality requirement was thus designed to accomplish three different objectives. The first was to strengthen the authority of, and enhance the respect for, the four appellate divisions by making them the courts of last resort for most litigants. The second was to enable the court of appeals to function solely as the final arbiter not of particular cases but of the crucial issue of state law likely to arise on appeals from final judgments or orders. Third, it was intended to screen out less important questions of

51 Id. at 897; see Judiciary Committee Report, supra note 32, at 465.
52 II Revised Record, supra note 32, at 897.
53 N.Y. Const. of 1894, art. VI, § 9.
54 Id. This exception to the general rule of finality is the forerunner of the present constitutional provision which permits the appellate division to grant an appellant leave to appeal to the court of appeals from a non-final order upon certified questions of law. N.Y. Const. art. VI, § 3(b)(4); N.Y. Civ. Prac. Law §§ 5602(b)(1), 5612(b), 5713 (McKinney 1978).

Upon analysis, it becomes clear that the exception does no violence to the principles underlying the general finality rule. Since the finality requirement was designed, in part, to preserve the respect for the appellate division by finalizing its decision on preliminary matters, there should be no concern where that court deems fit to authorize a further appeal, particularly since experience reflects that such permission is sparingly granted. Moreover, the court of appeals, as arbiter of questions of law, receives appeals which, in the opinion of the majority of the appellate division, involve important issues of law. Indeed, the provision assures that important issues arising in non-final contexts, which otherwise might not be heard or otherwise might be delayed by the need to complete further proceedings below, can be presented to the court of appeals promptly.
law, such as those relating to "petty practice," from the jurisdiction of the court of appeals and to vest final authority for those questions in the appellate division.\footnote{55}

**The Finality Rule Today**

The New York constitution continues to provide for a general requirement of finality in order to proceed on appeal to the court of appeals. With limited exceptions, an appeal as of right to the court of appeals and an appeal by permission of the court of appeals can be taken only from an order or judgment which "finally determines an action or special proceeding."\footnote{57} The finality rule is so fixed that, while the constitution permits the legislature to abolish all appeals as of right in civil cases,\footnote{58} provided no constitutional issue is directly involved,\footnote{59} all abolished categories of appeals must then be governed by the constitutional provision authorizing appeal from final appellate division determinations by permission of either the appellate division or the court of appeals.\footnote{60} In fact, however, the legislature has granted the court of appeals all of the jurisdiction authorized by the constitution, which it retains today.\footnote{61}

\footnote{55} The reservation of practice questions to the appellate division has the salutary effect of giving a regional tribunal some latitude to adjust the regulation of particular civil practice questions, to the extent permitted by law, to meet more localized concerns and standards.

\footnote{56} The two principal exceptions to the finality requirement are carry-overs from the constitution of 1894. See notes 53-54 and accompanying text supra. One is the provision that an order of the appellate division granting a new trial in a civil action can be appealed if the appellant stipulates that, in the event of affirmance, judgment absolute shall be entered against him. N.Y. CONST. art. VI, § 3(b)(3). The other major exception is that a non-final determination of the appellate division can be appealed to the court of appeals where the appellate division grants permission and certifies that questions of law have arisen that should be reviewed by the court of appeals. Id. § 3(b)(4).

\footnote{57} N.Y. CONST. art. VI, § 3(b)(1),(2),(6).

\footnote{58} Id. § 3(b)(3).

\footnote{59} Id.

\footnote{60} Id. § 3(b)(6),(8). The proposed 1967 constitution—which was rejected by the people—would have provided that (1) appeals as of right in civil cases would lie in any case in which constitutional issues were involved; (2) that appeals in civil cases could be had by permission of the appellate division from non-final determinations or by permission of either the court of appeals or the appellate division from final determinations; and (3) appeals in all other cases could be had where permitted by law or court rule. See Art. V, § 2 of Proposed 1967 Constitution, Proceedings of New York State Constitutional Convention of 1967, Vol. XI, Documents, Doc. No. 60.

\footnote{61} N.Y. CIV. PRAC. LAW §§ 5601, 5602 (McKinney 1978).
Finality: Standards and Considerations

While the constitution directs that appeals as of right to the court of appeals and appeals by permission of the court itself generally can be taken only from an order or judgment that "finally determines an action or special proceeding," the constitution does not provide any definition of the term "finally determines." Indeed, the clear constitutional directive on the document to be considered the appealable "paper"—and thus the focus of a finality inquiry—has been neatly shelved as an antiquity. The result is that while, in theory, finality determinations are made "within the meaning of the constitution," in practice, statute and case law precedent control.

The threshold issue in any finality inquiry is to identify the paper whose finality is to be considered. By statute, that paper is the order of the appellate division. This statement is not as obvious as it would appear on the surface. Under a literal reading of the constitution, a determination of the appellate division in a civil action could not be appealed directly; the appellant had to await the entry of a judgment in the trial court which put the appellate division determination into effect, and then appeal from that judgment. This practice was discarded with the enactment of the Civil Practice Law and Rules (CPLR).

Today, most appeals to the court of appeals, in both actions and special proceedings, must be taken from the dispositive paper of the appellate division. The determination made by the

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63 N.Y. Const. art. VI, § 3(b)(1), (6).
64 See notes 66-68 and accompanying text infra.
65 7 W.K. & M. supra note 2, ¶ 5611.01a.
68 Secor v. Levine, 296 N.Y. 1020, 1021, 73 N.E. 2d 726, 726-27 (1947) (mem.) (order of the appellate division could not be appealed even as a non-final determination with the permission of the appellate division).
69 See N.Y.Civ.Prac.Law § 5512(a) (McKinney 1978). The prior practice led to confusion in that one route was prescribed for actions and a different route was established for special proceedings. While in an action the appeal was from a judgment or order entered by the trial court pursuant to an appellate division determination, in a special proceeding the appeal could be taken directly from the order of the appellate division. N.Y. Civil Practice Act, ch. 297, § 591, [1942] N.Y. Laws 870 (repealed and superseded 1962). The court of appeals considered this distinction to be "unfortunate" and "confusing." Purchasing Assocs. v. Weitz, 13 N.Y.2d 267, 275, 186 N.E.2d 245, 248, 246 N.Y.S.2d 600, 606 (1963).
70 The term "dispositive paper" is used advisedly. Generally, an appellate division determination is embodied in either an order or a judgment. Unlike a trial court judgment
court of first instance is not relevant to a finality assessment, except to the extent that the determination is confirmed by the appellate division. Thus, it is the order of the appellate division and not any subsequent judgment or order that must be studied in order to determine if the finality requirement has been satisfied.

Having resolved the threshold issue of the appealable paper, the CPLR does not offer any useful standard by which to measure the finality of the appellate division order. CPLR 5611 provides only that an appellate division order should be considered final if it "is the resolution of the dispute" and "the embodiment of the verdict or decision," D. Siegel, New York Practice § 409, at 541 (1978), an order is merely "the determination of a motion," 2A W & M supra note 2, ¶ 2211.01 (footnote omitted); see CPLR 2211, and does not, in and of itself, finally determine the rights of the parties, see Marsh v. Johnston, 123 App. Div. 596, 597, 108 N.Y.S. 161, 161-62 (2d Dep't 1908). See also Concours Super Serv. Station, Inc. v. Price, 33 Misc. 2d 503, 503, 226 N.Y.S.2d 651, 652 (Sup. Ct. Bronx County 1962). For the purpose of further appeal, however, an order of the appellate division "is deemed to embody the 'final' determination," N.Y. Civ. Prac. Law § 5601, commentary at 493 (McKinney 1978), and hence, CPLR 5512(a) mandates, generally, that such order is the proper paper from which the appeal is to be taken.

There are some situations where the appellate division determination is embodied in a judgment rather than in an order. The primary example of this situation is the article 78 proceeding, N.Y. Civ. Prac. Law art. 78, which may be transferred from the supreme court to the appellate division for initial determination, which determination is made in the form of a judgment. N.Y. Civ. Prac. Law §§ 7804(g), 7806.

The term "order" is frequently used in this article to refer to the dispositive paper of the appellate division since orders are the most frequently encountered type of dispositive paper. Where appropriate, however, the term "judgment" may be substituted.

7 N.Y. Civ. Prac. Law § 5512(a) (McKinney 1978). This general rule is applicable where the appeal to the court of appeals is from an appellate determination; there are instances where an appeal can be taken from the judgment of the trial court. See N.Y. Civ. Prac. Law §§ 5601(b)(2), 5601(d) (McKinney 1978).

Although the practice sanctioned by the CPLR of direct appeal from the appellate division order seemingly contradicted the constitution, the practice was quickly sustained as constitutional by the court of appeals. Purchasing Assocs. v. Weitz, 13 N.Y.2d 267, 275, 196 N.E.2d 245, 249, 246 N.Y.S.2d 600, 606 (1963). The court held that "the CPLR may properly be read as treating the order of the Appellate Division in such circumstances as the equivalent of a judgment for purposes of appeal." Id.

