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BRINGING MORE FINALITY TO FINALITY: CONDITIONAL CONSENT JUDGMENTS AND APPELLATE REVIEW

THOMAS A. ENGELHARDT[†]

INTRODUCTION

Each year, the Supreme Court of the United States typically denies certiorari in over 9,000 cases.¹ Denying nearly ninety-nine percent of certiorari petitions is essential to the Court's sustainability, considering its extremely limited resources.² Despite the necessity of denying certiorari in an overwhelming majority of cases, a particular denial in 1980 frustrated Justice Harry Blackmun. The case was *Amstar Corp. v. Southern Pacific Transport Co. of Texas & Louisiana*.³

The petitioner in *Amstar* was a sugar refiner.⁴ After its sugar was damaged during delivery, Amstar sued Southern Pacific Transport ("Southern Pacific"), a common carrier.⁵ Although Southern Pacific initially denied liability, the real issue was the correct measure of damages.⁶ Amstar sought damages more than fifteen times higher than what Southern Pacific believed it might be liable for.⁷

After Southern Pacific moved for partial summary judgment solely on the issue of damages, the district court granted the motion in Southern Pacific's favor.⁸ With the quantum of damages determined to be the much lower of the disputed

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¹ *Frequently Asked Questions*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/faq.aspx#faqgi9> (last visited Feb. 24, 2015).

² *Id.*

³ 449 U.S. 924 (1980).

⁴ *Id.* at 924 (Blackmun, J., dissenting).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 924–25.

amounts, only the issue of liability remained in the case.⁹ The partial summary judgment was, of course, interlocutory and not yet appealable.¹⁰

During a pretrial conference, the parties agreed to a stipulation of facts and submitted a request to the court to enter a "consent judgment"¹¹ on the parties' terms.¹² The parties stipulated that Southern Pacific was liable and that it would pay the damages determined by the court's partial summary judgment ruling.¹³ The parties agreed, however, that Amstar could appeal the determination of damages.¹⁴ The court entered a consent judgment on the parties' stipulation and included the following language: "This judgment is rendered in recognition of the reservation by the plaintiff of its right to prosecute an appeal . . . in connection with this judgment and in connection with the partial summary judgment rendered on March 14, 1979."¹⁵

Amstar made a timely appeal to the United States Court of Appeals for the Fifth Circuit.¹⁶ After both sides devoted their briefs solely to the issue of damages, the court determined that "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it."¹⁷ The Supreme Court subsequently denied Amstar's petition for certiorari.¹⁸

In his dissent to the Court's denial of certiorari, Justice Blackmun noted that there was a clear dispute as to the measure of damages, and that appeal was not precluded by the parties' stipulation to a consent judgment.¹⁹ He argued that a review of

⁹ *Id.* at 925.

¹⁰ See 28 U.S.C. §§ 1291–92 (2012).

¹¹ As discussed later, a consent judgment is a judgment entered by a court based upon settlement terms negotiated and agreed to by the parties. E. H. Schopler, Annotation, *Right to Appellate Review of Consent Judgment*, 69 A.L.R.2d 755, § 2 (1960).

¹² *Amstar*, 449 U.S. at 925 (Blackmun, J., dissenting).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 925–26 (quoting *Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 607 F.2d 1100 (5th Cir. 1979) (per curiam)).

¹⁸ *Id.* at 924.

¹⁹ *Id.* at 926. Justice Blackmun quoted a 1928 Supreme Court decision to support the notion that appeal is not precluded by the parties entering into a consent judgment:

the merits of the partial summary judgment should not be foreclosed by an unnecessarily “strict concept of consent and acceptance in the face of facts that the asserted consent was specifically limited and that petitioner consistently and persistently disclaimed full settlement of the lawsuit.”²⁰ Justice Blackmun concluded his dissent by stating that although the amount of damages at issue may not have been exceptionally large, the Court was mistaken in denying review “in a case where the principle is important.”²¹

The test of time has validated Justice Blackmun’s foresight. Over thirty years after the Supreme Court denied certiorari in *Amstar*, a live controversy remains with respect to the appealability of consent judgments. The persistent issue is whether a party forfeits the right to appeal by stipulating to terms and entry of judgment on those terms, while reserving the right to appeal certain matters in the case. Further, the controversy has expanded to involve not only whether certain rulings in a case may be appealed from a consent judgment, but also whether certain voluntarily dismissed claims may “spring back to life” upon reversal of an adverse ruling.²²

The United States Circuit Courts of Appeals are divided over the appealability of conditional consent judgments in which judgments entered with the parties’ consent are conditioned on affirmance of an issue on appeal.²³ Uniform precedent would benefit parties when negotiating stipulations at the trial level. Instances, such as in *Amstar*—where the parties stipulated to a

The decree sought to be vacated was entered with the defendants’ consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered

Id. (alteration in original) (quoting *Swift & Co. v. United States*, 276 U.S. 311, 323–24 (1928)).