If the appellant mistakenly appeals from a judgment entered pursuant to the appellate division order, the mistake can be disregarded if the appeal is timely, if the proper paper is furnished to the court of appeals, and if there is no prejudice. Id.; see N.Y. Civ. Prac Law § 5512, commentary at 131-32 (McKinney 1978). If, however, an appeal is mistakenly taken from a judgment of special term entered upon an appellate division order and the time to appeal the appellate division order passes, the appeal will be dismissed. See Rodolitz v. Neptune Paper Prods., Inc., 22 N.Y.2d 383, 387, 239 N.E.2d 628, 631, 292 N.Y.S.2d 878, 882 (1968).


72 N.Y. Civ. Prac. Law § 5611, commentary at 543-44 (McKinney 1978); 7 W & M, supra note 2, ¶ 6611.01a.
the appellate division “disposes of all the issues in the action...”

On the surface, this language simply rephrases the question without providing any insight to the answer. It can be read as merely codifying the well-settled rule that a determination which resolves all the issues in a litigation is final. Few serious finality disputes, however, arise in cases where all the issues have been determined by the appellate division. Virtually all arise in situations where the appellate division order has addressed fewer than all the issues in the action.

Although an order which resolves all the issues is certainly final, the obverse is not necessarily true. An order which resolves fewer than all the issues can be final in some circumstances. A substantial body of case law provides finality rules in these situations; thus, CPLR 5611 should not be regarded as the exclusive definition of finality.

CPLR 5611 confirms the principle that the finality focus prop-

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77 N.Y. Civ. Prac. Law § 5611 (McKinney 1978). The term “action,” for purposes of section 5611, includes both civil actions and special proceedings. See id. § 105(b). The initial draft of section 5611 was even more nebulous than the language of the provision actually enacted. The draft provided that finality would not exist unless the appellate division disposed of all issues in the “case.” See Second Preliminary Report of the Advisory Committee on Practice and Procedure, Leg. Doc. (1958) No. 13, at 361.

It should be noted that the advisory committee apparently did not intend to provide a clear standard by which to measure finality issues. See generally 7 WK&M, supra note 2, ¶ 5611.03. Indeed, given the many facets of the finality rule and the necessary exceptions, complications, and limitations, no ready definition may be possible. The revisors’ purpose was more limited. As previously discussed, the principal purpose was to clarify prior practice with respect to the appealable paper. As a corollary, the advisory committee also intended, by giving some definition to the term “finality,” to prevent a second appeal to the appellate division on the same issues that were before it on a prior appeal. See Second Preliminary Report of the Advisory Committee on Practice and Procedure, Leg. Doc. (1958) No. 13, at 360. Thus, § 5611 must be read together with § 5701(c) which forbids an appeal to the appellate division from any order or judgment entered pursuant to a prior appellate division order “which disposes of all the issues in the action.”

Nevertheless, in setting forth a rule that measures finality by whether the appellate division disposed of all the issues in the action, § 5611 provides a basis upon which practitioners may ground arguments for holding that a particular order is final or non-final. The test provided in § 5611 is certainly not exclusive. See notes 65-66 and accompanying text supra.

75 7 WK&M, supra note 2, ¶ 5611.03.
76 Id. See generally N.Y. Civ. Prac. Law § 5611, commentary at 544 (McKinney 1978).
77 A leading example of a situation where an order which resolves fewer than all the issues, yet, may be considered final, involves the concept of implied severance discussed in notes 163-207 and accompanying text infra.
78 D. Siegel, New York Practice § 527, at 727 (1978); 7 WK&M, supra note 2, ¶ 5611.03.
erly should be on the effect the appellate division order has upon the *entire* action.\textsuperscript{79} An order that finally determines all the issues raised on the particular *appeal* may not dispose of all the issues in the *action* and hence may be non-final.\textsuperscript{80} Some appellate counsel tend to overlook this distinction and, in arguing for finality, note that the appellate division finally determined all that was before it. This, however, is not enough. More fundamentally, there is a conceptual difficulty in phrasing a finality rule in terms of the issues in the overall litigation. First, there can be, and often are, disputes over the issues in a particular litigation. If there is dispute about the nature and number of the issues, it follows that there will be difficulty in determining whether any, some, or all of the issues have been finally determined. Moreover, the issues in a case can be both substantive and procedural. An appellate division order can be final even though the substantive issues in the case have not been finally resolved on the "merits."\textsuperscript{81} The converse is equally true: that the appellate division has determined some or all of the substantive issues on the merits does not, by itself, require a conclusion that the resulting order is a final one.\textsuperscript{82}

\textsuperscript{79} Although not providing "an exclusive definition of finality," § 5611 "clarifies and codifies the rule that a determination *deciding all* the issues in the case is final." 7 WK&M, *supra* note 2, ¶ 5611.03 (emphasis added). Indeed, as Professors Cohen and Karger point out, "the whole case must ordinarily be disposed of before finality is recognized." H. COHEN \& A. KARGER, *supra* note 1, § 11, at 43.

\textsuperscript{80} For example, in a civil action, where the trial court grants the plaintiff's motion requesting a jury trial and the resulting order is appealed to the appellate division, the disposition on appeal is not a final determination so as to allow immediate appeal to the court of appeals, notwithstanding that the appellate division disposed of the only issue before it. See Laventhall v. Fireman's Ins. Co., 291 N.Y. 657, 657-58, 51 N.E.2d 934, 934 (1943). Similarly, an appeal from an interlocutory order sustaining the directing of reference has been held non-final. Gold v. Rubin, 20 N.Y.2d 967, 968, 233 N.E.2d 859, 859, 266 N.Y.S.2d 857, 857 (1967).

\textsuperscript{81} H. COHEN \& A. KARGER, *supra* note 1, § 37, at 153. Appellate division orders that have the effect of terminating the litigation as to all or even some of the causes of action have been held final, notwithstanding their failure to resolve the substantive issues on the merits. The most common example of an order that does not reach the merits, but nonetheless is held final, is one that dismisses the complaint for want of jurisdiction, for legal incapacity to sue, or for other technical reasons. See H. COHEN \& A. KARGER, *supra* note 1, at 153-54 nn. 88, 89. Although not resolving the substantive issues, it is clear that such an order "finally determines the action" within the meaning of the constitution.

Rather than assessing, for finality purposes, an appellate division order in narrow terms of issue resolution, it is generally more practicable and accurate to view the effect of the appellate division order on the entire litigation. The practitioner should consider whether the appellate division has determined to grant or to deny relief of a lasting nature sought in the pleadings and whether steps must be taken to implement the decision of the appellate division or to bring the entire litigation to a conclusion. If further judicial proceedings are needed to give practical effect to the appellate division determination, the likelihood is that the order is non-final. If, however, the determination resolves the action, or a distinct portion of the action, and no further proceedings are needed, the case may well be final and therefore “ripe to impose on the time and attention of the Court of Appeals.” Indeed, this sort of ripeness concept comports well with the intent of the framers of the constitutional finality requirement.

In determining whether the appellate division has put an end to any portion of the litigation, the practitioner must look to the basic claims raised in the pleadings. Determinations on procedural matters, however important and however conclusively resolved below, are likely to be non-final unless the holding on the procedural issue results in the final resolution of a claim, counterclaim or crossclaim. Otherwise, the procedural determination is a matter of “petty practice” which only serves to move the case further along the path to a final determination. As previously noted, final authority for practice and administrative matters have been left to the appellate division, subject only to the raising of such issues on an appeal to the court of appeals at a later time after a final order is entered.

The need or lack of need for further judicial consideration is an important factor that is weighed carefully by the court of appeals when it determines whether to retain jurisdiction of a partic-

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(1936); Caan v. Steir, 266 N.Y. 406, 406, 195 N.E. 128, 128 (1934), despite being determinations on the merits, have been held non-final. See H. COHEN & A. KARGER, supra note 1, § 40, at 161 & nn.17, 19 & 20.

See H. COHEN & A. KARGER, supra note 1, § 11, at 47. Professor Siegel notes that “[finality] has usually been given a pragmatic interpretation, meaning a judgment or order which puts an end to the case, or to a logically separable part of it, and leaves nothing else in respect of it to be decided.” D. SIEGEL, NEW YORK PRACTICE § 527, at 727 (1979).

N.Y. CIV. PRAC. LAW § 5601, commentary at 492 (McKinney 1979).

See notes 48-53 and accompanying text supra.

See note 55 and accompanying text supra.
ular appeal.\textsuperscript{87} Litigation brought before a court or judge for further consideration may obviate the need for the appeal. For example, if the appellate division denies a motion to dismiss a complaint for failure to state a cause of action and remits the matter for trial, the defendant may prevail at the trial, eliminating the need for a court of appeals review of the propriety of the initial appellate division determination. Accordingly, in assessing an order for finality purposes, a practitioner should consider whether any matter has been left open for further judicial review below and if so, whether the further consideration is of the kind that could alter the positions of the parties.

Counsel should also consider whether the parties can reach agreement to resolve the issues left open for further proceedings in order to finalize the appeal. For example, if the order of the appellate division finally adjudicates the issue of liability in favor of the plaintiff but leaves the question of damages open for a new trial, a stipulation as to the amount of damages in the event liability is sustained may obviate the need for further proceedings. The court of appeals may then treat the order as having been "finalized" for purposes of entertaining an appeal on liability. Thus, the parties may be able to agree to finalize an otherwise non-final order.

**Finality: Illustrative Cases**

It has been stated authoritatively that no general rule can give proper emphasis to the myriad aspects of the finality rule.\textsuperscript{88} Consequently, the general considerations outlined above may serve only as a useful framework within which to consider a particular finality issue. Specific finality issues have been litigated, and a review of pertinent precedent may lend further assistance to practitioners confronted with a finality issue. Given the great volume of court of appeals determinations on finality questions, most of which are not accompanied by opinion or other written elaboration, it is not possible to comment in this Article upon every decision. A review of the more recent decisions on frequently encountered issues, however, may be useful to attorneys whose cases fall within the scope of the cited authorities and will serve to illustrate the types of determinations that are considered final and those that are not.

\textsuperscript{87} See H. Cohen & A. Karger, *supra* note 1, § 11.

**Pre-trial Determinations**

As a general rule, the court has held that the most frequently encountered types of pre-trial rulings are non-final, unless a particular determination has the effect of putting an end to a distinct part of the litigation. Thus, an order of the appellate division that either affirms the denial of a motion to dismiss a complaint or reverses the grant of such a motion is non-final. Similarly, an order that denies or grants a motion to amend a pleading is considered non-final. If, however, the appellate division determination dismisses or affirms the dismissal of an entire pleading or a distinct cause of action, the determination should be considered final to that extent. Thus, for example, while orders that set aside service of process are generally considered non-final, the order is considered final if it also dismisses the complaint.

The rationale for these distinctions is plain: if the order merely regulates the course of the litigation, while permitting it to proceed further in the courts, the order is one of “petty practice,” for which the appellate division has final appellate responsibility. On the other hand, if the order has the effect of bringing the litigation or a distinct part of it to a halt, then the order or the pertinent portion of it is final.

A frequently encountered problem concerns orders that dismiss complaints or causes of action but grant the plaintiff leave to plead over or to apply for permission to replead. This problem is

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85 Pursuant to CPLR 3211(e), leave to replead may be requested by a plaintiff if the defendant has moved to dismiss on the ground that the complaint fails to state a cause of action. N.Y. Civ. Prac. Law § 3211(e) (McKinney 1970). “Intended to obviate the former
partially addressed by the second sentence of CPLR 5611 which provides that "[i]f the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it."\(^9\) In other words, if the appellate division order permits repleading within a specified number of days, and those days pass without repleading, the order becomes final.\(^9\) Should the aggrieved party take advantage of the opportunity to replead, however, the order would be non-final.\(^9\)

CPLR 5611 does not address a significant problem that may arise when the appellate division grants leave to replead but does not specify a time period within which the repleading must be accomplished. Nor does the statute cover the situation where the appellate division authorizes the pleader to apply at special term for permission to replead and does not set a time limit for the service of a motion for such permission. By its terms, CPLR 5611 is not applicable unless a specific time limit is fixed.\(^9\) The court of appeals in recent decisions, appears to have held that such orders are non-final, at least in the absence of a formal waiver of the option to replead.\(^10\)

loose practice and undue liberality with which leave to replead was granted under the Civil Practice Act," CPLR 3211(e) conditions the granting of such leave not only on the formal correction of the deficient pleading, but also, in the discretion of the court, on the submission of evidence tending to establish the validity of the cause of action. Cushman & Wakefield, Inc. v. John David, Inc., 25 App. Div. 2d 133, 135, 267 N.Y.S.2d 714, 717 (1st Dep't 1969); see N.Y. Civ. Prac. Law § 3211(e) (McKinney 1970).


\(^{97}\) Id., commentary at 545 (McKinney 1978). See Greschler v. Greschler, 71 App. Div. 2d 332, 422 N.Y.S.2d 718 (2d Dep't 1979)(complaint dismissed with leave to replead within 20 days of service of order with notice of entry), motion to dismiss appeal denied, N.Y.L.J., March 31, 1980, at 5, col. 1; see also 7 WK&M, supra note 2, ¶ 5611.05; H. COHEN & A. KARGER, supra note 1, § 14.

Counsel who elect not to replead should be careful to serve and file a notice of appeal or a motion for leave to appeal timely, irrespective whether the time within which to replead extends beyond the statutory time for taking an appeal. CPLR 5611 does not enlarge the time within which to pursue an appeal, and, with the abandonment of the option to replead, counsel should not allow the appeal to be abandoned either.

\(^{98}\) 7 WK&M, supra note 2, ¶ 5611.05; N.Y. Civ. Prac. Law § 5611, commentary at 545 (McKinney 1978); see Department of Health v. Natural Plating Corp., 11 N.Y.2d 674, 675, 180 N.E.2d 906, 906, 225 N.Y.S.2d 751, 751 (1962).

\(^{99}\) 7 WK&M, supra note 2, ¶ 5611.05.

\(^{100}\) Compare C.E. Hooper, Inc. v. Perlberg, Monness, Williams & Sidel, 49 N.Y.2d 736 (1979) and New York Auction Co. v. Belt, 40 N.Y.2d 1079 (1976) (appeals dismissed for want of finality) with Shoreco Int'l. Inc. v. Ivy Hill Communications Corp., 38 N.Y.2d 863,
If, based upon an assessment of the facts of the case, an attorney concludes that the repleading cannot be accomplished successfully, as when the facts would not support the new pleading, and that an appeal is the client’s best remedy, counsel might consider the execution and service of a written waiver of the option to replead. Upon the execution and service of such a waiver, the action logically should be considered as having been finally determined, since the existing pleading was found insufficient and no further repleading is possible. An appeal may then be available either as of right or by permission. The hazards of such a course are obvious: if the client has some opportunity, however small, of prevailing upon repleading, prudence would suggest that an appeal not be taken until the action has been concluded below.

On the pre-trial motion to dismiss, special mention should be made of an appellate division order that directs the dismissal of a complaint for failure to prosecute.\textsuperscript{101} Although the orders are final, the court has dismissed or denied appeals from such orders on the ground that it lacked the authority to review such determinations.\textsuperscript{102}

Consistent with the general rule on pre-trial determinations, orders granting or refusing provisional remedies, such as arrest or attachment generally are considered to be non-final in nature. Thus, orders granting or denying preliminary injunctions are non-final according to well-settled case law.\textsuperscript{103}

This does not mean that whenever equitable relief is sought, finality will not exist. If a decree is issued in the nature of mandamus which grants relief that is outside the scope of the litigation, finality is not achieved. See H. COHEN & A. KARGER, supra note 1, § 74, at 323; § 40, at 161. See N.Y. Civ. Prac. Law § 3216(a) (McKinney 1970).

\textsuperscript{101} See supra note 1, § 40, at 161.


Orders denying or granting preliminary injunctions may, however, be appealed with the permission of the appellate division. See Barclay's Ice Cream Co. v. Local 7579, Ice Cream Drivers, 41 N.Y.2d 269, 271, 360 N.E.2d 956, 957, 392 N.Y.S.2d 278, 727 (1977).
such decree may be regarded as final. This is the holding of In re North Hempstead Turnpike, Nassau County,\textsuperscript{104} wherein the petitioner recovered a condemnation award, and the lower courts directed the county attorney to apply to the board of supervisors for authority to submit a tentative decree to enforce the award. The court of appeals held the order was final, since it was "well outside the scope of the condemnation proceeding" and was, in fact, relief granted in a "separate proceeding."\textsuperscript{105}

The holding in North Hempstead Turnpike is in accord with a long line of more familiar decisions in which the court of appeals has accepted jurisdiction or appellate division determinations that granted or denied writs or prohibition.\textsuperscript{106} Writs of prohibition have been sought in efforts to prevent courts or district attorneys from proceeding with the prosecution of a criminal action in a manner which the defendant claims is in excess of their jurisdiction.\textsuperscript{107} Although the right to appeal in criminal matters is carefully—and narrowly—regulated by statute for the expressed purpose of avoiding "protracted and multifarious appeals and collateral proceedings,"\textsuperscript{108} applications for writs of prohibition are separate proceedings,\textsuperscript{109} independent from the underlying criminal action. Accordingly, orders granting or denying such writs are generally regarded as finally determining independent proceedings.\textsuperscript{110}

Finality problems are frequently encountered in connection with appeals from orders made on applications to stay or to compel arbitration. Typically, whether a particular dispute must be submitted to arbitration is presented either by way of an application to stay or to compel arbitration.\textsuperscript{111} Both applications are pro-

\textsuperscript{104} 16 N.Y.2d 105, 209 N.E.2d 785, 262 N.Y.S.2d 453 (1965).
\textsuperscript{105} Id. at 110, 209 N.E.2d at 787, 262 N.Y.S.2d at 455.
\textsuperscript{107} See cases cited at note 106 supra.
\textsuperscript{109} See N.Y. Civ. Prac. Law § 7801 (McKinney 1963). An application for a writ of prohibition must be made by a special proceeding commenced pursuant to article 78 of the CPLR. Id.
\textsuperscript{110} H. COHEN & A. KARGER, supra note 1, § 31, at 128; cf. D. SIEGEL, NEW YORK PRACTICE § 527, at 727 (1978) (special proceeding determining "arbitrability" is independent, hence disposition is final).
\textsuperscript{111} See generally D. SIEGEL, NEW YORK PRACTICE § 592 (1978).
provided for and are governed by article 75 of the CPLR, and both constitute independent special proceedings. Indeed, such applications are commonly made at a time when the dispute is not yet the subject of civil litigation. The court of appeals has consistently held that “an order of the Appellate Division directing arbitration or denying a stay of arbitration is deemed final and appealable as such to this court.”