²⁰ *Id.* at 927.

²¹ *Id.*

²² *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 842 (8th Cir. 2013) (noting that upon reversal and remand, petitioner could have sought further recovery as part of a class).

²³ *Compare LaForest v. Honeywell Int’l Inc.*, 569 F.3d 69, 73 (2d Cir. 2009) (stating that a party to a consent judgment may reserve a right to appeal as long as it does so unequivocally), *with Jones v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 422 F. App’x. 315, 316 (5th Cir. 2011) (per curiam) (stating that a party that consents to the entry of a final judgment is precluded from bringing an appeal).

consent judgment and prepared for appeal by solely briefing the issue of damages, just to have the court deny the appeal—are a waste of time and resources for litigants. Looking at past and present case law, as well as policy factors, this Note argues generally for a standard that allows a party to secure appeal of adverse prior rulings by stipulating to a consent judgment that explicitly reserves a right to appeal. More specifically, this Note argues that, in stipulating to a consent judgment that reserves a right to appeal, a party may dismiss a claim without prejudice on condition that the claim may be reasserted only if an adverse ruling is reversed on appeal. If the challenged district court ruling is affirmed on appeal, the dismissal becomes binding and the claim may not be reasserted.

Part I provides background on finality, including an overview of the final judgment rule and other statutory grants of appellate jurisdiction. Part I then discusses consent judgments, including conditional consent judgments. Part II examines the circuit splits with respect to issues of finality and the appealability of consent judgments that reserve a right to appeal. Part III presents arguments for and against strict interpretation and application of the finality requirement regarding consent judgments. Part IV argues for resolving the controversy by adopting a standard by which appellate courts uniformly recognize a consent judgment's reservation of a right to appeal certain adverse rulings. This Note concludes by explaining how this standard achieves the goals of the federal judicial system, such as judicial economy and fairness to parties.

I. OVERVIEW: FINALITY; CONSENT JUDGMENTS

A. *Background on Finality*

1. Overview of Appellate Jurisdiction

As inferior courts created by Congress, the circuit courts possess only such jurisdiction as Congress confers by statute.²⁴ 28 U.S.C. § 1291 is the circuit courts' primary basis for jurisdiction, conferring "jurisdiction of appeals from all final decisions of the district courts of the United States."²⁵ The requirement of a final judgment is called the "final-judgment rule."²⁶ A final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."²⁷ To secure appellate jurisdiction, the decision subject to appeal must be characterized as "final," unless one of the narrow alternative statutory bases applies.²⁸

The primary justification for such a narrow scope of appellate jurisdiction is to protect the relationship between trial and appellate courts—a relationship that is fundamental to our legal system.²⁹ The timing for bringing appeals is affected by two important aspects of the relationship between the trial and appellate courts. The first is the trial court's obligation of fact

²⁴ See 2 FEDERAL PROCEDURE, LAWYERS EDITION § 3:123 (2015). Chief Justice Warren summarized the courts of appeals' jurisdictional nature in the following way:

It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction.

Carroll v. United States, 354 U.S. 394, 399 (1957). A court shall not exercise jurisdiction over non-final decisions and is also obliged to raise the question of jurisdiction *sua sponte*. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.").

²⁵ 28 U.S.C. § 1291 (2012). This provision provides an exception for when direct review may be granted by the Supreme Court. *Id.*

²⁶ BLACK'S LAW DICTIONARY 747 (10th ed. 2014).

²⁷ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

²⁸ 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3905 (2d ed. 2015).