This rule is sound both in theory and as a matter of practicality. In theory, the application pursuant to article 75 is entirely independent from a civil action, which in all likelihood has not yet been commenced. An order that resolves the application determines once and for all whether the parties should arbitrate their dispute. As a matter of practicality, it is useful to settle finally the arbitration issue by obtaining a court of appeals ruling before the parties and the courts are required to expend time, effort, and money to litigate a dispute that may not properly be the subject of a litigation.

An interesting body of case law exists, however, in situations where an application to compel arbitration is made, not independently pursuant to article 75 of the CPLR, but by way of a motion in a pending action. The general rule is that where a motion is made to stay an action pending arbitration, the order is not final if the motion is made in the court in which the action is pending and the application bears the same captions as the action itself. In 1967, the court of appeals, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Griesenbeck*, overruling some earlier cases, held that orders which compel arbitration, as opposed to orders which merely stay actions pending arbitration, are final. In *Merrill Lynch*, a defendant in a civil action moved to dismiss the complaint and sought an order directing the plaintiff to proceed to arbitration. The appellate division entered an order which refused dismissal of the complaint but which directed the parties to arbi-

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114 See H. Cohen & A. Karger, supra note 1, § 31, at 129 n.11 and cases cited therein.
The court of appeals concluded that the appellate division order was a "final order in a special proceeding" and that "[t]he mere fact that this order was made on a motion in a pending action does not impair its finality."117

Approximately 2 years later, the court indicated that the exception made in Merrill Lynch with respect to orders compelling arbitration did not subsume the general rule that orders staying actions pending arbitration are non-final. In Kushlin v. Bialer,118 the defendants moved to stay a pending action and to compel arbitration. Special term granted the motion, ordering that the action be stayed pending arbitration. The appellate division affirmed,119 one justice dissenting.120 The defendants, on the basis of the dissent, took an appeal as of right to the court of appeals. The court dismissed the appeal for want of finality.121 The court stated that "the order, entered in the action itself, staying such action pending arbitration, does not finally determine the action within the meaning of the Constitution."122 As authority, the court cited a case decided prior to Merrill Lynch as well as a footnote in the Cohen & Karger treatise which describes the general rule.123 The court appears to have distinguished Merrill Lynch on the ground that, in Kushlin, all that was involved was an order staying the action and to have applied the general rule that stay orders are not ordinarily orders that finally determine the action.124 Seemingly, the difference between Kushlin and Merrill Lynch is that in Merrill Lynch the parties were actually directed to arbitrate, whereas in Kushlin the action was merely stayed pending arbitration. In at least one subsequent decision the court has adhered to Kushlin.125 More recently, however, in Clurman v. Clurman,126 the court, citing Mer-

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117 21 N.Y.2d at 690, 234 N.E.2d at 457, 287 N.Y.S.2d at 419.
120 Id. at 218-21, 301 N.Y.S.2d at 183-86 (Nunez, J., dissenting).
121 26 N.Y.2d at 748, 257 N.E.2d at 294, 309 N.Y.S.2d at 48.
122 Id. at 748, 257 N.E.2d at 294, 309 N.Y.S.2d at 48.
124 26 N.Y.2d at 748, 257 N.E.2d at 294, 309 N.Y.S.2d at 48. The court made a "cf." citation to Merrill Lynch without setting forth an express ground for distinguishing Kushlin from Merrill Lynch.
126 N.Y.L.J., April 7, 1980, at 11, col. 5. The court stated that the order finally deter-
rill Lynch, held that an order that denied a within-an-action motion to compel arbitration to be final.

The general rule adhered to in Kushlin would appear to stand upon a stronger theoretical base than the exception made in Merrill Lynch. Since the application for arbitration is made within an existing action, there appears to be no basis for the claim made by the Merrill Lynch court and reiterated in Clurman that the order compelling arbitration is a “final order in a special proceeding,” particularly since the movant in Merrill Lynch could not have properly commenced a special proceeding. Moreover, if the application to compel arbitration is granted and the action stayed, it is clear that the action has not been finally determined, and the theory underlying Kushlin should be applied. The action would become final only after an arbitration award is made and confirmed and the action dismissed or disposed of as barred by the award. Similarly, if the motion to compel arbitration and to stay the action is denied, that order should also be technically non-final since the issues in the action would not have been finally determined.

While the Kushlin rule is technically sound, the rule does have some practical disadvantages. If the order stays the action pending arbitration, the parties may be relegated to engage in an arbitration proceeding that the court of appeals later may conclude was not proper. This practical concern appears to be at the root of the Merrill Lynch decision. On the other hand, if the order denies the stay pending arbitration, the parties may be forced to litigate, and the courts forced to determine, a dispute that the court of appeals may later hold to be arbitrable. Thus, whether the motion to stay the action is granted or denied, the parties may have to engage in an unnecessary proceeding, and the determination of the

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127 21 N.Y.2d at 690, 234 N.E.2d at 456-57, 287 N.Y.S.2d at 419.
128 CPLR 7503(c) specifically states that “[i]f an issue claimed to be arbitrable is involved in an action pending in a Court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action.” N.Y. Civ. Prac. Law § 7503(c) (McKinney 1978).
130 See id. § 3211(a)(5) (1978).
131 The issue of arbitration might be presented to the court on an appeal from an order or judgment that disposed of the action as barred by the result in the arbitration.
132 The issue of arbitration might be raised on appeal from an order or judgment that determines the merits of the action.
merits of the controversy may be delayed if, on a later appeal, the court of appeals finds that the conclusion reached on the threshold issue of arbitration was erroneous. Nevertheless, the present rule appears to be that orders which actually compel arbitration are final, but orders which merely stay the action pending arbitration are non-final. This distinction appears to be highly technical and worthy of reassessment.

One further point should be noted in connection with finality of orders made on arbitration applications. The court of appeals has held that a motion made to disqualify an arbitrator is a final order. The holding is notable in that there is no statute expressly authorizing pre-arbitration hearing motions, addressed to a court, to disqualify arbitrators. Since the court of appeals has held that courts have inherent authority to entertain such applications, it is apparent that, despite the lack of express statutory authority, the applications are to be made as special proceedings. A determination to grant or deny the the application is therefore a final determination of a special proceeding.

There are other frequently encountered pre-trial rulings that should be mentioned. Article 9 of the CPLR requires a plaintiff suing on behalf of a class to move for an order to determine whether the action may proceed as a class action. The court of appeals has squarely ruled that appellate division orders granting or denying class action status are non-final. In addition to Clurman, there is at least one other case that appears to follow Merrill Lynch. In In re Allcity Ins. Co., 66 App. Div. 2d 531, 413 N.Y.S.2d 929 (1st Dep't 1979), the appellate division affirmed an order which denied a within-an-action motion to compel arbitration. The court of appeals, in determining to dismiss the motion for leave to appeal in part and to deny the motion in part, implicitly treated the denial of arbitration by the appellate division as final. 48 N.Y.2d 629, 396 N.E.2d 474, 421 N.Y.S.2d 192 (1979).

The refusal of the court of appeals to hold orders granting or denying class action status to be final is similar to the practice now followed by the federal courts. At one time, several federal appellate courts, including the Second Circuit, held that orders denying class action status were appealable as final orders since such a ruling may have the practical economic

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133 In addition to Clurman, there is at least one other case that appears to follow Merrill Lynch. In In re Allcity Ins. Co., 66 App. Div. 2d 531, 413 N.Y.S.2d 929 (1st Dep't 1979), the appellate division affirmed an order which denied a within-an-action motion to compel arbitration. The court of appeals, in determining to dismiss the motion for leave to appeal in part and to deny the motion in part, implicitly treated the denial of arbitration by the appellate division as final. 48 N.Y.2d 629, 396 N.E.2d 474, 421 N.Y.S.2d 192 (1979).
138 Rosenfield v. A. H. Robins Co., 46 N.Y.2d 731, 731, 385 N.E.2d 1301, 1301, 413 N.Y.S.2d 374, 374 (1978). The court in Rosenfield also held that such orders cannot be appealed even where permission of the appellate division is obtained, since such orders do not raise questions of law. Id.
Orders to compel disclosure and protective orders to prevent disclosure are generally non-final in nature. A major caveat concerns orders granting or denying applications to quash subpoenas issued in criminal actions or proceedings. The court of appeals has consistently held that such orders are "final orders in special proceedings on the civil side of a court vested with civil jurisdiction." This rule is similar in theory to the rule holding that orders directing or denying stays of arbitration are final orders.

The court, however, has not been inclined to broaden the criminal subpoena rule so as to encourage other appeals from essentially non-final determinations in criminal actions.

Another frequently encountered type of determination is an order that decides a motion for summary judgment. Here, final-

significance of ringing the "death knell" of the action. E.g., Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 396 U.S. 1235 (1967). In 1978, however, the United States Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), unanimously rejected the "death knell" doctrine and held that such orders are not appealable to the circuit court of appeals as of right. The Court stated that the "incremental benefit" afforded a few litigants by the "death knell" doctrine is "outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." Id. at 473.

It should be noted that the New York Court of Appeals apparently has never published an opinion in which the court has adopted the "death knell" doctrine in any form. The chances of the court so doing in any given situation are reduced by the unanimous rejection of the doctrine by the United States Supreme Court. It would appear to be beyond a proper exercise of the judicial function for the court to hold that finality issues must turn upon the court's assessment of the economic impact of the orders made below.

E.g., Beuschel v. Manowitz, 265 N.Y. 509, 193 N.E. 295 (1934) (order granting physical examination not final); see H. COHEN & A. KARGER, supra note 1, § 38, at 156.


See note 113 and accompanying text supra.

See, e.g., People v. Santangello, 38 N.Y.2d 536, 539, 344 N.E.2d 404, 406, 381 N.Y.S.2d 472, 473-74 (1976). The Santangello court held that an order granting the application of a grand jury witness for disclosure of electronic surveillance records and granting the application to determine whether such surveillance was used to prepare questioning is non-final. The court distinguished the subpoena cases on the ground that [a] motion to quash is limited in scope, challenging only the validity of the subpoena or the jurisdiction of the issuing authority . . . and should be made prior to the return date, thereby requiring such timeliness that substantial delay in the proceedings is unlikely. . . . Moreover, where granted, it results in completely voiding the process . . . thus saving the needless expenditure of litigation effort. 38 N.Y.2d at 539, 344 N.E.2d at 405-06, 381 N.Y.S.2d at 473 (citations and footnote omitted). The court noted that the application made in Santangello, in contrast, raised neither a jurisdictional nor a process objection, possessed potential for delay and could not dispose of any portion of the investigation. Id.

See N.Y. CIV. PRAC. LAW § 3212 (McKinney 1970).
ity hinges upon the result. If the motion for summary judgment is granted, thereby disposing of a distinct portion of the action, the order is final. If the motion for summary judgment is denied, however, the order is non-final.

In the matrimonial sphere, it should be noted that applications for pendents lite relief, such as temporary alimony and counsel fees, are generally regarded as non-final.

**Judgments and Post-trial Orders**

The clearest type of final order is one from the appellate division that determines both liability and the relief to be assessed in favor of the prevailing party. Thus, an appellate division order that affirms a judgment in favor of one party and against another for a specified sum is clearly final. Of course, the order need not authorize judgment for a specified sum to be final; declaratory judgment orders are final if the judgment fully declares the rights of the parties.

Orders that determine liability only, leaving the assessment of damages open for further judicial proceedings, are generally non-final. This rule is not absolute, however. Under the principle of

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144 See Created Gemstones, Inc. v. Union Carbide Corp., 47 N.Y.2d 250, 254, 391 N.E.2d 987, 989, 417 N.Y.S.2d 905, 906 (1979) (grant of partial summary judgment to defendant implicitly held final); see also notes 163-207 and accompanying text infra (discussing the doctrine of implied severance).


“irreparable injury,” an interlocutory judgment, which fixes liability but leaves damages to be determined, “is final for purposes of appeal to the extent that it directs an immediate irrevocable change of position by one of the parties, or orders action which will cause immediate irreparable injury to one of them.”149 An example of this type of situation is an order that fixes liability and directs an accounting but directs the liable party to immediately turn over property in his possession.

An order of the appellate division which reverses a judgment and orders a new trial is also non-final;160 the parties must retry the case and appeal from the outcome of the second trial.151

A slightly different situation is confronted where a party’s successful motion in the trial court for a new trial is reversed by the appellate division. The court of appeals has held that appellate division orders that reverse grants of new trials are not final.162 In such cases, the appellant’s remedy is either to obtain leave to appeal from the appellate division or to pursue an appeal from the judgment entered upon the result of the first trial.163 There is one caveat, however. Since the appellant does not lose his opportunity for a second trial until the appellate division rules on the appeal from the new trial order of the trial court, the time within which to take an appeal from the judgment entered on the first trial may elapse. Attorneys who move for a new trial, therefore, should also be sure to notice an appeal from the judgment entered after the first trial, lest the opportunity to appeal that judgment be lost after the refusal of an application for a new trial.

There is a point of comparison between the cases holding that orders directing new trials are not final and cases holding that orders leaving damage issues open for judicial determination are not final. Both lines of cases demonstrate that if further judicial consideration at the trial level is needed to complete the case, the case

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266 N.Y. 603, 195 N.E. 220, (1935) (order granting summary judgment to plaintiff, striking answers and directing trial as to damages).

149 H. COHEN & A. KARGER, supra note 1, § 17, at 72.
151 See H. COHEN & A. KARGER, supra note 1, § 11, at 42.
153 See H. COHEN & A. KARGER, supra note 1, § 10, at 40.
is not yet ripe for review by the court of appeals. This is subject to qualification, however. If the work to be done below is ministerial in nature, such as where only arithmetic computations are involved, the order may be considered final. Moreover, the remittal for further proceedings must be to a court or to a state administrative agency; a remittal to entities outside the court system or outside the system of state administrative agencies is insufficient.

The recent decision of the court of appeals in Sofair v. State University of New York Upstate Medical Center College of Medicine aptly illustrates this point. In Sofair, a medical student brought an article 78 proceeding which sought an order directing the medical school to reinstate him and to award him a medical degree. Special term dismissed the petition, but the appellate division reversed, concluding that the student had been denied procedural due process and that the medical school must hold a new hearing. The school appealed to the court of appeals, and the student sought to dismiss the appeal as being from a non-final order, pointing to the fact that the appellate division had "remitted" the case back to the school for a further hearing. The court of appeals rejected this contention and retained jurisdiction.

The so-called "remittal", however, was not within the judicial system or to an administrative agency of the state. Any judicial review of the new determination to be made by the College of Medicine following the mandated hearing could only be had in a new, second article 78 proceeding; the present proceeding could not be revived as a procedural vehicle for such review. Accordingly, the disposition of the Appellate Division finally determined the present proceeding within the meaning of the Constitution.

Thus, Sofair demonstrates two key points: the remittal must be to a court or state agency, and the order should be considered final if the actions taken upon the remittal cannot be reviewed within the context of a pending proceeding.

A motion commonly encountered is one to vacate an order or judgment entered upon a default. The court of appeals has consistently held that if the order of the appellate division denies the mo-

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154 H. Cohen & A. Karger, supra note 1, § 11, at 47-49.
155 See H. Cohen & A. Karger, supra note 1, § 11.
157 Id. at 479, 377 N.E.2d at 731, 406 N.Y.S.2d at 277 (citations omitted).
tion to vacate, the order is non-final. The rationale for this rule is that a denial of a motion to vacate a prior judgment "neither adds to nor detracts from the rights of the parties as determined by such judgment—it merely adheres to the already final determination." An order that grants the motion to vacate logically should be considered non-final as well, since, upon the grant of the vacatur, the prior judgment is lifted and the rights of the parties must be determined anew.

Occasionally, a practitioner may attempt to appeal from an order of the appellate division issued in the course of administering the appeal. Such attempts have been uniformly rejected as non-final. Thus, an order denying a motion to consolidate a cross appeal with the main appeal, an order denying a stay pending appeal, and an order of the appellate division denying reargument and denying leave for a further appeal are not final.

**Finality: Implied Severance**

Particularly difficult finality problems arise in multiple claim situations. In a given case, for example, the order of the appellate division may finally determine only one of several causes of action or only a main claim but not a counter-claim or cross-claim. Appellate counsel who seek immediate court of appeals review may be met with a dismissal on the grounds that the order below was not final since it decided only a portion of the claims.

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163 See 7 WK&M, supra note 2, ¶ 5611.03. Concern has been expressed regarding the effect of an erroneous decision by counsel not to take advantage of the concept of implied severance. It has been theorized that a practitioner who does not take an appeal, after concluding that an order is not final, may become ensnared in a procedural trap if the court of appeals later finds that the order was final, thus barring an appeal from a later order. Cf. In re Hillowitz, 20 N.Y.2d 952, 233 N.E.2d 719, 286 N.Y.S.2d 677 (1967) (court rejected an attempt to use implied severance as a sword rather than as a shield). Hillowitz is discussed in notes 176-178 and accompanying text infra. There is no reported decision, however, in which the court has permitted the use of a doctrine devised as a means for preserving an appeal as a justification for barring a later appeal. It would therefore seem unlikely that the court would permit this salutory doctrine to be used in such a fashion.
At one time, the court took the position that an order finally
determining fewer than all causes of action in a complaint was not
final unless the finally determined causes of action were officially
and expressly severed from the remaining causes of action.164

In 1949, however, the court recognized the concept of implied
severance. In New York Trap Rock Corp. v. Town of Clarks-
town,166 the plaintiff brought an action for declaratory and injunc-
tive relief against enforcement of a local building zone ordinance.
Defendants, the town and several local officials, counterclaimed for
an injunction against plaintiff's continued operation of a nuisance.
On an appeal from an order denying a motion to dismiss the coun-
terclaim, the appellate division held that defendants lacked the le-
gal capacity to maintain the counterclaim. Defendants appealed to
the court of appeals, thereby setting the stage for an important
pronouncement on finality in the context of cases involving multi-
ple claims.