²⁹ *Id.* § 3907 (noting the final judgment rule seeks to maintain "the capacities and performance of trial courts").

finding and applying legal standards to those facts.³⁰ The next is the wide discretion granted to a trial court in carrying out and governing procedural matters, which appellate courts normally defer to the trial court judge.³¹ These preliminary responsibilities—fact finding, applying legal standards, and ruling on procedural matters—play a vital role in an appellate court's ability to accurately identify controlling legal questions.³²

Aside from the final judgment provision of § 1291, jurisdiction is primarily conferred on the circuit courts by the interlocutory appeal provision in 28 U.S.C. § 1292,³³ and extraordinary writs authorized by the All Writs Act.³⁴ With respect to § 1292, the Supreme Court delineated a test for when interlocutory appeal is appropriate in *Cohen v. Beneficial Industrial Loan Corp.*³⁵ This test is known as the “collateral order doctrine.”³⁶ The requirements for securing “collateral order appeal” typically include: (1) the disputed question be conclusively determined by an order; (2) the appealed matter be separate from—and collateral to—the merits; and (3) the matter would effectively be unreviewable on appeal from a final judgment.³⁷

The collateral order doctrine is based on an expansion of finality under § 1291; however, the Supreme Court has made clear that in applying the collateral order doctrine, a court shall “never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 28 U.S.C. § 1292 (2012) (concerning interlocutory decisions and permitting review of certain interlocutory orders—most notably those involving preliminary injunctive relief and questions certified by the district court and accepted by the court of appeals).

³⁴ *Id.* § 1651. This provision enables the circuit courts and other courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* § 1651(a).

³⁵ 337 U.S. 541, 546–47 (1949).

³⁶ *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989).

³⁷ 4 AM. JUR. 2D *Appellate Review* § 105 (2015); see also *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 172–73 (5th Cir. 2009) (suggesting that the three common requirements—that an order be conclusive, separate, and unreviewable—are not so much “strict preconditions” but “guidelines in making the pragmatic determination of whether to allow an order to be immediately appealed”).

has been entered.”³⁸ Despite the narrow scope of the collateral order doctrine, its expansiveness provides precedent for further flexibility with respect to the finality requirement.

In rarer cases, other statutes provide grounds for appellate review,³⁹ and on occasion, statutes provide for the certifying of a question to a circuit court if the question fits a narrow category.⁴⁰ Further, statutes provide for review of acts by independent administrative officials or agencies within the executive branch.⁴¹ Finally, the circuit courts are granted jurisdiction by a rather unusual statute in certain extremely rare cases that would otherwise be brought before the Supreme Court.⁴²

An important justification for limiting appeals to final judgments, collateral orders, and narrow statutory categories is that Congress—by providing for appeals in certain circumstances and not in others—has made its intent to limit appellate jurisdiction clear.⁴³ Congress has made this intent clear as far back as the Judiciary Act of 1789 when Congress specifically

³⁸ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citation omitted)) (internal quotation marks omitted).

³⁹ *See, e.g.*, 28 U.S.C. § 158(d) (2012) (governing bankruptcy appeals to the circuit courts).

⁴⁰ *See, e.g.*, 52 U.S.C.A. § 30110 (West 2014) (originally enacted as Federal Election Campaign Act of 1971 (FECA), § 310) (providing that in a voter action brought to determine the constitutionality of a provision of the act, or of a certain section of Title 18, “The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.”).

⁴¹ *See Rosenthal & Co. v. Commodity Futures Trading Comm’n*, 614 F.2d 1121, 1125 (7th Cir. 1980) (“The jurisdiction of the courts of appeals to review orders rendered by administrative agencies is wholly dependent upon statute.” (internal quotation marks omitted) (quoting *Noland v. U.S. Civil Serv. Comm’n*, 544 F.2d 333, 334 (8th Cir. 1976)).

⁴² *See* 28 U.S.C. § 2109 (2012). The statute covers cases that are on direct appeal to the Supreme Court from a district court where a quorum of qualified justices cannot be assembled. As a result, appeal is heard in the circuit court for the district in which the case was initiated, and that circuit court may make a final decision. *WRIGHT ET AL.*, *supra* note 28, § 3901.

⁴³ The collateral order doctrine involves the Supreme Court’s interpretation of § 1292.

rejected piecemeal appellate practice.⁴⁴ Consequently, some courts feel that appeals heard in other circumstances constitute a run around congressional intent.⁴⁵

2. Orders Prior to Trial—Voluntary and Involuntary Dismissal

With some background on finality, it is appropriate to analyze how finality is affected by pretrial orders. The involuntary dismissal of a claim or the granting of summary judgment on an important issue may represent a loss of a vital part of the case.⁴⁶ Under those circumstances, the adversely affected party may decide that it is not worth settling or pursuing certain remaining claims to final judgment. In such a situation, a means of achieving final disposition is through voluntary dismissal of the remaining claims.⁴⁷

In this scenario, finality has been recognized following voluntary dismissals both with and without prejudice—although a dismissal with prejudice is a surer route to a final judgment for purposes of appeal.⁴⁸ A final judgment—as mentioned above—“ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁴⁹ Under these circumstances, it is critical to preserve the right to appeal prior involuntary dismissals or adverse rulings.⁵⁰ Preserving the right to appeal is important because those prior rulings created the circumstances that prompted voluntary dismissal due to futility.⁵¹

A safer tactic to preserve a right to appeal seems to be inviting dismissal without prejudice in conjunction with a conditional consent judgment.⁵² The stipulation upon which the court enters the judgment should expressly reserve a right to

⁴⁴ See *Catlin v. United States*, 324 U.S. 229, 233–34 (1945).

⁴⁵ See *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178–79 (1955) (“Section 22 of the Judiciary Act of 1789 . . . provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments.”).

⁴⁶ WRIGHT ET AL., *supra* note 28, § 3914.8.

⁴⁷ *Id.*; see also FED. R. CIV. P. 41.

⁴⁸ WRIGHT ET AL., *supra* note 28, § 3914.8; see also *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 & n.1 (7th Cir. 1976) (securing review of a dismissed count by obtaining dismissal of the remaining three counts of a four-count complaint without prejudice).

⁴⁹ *Catlin*, 324 U.S. at 233.

⁵⁰ See WRIGHT ET AL., *supra* note 28, § 3914.8.

⁵¹ See *id.*

⁵² See *id.*

appeal any adverse rulings and reinstate the dismissed claim on condition that those adverse rulings are reversed.⁵³ A number of courts, however, have refused to exercise appellate jurisdiction following these stipulations fearing they “permit finality to be manufactured too easily.”⁵⁴

B. *Background on Consent Judgments*

A consent judgment is a judgment entered by a court based upon settlement terms negotiated and agreed to by the parties.⁵⁵ This type of judgment is aimed at ending the litigation while securing an enforceable judgment.⁵⁶ The parties’ mutual understanding and agreement with respect to the terms, conditions, and amounts is required before the court will enter judgment.⁵⁷ Judges, of course, have discretion regarding whether to enter judgment on the parties’ terms.⁵⁸

⁵³ *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 976–77 (9th Cir. 2008). A party may still face difficulty in an appellate court that strictly adheres to finality. *See, e.g., Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 607 F.2d 1100, 1100 (5th Cir. 1979) (per curiam) (“Although the consent judgment contained a recognition that the plaintiff wished to appeal the issue of the limitation of damages, the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it.”).

⁵⁴ *WRIGHT ET AL.*, *supra* note 28, § 3914.8. An important aspect of voluntarily invited dismissal is whether a plaintiff is permitted to reassert the relinquished claim. *See id.*

⁵⁵ Schopler, *supra* note 11. “A consent judgment results from mutual understanding and concerted action by the parties, as documented in a settlement agreement or stipulation which is consented to and sanctioned by the court.” Robert R. Zitko, *The Appealability of Conditional Consent Judgments*, 1994 U. ILL. L. REV. 241, 242 (1994) (footnotes omitted).

⁵⁶ *See* Schopler, *supra* note 11.

⁵⁷ *Id.* Consent judgments differ from judgments by default, judgments by confession, and judgments upon an agreed statement of fact. *Id.* Judgments by default differ in that they result from defendants either not having a defense or not offering one. *Id.* Judgments by confession differ in that they are based upon acts by defendants in which they acknowledge and admit that the plaintiff has a just and rightful cause of action. *Id.* Judgments upon an agreed statement of facts differ in that it is the court, rather than the parties, that makes the final determination with respect to matters of fact. *Id.*

⁵⁸ 15 U.S.C. § 16 (2012). An important factor considered by a court is whether “the entry of such judgment is in the public interest.” *Id.* § 16(e)(1).