The court of appeals retained jurisdiction of the appeal, rea-
soning that the counterclaim was "in effect a separate and distinct
action brought by defendants against plaintiff."168 When the appel-
late division ordered the counterclaim dismissed, it necessarily
"impliedly severed it from the action, which still is pending unde-
termined, and to that extent is final."167

The concept of "implied severance" enunciated in New York
Trap Rock was later broadened to cover situations involving the
dismissal of fewer than all causes of action asserted in a single
pleading. Initially, this expansion was accomplished without dis-
cussion of the jurisdictional principle involved.168 Then, in 1967,
the court of appeals articulated the basis for the expansion in a case whose facts were well within New York Trap Rock.

In Sirlin Plumbing v. Maple Hill Homes, Inc., the plaintiff brought an action to recover the balance due for plumbing services, and the defendant set up an affirmative defense and counterclaim based upon alleged overcharges. Several of the alleged overcharges involved transactions referred to in the complaint. The appellate division, reversing special term, granted the plaintiff's motion to dismiss the affirmative defense and counterclaim. When the defendant appealed to the court of appeals, the plaintiff moved to dismiss the appeal for want of finality.

The court denied the motion. In a per curiam opinion which quoted New York Trap Rock, the court held that the determination of the appellate division, insofar as it dismissed the counterclaim, impliedly severed it from the still pending action and thus was final to that extent. Although this was all that was strictly necessary to its determination to retain jurisdiction under the facts, the court went on to state the general rule regarding the concept of implied severance:

It is on the same theory of implied severance that a determination dismissing one of several causes of action in a complaint is to that extent held final, although the other causes of action have not yet been determined. . . . Some of our early decisions suggested that this doctrine of severance was of limited availability and was inapplicable where there were common issues and a close interrelationship between the claim that was dismissed and the claims still pending. . . . However, our more recent decisions reflect a pronounced trend away from that approach. These later decisions have thus consistently upheld as final determinations such as that in this case, dismissing but one of several causes of action or a counterclaim alone, even though the claim that has been disposed of involves the same transaction as the claims remaining undetermined and is directly related thereto.


170 Id. at 402, 230 N.E.2d at 394, 283 N.Y.S.2d at 489-90.
171 Id. at 403, 230 N.E.2d at 395, 283 N.Y.S.2d at 490.
172 Id. at 402, 230 N.E.2d at 394, 283 N.Y.S.2d at 490.
173 Id. at 402-03, 230 N.E.2d at 394-95, 283 N.Y.S.2d at 490 (citations omitted). Sirlin is an unusual decision not only because of its broad holding but also because the court issued a per curiam opinion in ruling on a pre-argument motion to dismiss the appeal; such motions
In other words, the court in Sirlin broadly decreed that orders below which finally determine only one cause of action asserted in any pleading could be deemed "final" under the doctrine of "implied severance," even though a large portion, if not most, of the overall action remained pending.

Although Sirlin proclaimed that finality ordinarily would not be affected by the fact that both the non-final claims and the finally determined claims arose out of the same transactions, the court left open the possibility that an order involving extremely closely related claims might be non-final.174

Shortly after the Sirlin decision, the court further expanded the doctrine of implied severance. In Kelly v. Bremmerman,175 the court ruled that where a pleading asserts only one cause of action, but the order below treats the single cause of action as involving two or more distinct claims and finally determines one of those claims, the finally determined claim would be deemed impliedly severed from the balance of the still pending cause of action.176 Thus, implied severance would be applied not only to "sever" distinct causes of action contained in one or more pleadings,177 it also would "sever" claims within a single cause of action.

During the same year, however, the court of appeals imposed ordinariy do not generate a detailed writing from the court. See notes 8-9 and accompanying text supra.

174 Id. at 403, 230 N.E.2d at 395, 283 N.Y.S.2d at 490. Foreshadowing its later decision in Behren v. Papworth, 30 N.Y.2d 532, 281 N.E.2d 178, 330 N.Y.S.2d 381(1972), the court added: "We need not decide whether the rationale of our earlier decisions may yet be apposite in some exceptional situations involving an extremely close interrelationship between the respective claims. It is sufficient to note that no such situation is here presented." 20 N.Y.2d at 403, 230 N.E.2d at 395, 283 N.Y.S.2d at 490.


176 Id. at 202, 234 N.E.2d at 220, 287 N.Y.S.2d at 45. In Kelly, the plaintiff asserted a single cause of action for recovery of an assessment due on two insurance policies. The order below granted judgment to the defendant on one of the policies but directed a trial with respect to the other. The court of appeals noted that while the two claims were related, there was an important distinction in that the policies had different expiration dates. Id.

177 See, e.g., Rose v. Bailey, 28 N.Y.2d 857, 271 N.E.2d 230, 322 N.Y.S.2d 252 (1971). In Rose, the court, although dismissing an appeal as of right, on other grounds held that in a negligence action, an order which finally determined plaintiffs' causes of action for personal injury and loss of consortium should be deemed impliedly severed from a still pending counterclaim for property damage. Id. at 858, 271 N.E.2d at 230, 322 N.Y.S.2d at 252. The court nevertheless later refused to apply the concept of implied severance in a divorce action where the appellate division concluded that neither party had proved a cause of action for divorce. It therefore remitted the case to the trial court for an assessment of support due the wife. Schine v. Schine, 28 N.Y.2d 993, 272 N.E.2d 343, 323 N.Y.S.2d 846 (1971).
an important limitation on the concept of implied severance. Interestingly, the case before the court, In re Hillowitz, involved an attempt to use the concept as a sword to dispose of an appeal, rather than as an effort to justify it. In Hillowitz, an appellate division order directed the grant of a petition brought by an executor to transfer to him certain property in possession of the decedent's widow. On appeal to the court of appeals, the widow sought review of a prior order of the appellate division that had rejected one of her defenses to the petition. The executor moved to dismiss the appeal on the ground that the prior order itself was a final determination of a severable claim asserted by the widow.

The court of appeals rejected this contention, holding that the theory of implied severance as expounded in Sirlin is applicable only where there has been a final determination of a distinct cause of action or part thereof. Implied severance, the court declared, has no application where, as in Hillowitz, the appellate division merely settles some of the issues involved in a single cause of action.

In 1972, the court began to retrench somewhat from the broad rule declared in Sirlin. In Behren v. Papworth, the court addressed the question, left open in Sirlin, of "exceptional situations involving an extremely close interrelationship between the respective claims." In Behren, the complaint alleged nine separate causes of action based upon an alleged oral joint venture agreement. Special term dismissed each of them, but the appellate division reinstated three of the nine. The plaintiff thereafter appealed from so much of the appellate division order as affirmed the dismissal of one of six other causes of action.

Dismissing the appeal for want of finality, the court noted that the dismissed cause of action was predicated on the same joint venture agreement and upon the same alleged breach of the agreement as was one of the causes of action reinstated by the appellate

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179 For a discussion of an appeal from a prior order of the appellate division which has become final see notes 207 & 210 and accompanying text infra.
182 20 N.Y.2d at 403, 230 N.E.2d at 395, 283 N.Y.S.2d at 490.
183 30 N.Y.2d at 533, 281 N.E.2d at 178, 330 N.Y.S.2d at 382. Defendants sought to appeal so much of the appellate division order as reinstated three causes of action. This appeal, involving the denial of the motion to dismiss causes of action, was held to be from an order that was clearly non-final and thus was dismissed. Id. at 534, 281 N.E.2d at 179, 330 N.Y.S.2d at 383.
division. Indeed, the reinstated cause sought as relief an accounting of profits from the alleged joint venture, while the cause under consideration, which repeated the allegations of the first, sought damages based upon the shares of stock the plaintiffs were to receive under the same agreement. The court held that the two causes of action "comprise, in essence, nothing more than a single cause of action in which merely alternative forms of relief for the individual defendant's breach of a single agreement are sought." Accordingly, the appellate division order only settled "some of the issues involved in a single cause of action" and did not "make a final disposition of a separate and distinct cause of action."

Thus, in Behren, the court concluded that the "general rule" of Sirlin was inapplicable where there is an "extremely close interrelationship between the respective claims." Behren further demonstrates that the court is not required to follow the numbering of causes of action made by the draftsman of the pleadings. The court could and did pierce the formal veil of separate numbering to determine that, for finality purposes, only one basic cause of action existed.