Upon entering a consent judgment, a court retains subject matter jurisdiction to enforce the judgment.⁵⁹ In fact, a court may enforce a consent judgment by all means—legal and equitable—available to it.⁶⁰ Consequently, unlike with a private settlement, parties do not have to file separate lawsuits each time the agreement is violated.⁶¹

While a private settlement agreement may be relatively easy to modify, courts usually do not modify consent judgments after they are entered.⁶² Modification of the judgment will only be granted when compliance with the judgment is made substantially more onerous or illegal by changed factual or legal conditions.⁶³

Ordinarily, a consent judgment is not appealable on the merits.⁶⁴ While consent judgments may help resolve cases more promptly and efficiently, some appellate courts are wary of considering them final since they are entered with the consent of both parties rather than after fully litigating all matters.⁶⁵ Many other courts will, however, permit appeal from a consent judgment,⁶⁶ which makes sense considering that a consent judgment fits quite squarely into the category of final judgments. Like a final judgment, a consent judgment “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”⁶⁷ rather than non-final or interlocutory orders which require further steps at the trial level to decide the case on the merits.⁶⁸

⁵⁹ Frederic C. Tausend & David H. Binney, *Consent Judgments*, in 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 50:20 (Robert L. Haig ed., 3d ed. 2013). Further, disputes are heard by a judge who is familiar, or at least should be, with the case. In this respect, “consent judgments ensure compliance more effectively than private settlements.” *Id.*

⁶⁰ See *Cook v. City of Chi.*, 192 F.3d 693, 695 (7th Cir. 1999). These means include sanctions for contempt. See *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 291 (2d Cir. 2008).

⁶¹ Tausend & Binney, *supra* note 59.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Schopler, *supra* note 11, § 3.

⁶⁵ Zitko, *supra* note 55, at 244–45.

⁶⁶ *Swift & Co. v. United States*, 276 U.S. 311, 324 (“Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered . . .”); see also *Thompson v. Maxwell Land-Grant & Ry. Co.*, 168 U.S. 451, 462 (1897) (noting that review has also been granted based on a claim of fraud in the procurement of one party’s consent).

⁶⁷ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

⁶⁸ Zitko, *supra* note 55, at 247.

However, even when hearing an appeal from a consent judgment, courts apply a “waiver of error” standard—a severely restricted scope of appellate review.⁶⁹ The rationale for such a limited scope of review is that consent judgments are entered with the consent of both parties and thus do not deserve the same attention of valuable appellate resources as judgments that are favorable to one party’s wishes and unfavorable to the other’s.⁷⁰ Generally, when applying a waiver of error standard,⁷¹ the court determines whether a purported error falls within the waiver.⁷² With respect to a consent judgment, the court’s job is made relatively easy since consent judgments by their nature involve the parties’ consent to entry of final judgment.⁷³ Thus, most courts simply affirm consent judgments without consideration of the merits, holding that a party waives a claim of error by consenting to the entry of judgment.⁷⁴ As a result, consent judgments are subjected to a *de facto* rule of non-appealability.⁷⁵

Though there are exceptions to this general rule, the impact of these exceptions is limited because they involve issues that are separate from the substance of the trial court’s ruling.⁷⁶ These

⁶⁹ *Id.* at 247–48, 250.

⁷⁰ *See id.* at 247. Part of the issue with this line of reasoning is that consent judgments are often stipulated to because of circumstances presented following an adverse pretrial ruling, such as a partial summary judgment. *See, e.g.,* *Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 449 U.S. 924, 925 (1980) (Blackmun, J., dissenting) (entering a consent judgment following partial summary judgment in the plaintiff’s favor on the issue of the appropriate measure of damages).

⁷¹ *See* *Zitko*, *supra* note 55, at 250. The seminal case regarding the waiver of error standard of review for consent judgments is *Swift & Co. v. United States*, 276 U.S. 311 (1928). In *Swift*, the Court set out waiver of error as the standard of review by citing the Supreme Court case *United States v. Babbitt*, 104 U.S. 767 (1881), which used waiver of error as the scope of review of a consent judgment. *See Swift*, 276 U.S. at 327; *Babbitt*, 104 U.S. at 768. Despite never providing a clear rationale for the standard, the Court did allude to the fact that under English practice, consent judgments could only be overturned based on the finding of clerical error. *See Swift*, 276 U.S. at 323–24.