The Behren analysis was subsequently applied to a case involving a final order on a complaint that left an affirmative defense and counterclaim unresolved. There, the order of the appellate division affirmed a judgment which held that the plaintiff was entitled to recover a specified sum from the defendant under a construction contract. Although the judgment left the sum subject to reduction if the defendant prevailed on an affirmative defense, it also provided for the dismissal of defendant's counterclaim based on performance of the work. The court of appeals dismissed the defendant's appeal from the appellate division order. Not only did the judgment leave open the issue of damages, but the dismissed counterclaim was dependently related to the main cause of action, and thus, "the main cause of action which was left open for further adjudication was inextricably related to the counterclaim."

Similarly, where the parties had brought separate but consoli-

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184 Id. at 534, 281 N.E.2d at 179, 330 N.Y.S.2d at 383.
185 Id. at 534, 281 N.E.2d at 179, 330 N.Y.S.2d at 383-84 (quoting In re Hillowitz, 20 N.Y.2d 952, 954, 233 N.E.2d 719, 720, 286 N.Y.S.2d 677, 679 (1967)).
186 30 N.Y.2d at 523, 281 N.E.2d at 179, 330 N.Y.S.2d at 383.
188 Id. at 855, 292 N.E.2d at 308, 340 N.Y.S.2d at 167.
dated actions against each other arising out of the same transaction, and the appellate division order finally determined only one of the actions, the court has declined to imply a severance of the actions. In such cases, the court has reasoned that the issues are so closely related as to indicate that the result in one of the actions might predetermine the result in the other on the identical record.

In 1975, the court of appeals again had occasion to consider the applicability of the exception noted in *Sirlin* and followed in *Behren*. In *Lizza Industries, Inc. v. Long Island Lighting Co.*, a public contractor brought suit against a utility to recover the costs incurred in protecting the utility's installations during a construction project. The utility counterclaimed for damages to the installations and for the cost of relocating several power lines. The appellate division order directed the dismissal of one of plaintiff's three causes of action and granted defendant summary judgment solely on the issue of liability on two of four counterclaims. When plaintiff took an appeal to the court of appeals from this order, the court dismissed the appeal for lack of finality. The *Lizza* court ruled that the concept of implied severance was not applicable since the finally determined cause of action, *i.e.*, the single dismissed cause of action, was "not discrete from the transactions giving rise to counterclaims which are not finally determined."192

In *Lizza* the court seemed to be both applying the narrow exception made in *Sirlin* and *Behren*, previously applicable in extraordinary cases where the respective claims are extremely closely related, and indicating that the narrow exception may be more generally applied. Indeed, *Lizza*, unlike *Behren*, was not a case where one cause of action was disguised as two. The plaintiff's cause of action was plainly different from the defendants' counterclaims. *Lizza* was far more similar to *Sirlin*, since in *Sirlin* both the complaint and the counterclaim were based upon at least some of the same transactions. Thus, it appeared that the court had, in effect, abandoned *Sirlin* in favor of the narrower rule pro-

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190 34 N.Y.2d at 855, 316 N.E.2d at 350, 359 N.Y.S.2d at 70.


192 36 N.Y.2d at 754-55, 329 N.E.2d at 664, 368 N.Y.S.2d at 830.

claimed in *Lizza.*

*Lizza,* however, is not the last word on the subject. In *Ratka v. St. Francis Hospital,* the plaintiff brought a negligence action which asserted causes of action for conscious pain and suffering and wrongful death. Two defendants asserted the statute of limitations as an affirmative defense. The plaintiff moved to dismiss the affirmative defense, and the defendants cross-moved to dismiss the wrongful death action. The appellate division order granted the defendants’ cross-motion, and the plaintiff appealed.

The court of appeals retained jurisdiction on the ground that the finally determined wrongful death cause of action was “materially separate and distinct” from the non-final conscious pain and suffering cause of action. The *Ratka* court took note of the trend, evidenced in *Sirlin,* “away from earlier decisions limiting the availability of the implied severance theory.” At the same time, the court expressly recognized that the doctrine may not be applied “in instances characterized as ‘some exceptional situations involving an extremely close interrelationship between the respective claims.’” After reviewing the precedent, the *Ratka* court concluded that “in cases involving an interrelationship or overlap of claims, the separateness of the dismissed claim must be determined.”

In measuring the claims involved in *Ratka* under the “separateness” standard, the court noted that recovery for conscious pain and suffering accrues to the decedent’s estate, while wrongful death damages benefit the decedent’s distributees. Since the claims involved different legal theories and the recovery under each belonged to different parties, the claims were held to be separate and therefore severable for finality purposes, even though “there is some overlap” and even though the claims may arise from the same factual transaction. The court further stressed that the

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194 Indeed, the *Lizza* court did not even cite *Sirlin.* Although the *Lizza* test of discreteness is seemingly a bit broader than the *Behren* “one cause of action” standard, it has been suggested that *Lizza* is “perhaps somewhat inconsistent” with *Sirlin* and that the court may have signalled a retreat from *Sirlin* in order to lighten its caseload. See 7 WK&M, *supra* note 2, ¶ 5611.03.


196 *Id.* at 609, 378 N.E.2d at 1030, 407 N.Y.S.2d at 460.

197 *Id.*

198 *Id.* (citing *Sirlin* and *Behren*).

199 *Id.*

200 *Id.*
challenged affirmative defense of the statute of limitations applied only to the wrongful death cause of action and not to the conscious pain and suffering claim.\textsuperscript{201}

\textit{Ratka} thus reflects a practical application of the prior implied severance precedents. If claims asserted in the pleadings are based upon legally distinct theories and the issue on appeal relates only to a finally determined claim, under \textit{Ratka}, implied severance may be in order, even though the final and non-final claims do not stem from “discrete” transactions.

Analysis is further assisted by two recent cases. In one case,\textsuperscript{202} the plaintiff asserted three causes of action arising out of two contracts between the parties; the first for fraud and the second two for breach of contract. Two causes of action were based upon the parties’ original contract; the other was based upon a subsequent contract. The order of the appellate division granted the defendant summary judgment on the first two causes of action but left the third cause of action pending. The court of appeals refused to dismiss the appeal, since in accordance with \textit{Ratka}, the two finally determined causes of action “both present different legal issues and arise out of transactions different from the third cause and should be deemed impliedly severed.”\textsuperscript{203} On the other hand, where several causes of action arose out of the same alleged contract, the court refused to “impliedly sever” a finally determined cause of action from the causes of action still pending.\textsuperscript{204}

The current tendency of the court of appeals appears to steer a middle course between the liberality of \textit{Sirlin} and the rigidity of \textit{Lizza}. The concept apparently will be applied where finally determined claims assert legal theories and involve legal issues distinct or separate from the claims in the case that remain undetermined. The separateness of the legal issues seemingly is more significant than whether the claims stem from the same operative facts. If, however, the claims are closely allied in theory and arise from the same basic facts, implied severance is likely to be refused. As is evident from this discussion, however, application of the concept of

\begin{itemize}
\item \textsuperscript{201} Id. at 610, 378 N.E.2d at 1030, 407 N.Y.S 2d at 460.
\item \textsuperscript{203} 46 N.Y.2d at 882, 387 N.E.2d at 614, 414 N.Y.S.2d at 682.
\item \textsuperscript{204} Associated Coal Sales Corp. v. Hughes, 46 N.Y.2d 1071, 390 N.E.2d 301, 416 N.Y.S.2d 794 (1979), dismissing appeal from 64 App. Div. 2d 562, 406 N.Y.S.2d 827 (1st Dep't 1978).
\end{itemize}
implied severance greatly depended upon facts presented in particular cases.

Attempts to invoke the concept of implied severance in order to appeal from arguably non-final orders may well increase the number of motions to dismiss and the number of sua sponte dismissals that the court must act upon. A practical, but drastic, alternative—to eliminate the need for the court to pass upon the jurisdictional bases of such attempts might be a statutory amendment that would eliminate the doctrine of implied severance entirely by providing that if a portion of the order is non-final, the entire order should be considered non-final. An appeal in such cases could then be taken only with the permission of the appellate division. Such a provision would reduce the number of cases and motions submitted to the court and would protect counsel from the pitfalls inherent in the implied severance concept. Indeed, such a procedure would treat partially final orders under the same rules that permit appellants to take completely non-final orders to the court of appeals with the permission of the appellate division.\(^\text{205}\)

The elimination of the doctrine of implied severance by deeming all partially final orders to be non-final appears to be the only constitutionally valid means of dealing with the issue. Once portions of a partially final order are considered “severed,” and hence final, the constitutional provisions for appeals as of right and for appeals by permission of the court of appeals are triggered.\(^\text{206}\) Ad-

\(^{205}\) See N.Y. CIV. PRAC. LAW §§ 5601(d), 5602(a)(1)(ii) (McKinney 1978).

\(^{206}\) But see Created Gemstones, Inc. v. Union Carbide Corp., motion for leave to appeal granted in part, 45 N.Y.2d 959, 411 N.Y.S.2d 565 (1978), appeal determined, 47 N.Y.2d 250, 391 N.E.2d 990, 417 N.Y.S.2d 905 (1979). In Created Gemstones, the court applied the concept of implied severance to a case in which defendant had been granted summary judgment on counterclaims for breach of the same contract as he was sued upon by plaintiff. Plaintiff had commenced an action in which it was alleged that defendant had breached a distributorship arrangement by refusing to ship goods to plaintiff on credit. Defendant counterclaimed for the balance due for prior deliveries and to recoup a small overcredit. The lower courts granted defendant summary judgment on the counterclaims on the ground that plaintiff's liability for goods previously shipped was clearly established.

This application of implied severance accords with the court's decision in Ratka v. St. Francis Hosp., 44 N.Y.2d 604, 378 N.E.2d 1027, 407 N.Y.S.2d 458 (1978), since, although the claims arose from the same contract, different legal theories were involved. Further, the transactions giving rise to the opposing claims in Created Gemstones appear to be different since plaintiff complained of a failure to sell additional goods while defendant's counterclaims were based upon past sales.

Notwithstanding the foregoing, the factual differences between Created Gemstones and Associated Coal Sales Corp. v. Hughes, 46 N.Y.2d 1071, 390 N.E.2d 301, 416 N.Y.S.2d 794 (1979), appear to be slight. This further suggests that the availability of implied severance may hinge upon minute factual distinctions and upon the attitude of the court prevailing at
ditionally, such an amendment could be analogous to the procedures now followed in the federal courts in similar cases.\textsuperscript{207}

**APPEAL OF FINAL AND NON-FINAL ORDERS**

Having discussed the criteria for assessing whether an order is final or non-final, we may now briefly highlight the avenue by which both types of orders can be taken to the court of appeals.

The most frequently encountered methods for appealing final orders are well-known. A final order of the appellate division can be appealed as of right in a case originating in the supreme, county, surrogate’s, and family courts, the court of claims, or a state administrative agency if: (1) there is a dissent on a question of law in favor of the appellant; (2) the order reverses the order or judgment made in the court or agency below; or (3) the order substantially modifies the determination below to the detriment of the appellant, and the modification is reviewable by the court of appeals.\textsuperscript{208}

A final order can be appealed as of right if the construction of the state or federal constitutions is directly involved,\textsuperscript{209} and a final judgment of a court of record of original instance can be appealed directly as of right if the only issue is the validity of a federal or state statute under either the state or federal constitutions.\textsuperscript{210}

An appeal as of right also may be taken from a final judgment of a court of first instance or from the final determination of an agency or from a final order of the appellate division, where, on a prior appeal, the appellate division has made an order which necessarily affects the final judgment or determination, and the prior order could have been appealed as of right except for the fact that it was non-final.\textsuperscript{211}

\textsuperscript{207} Rule 54(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 54(b), provides that where more than one claim for relief is involved, whether as a claim, counterclaim, cross-claim or third party claim, or where there are multiple parties involved, the district court may direct the entry of judgment on fewer than all the claims or parties “upon an express determination that there is no just reason for delay . . . .” Id. Such judgment can then be appealed to the circuit court of appeals. See 28 U.S.C. § 1291 (1976). When the appellate division allows an appeal from a non-final order, it is implicit in the grant of such permission that there is “no just reason for delay” in the presentation of the appeals to the court of appeals.

\textsuperscript{208} N.Y. Civ. Prac. Law § 5601(a) (McKinney 1978).

\textsuperscript{209} Id. § 5601(b)(1).

\textsuperscript{210} Id. § 5601(b)(2).

\textsuperscript{211} Id. § 5601(d). However, only the prior non-final order that is the predicate for the
An order of the appellate division that grants a new trial or that affirms the granting of a new trial can be appealed if the apppellant stipulates that, should he lose the appeal, judgment absolute shall be rendered against him.\textsuperscript{212}

A final order of the appellate division that cannot be appealed as of right can be appealed with the permission of either the court of appeals or the appellate division.\textsuperscript{213}

Lastly, a final appellate division order or a final agency determination can be appealed with the permission of the court of appeals or the appellate division where, on a prior appeal, the appellate division has made an order which necessarily affects the final judgment or determination and the prior order was not appealable as of right.\textsuperscript{214}

There are a limited number of circumstances under which a non-final order can be appealed to the court of appeals. The two encountered most frequently should be noted briefly. First, a non-final order of the appellate division can be appealed with the permission of either the court of appeals or the appellate division in proceedings brought by or against one or more public officers, or a public board or commission, or a court or tribunal, provided the order does not grant or affirm the granting of a new trial.\textsuperscript{215} Second, a non-final order of the appellate division can be appealed with the permission of the appellate division, provided that the appellate division certifies that questions of law have arisen which appeal can be reviewed. Gilroy v. American Broadcasting Co., 46 N.Y.2d 580, 389 N.E.2d 117, 415 N.Y.S.2d 804 (1979).

\textsuperscript{212} N.Y. Civ. Prac. Law § 5601(c) (McKinney 1978).

\textsuperscript{213} Id. § 5602(a)(1)(i).

\textsuperscript{214} Id. § 5602(a)(1)(ii).

\textsuperscript{215} Id. § 5602(a)(2). This section was designed to relieve agencies from the difficulty confronted when the appellate division annuls a determination and remands the case for further proceedings. See F.J. Zeronda, Inc. v. Town Board of Halfmoon, 37 N.Y.2d 198, 200, 333 N.E.2d 154, 155, 371 N.Y.S.2d 872, 874 (1975)(per curiam). Prior to the enactment of the amendment, the agency could not appeal such an order because it was not final, nor could it appeal from its own determination made upon remand. After 1944 and prior to the 1952 enactment of the predecessor of CPLR 5602(a)(2), the agency's only option was either to stipulate to judgment absolute or forego the appeal. Id. at 200, 333 N.E.2d at 155, 371 N.Y.S.2d at 874.

The court of appeals has held that a municipality and its governing board fits within CPLR 5602(a)(2) only if it was acting in an adjudicatory capacity. Id. at 201, 333 N.E.2d at 156, 371 N.Y.S.2d at 875. But cf., James v. Board of Educ., 42 N.Y.2d 357, 366 N.E.2d 1291, 397 N.Y.S.2d 934 (1977) (court accepted jurisdiction to review order of injunction issued against school board's administration of examination without discussion of whether decision to administer test was “adjudicatory” in nature).
ought to be reviewed by the court of appeals.\textsuperscript{216}

CONCLUSION

Finality is a complex subject. Its many avenues are replete with pitfalls to be avoided and roadblocks to be overcome in order to obtain a ruling from the court of appeals on the merits of the litigation. Persisting issues of controversy include the direct appeal of orders made on within-an-action motions to compel arbitration and the problem of implied severance. As to the former, the court, in its most recent decision, appears to have held that rulings made on within-an-action motions to compel arbitration are final. On the issue of implied severance, it is submitted that a legislative abrogation of the concept may serve to eliminate the uncertainty inherent in it, while reducing the caseload of the court of appeals by eliminating appeals from orders which are only partially final. Such appeals may be properly taken at a time when the action has been finally determined.

This article has sought to discuss the policies which underlie the finality concept and to highlight frequently encountered

\textsuperscript{216} N.Y. Civ. Prac. Law §§ 5602 (b)(1), 5713 (McKinney 1978). The question of law certified by the appellate division must be decisive of the correctness of the appellate division's determination. If the decision could turn on the exercise of discretion, the question of law is not decisive and the appeal will be dismissed. See, e.g., Stellem v. Vantage Press, Inc., 47 N.Y.2d 828, 392 N.E.2d 1268, 419 N.Y.S.2d 75 (1979) (appeal on certified question from grant of class action certification dismissed); Rosemont Enterprises, Inc. v. Irving, 41 N.Y.2d 829, 361 N.E.2d 1040, 393 N.Y.S.2d 392 (1977) (modification of preliminary injunction could turn on discretion so appeal dismissed); Patrician Plastic Corp. v. Bernadel Realty Corp., 25 N.Y.2d 599, 256 N.E.2d 180, 307 N.Y.S.2d 868 (1970) (question of law on issuance of supplemental summons held decisive); but see Barasch v. Micucci, N.Y.L.J., April 1, 1980, at 4, col. 1, which involved an appeal on a certified question from denial of motion to dismiss complaint for failure to prosecute. The court held that, while decisions on such motions are discretionary, "the possibility that the lower court's discretion was abused does give rise to a question of law cognizable in this Court." Id. Thus the certified question was held "decisive."

If the appellate division has indicated that its discretion would be exercised in favor of the appellant, the question of law would then be decisive, and jurisdiction will be retained by the court of appeals. See Kritchmar v. Kritchmar, 42 N.Y.2d 866, 366 N.E.2d 863, 397 N.Y.S.2d 775 (1977). In Kritchmar, the appellants sought to amend their answer to add a defense. In retaining jurisdiction, the court of appeals reasoned that since the appellate division and the lower court allowed the answer to be amended in other respects, "it may reasonably be concluded that the courts below would have permitted the amendment, in discretion, had they believed the defense available as a matter of law." Id. at 860, 366 N.E.2d at 865, 397 N.Y.S.2d at 776-77.
problems. With an understanding of the fundamental purposes of the finality rule, practitioners may stand on firmer footing in traversing the finality morass.