⁷² *Zitko*, *supra* note 55, at 247.

⁷³ *See supra* Part I.B (“The parties’ mutual understanding and agreement with respect to the terms, conditions, and amounts is required before the court will enter [a consent] judgment.”).

⁷⁴ *Zitko*, *supra* note 55, at 247–48.

⁷⁵ *Id.* at 248.

⁷⁶ *Schopler*, *supra* note 11, § 3.

established exceptions include claims of (a) lack of actual consent,⁷⁷ (b) fraud in the procurement of consent,⁷⁸ (c) mistake,⁷⁹ and (d) lack of jurisdiction over the subject matter.⁸⁰

Despite the exceptions to the *de facto* rule of non-appealability, an unconditional consent judgment presents barriers to some litigants' ultimate goals.⁸¹ Consequently, litigants have sought to use an alternative procedural tactic in which similar objectives are achieved yet a right to appeal is preserved.⁸² Conditional consent judgments—which make settlement terms conditional on affirmance of adverse rulings—have emerged as a means of ending litigation while reserving a right to appeal.⁸³ Courts are divided over whether appellate review is appropriate with respect to conditional consent judgments.⁸⁴ Issues of finality are the main reasons for

⁷⁷ *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928). An attorney's failure to inform the client as to the clients' personal liability under the consent judgment represents sufficient lack of authority to vacate the consent judgment. *Zitko*, *supra* note 55, at 248.

⁷⁸ *Swift*, 276 U.S. at 324.

⁷⁹ *Id.* at 323–24.

⁸⁰ *Id.* at 324. A party may, of course, challenge subject matter jurisdiction at any point during the case and a court may raise the issue *sua sponte*. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Parties may not create subject matter jurisdiction through stipulation or waiver. A court must—in addition to jurisdiction over the subject matter—have jurisdiction over each party to the consent judgment before it can issue such a judgment. *Zitko*, *supra* note 55, at 250.

⁸¹ For example, the waiver of error standard of appeal is not helpful to an individual who wishes to settle after receiving an adverse pretrial ruling, but believes she has a strong case on appeal to have the prior ruling reversed. See *id.* at 251–52. For this individual, the best situation would be settlement on condition that the adverse judgment is reviewed on the merits and affirmed on appeal.

⁸² See, e.g., *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) (entering of judgment by the court with the consent of both parties and “without waiving the right of the defendant to appeal” a pretrial evidentiary ruling).

⁸³ See *Zitko*, *supra* note 55, at 251–52. This includes conditional settlement of damages based on the circumstances as they present themselves following adverse pretrial rulings as well as conditional dismissal of certain claims that are futile based on such adverse rulings.

⁸⁴ *Schopler*, *supra* note 11, § 3.

the split among authorities,⁸⁵ as some view conditional judgments as non-final because they are entered “for the express purpose of facilitating an appeal.”⁸⁶

II. NATURE OF THE CONTROVERSY—CIRCUIT SPLITS

The appealability of consent judgments presents longstanding and recurring issues that divide the circuit courts.⁸⁷ One circuit split involves whether consent judgments that expressly reserve a right to appeal are final judgments for purposes of appeal. There are differing views concerning the appealability of a consent judgment that provides for litigation to continue at the trial level upon reversal and remand. The view that appeal from such a consent judgment is proper is supported by the Seventh and Eleventh Circuits.⁸⁸ The view that appeal from such a consent judgment is prohibited is supported by the Fifth Circuit and a broad reading of a recent Eighth Circuit holding.⁸⁹

The Eighth Circuit joined the discussion in a manner that added an additional wrinkle to the conflict. A second split now involves how a conditional voluntary dismissal impacts finality. One view, that a judgment is final notwithstanding a conditional

⁸⁵ *Id.* § 4. Compare *Clark v. Hous. Auth. of Alma*, 971 F.2d 723, 726 (11th Cir. 1992) (holding that although consent judgments are ordinarily not appealable, appellate jurisdiction and review is appropriate where a party’s intent to appeal is expressly recognized in the stipulation of judgment), and *Keefe v. Prudential Prop. and Cas. Ins. Co.*, 203 F.3d 218, 223 (3d Cir. 2000) (stating that a party does not waive the right to appeal upon entering a consent judgment when there is a clear understanding and agreement that one of the parties will appeal a contested issue decided at the district court level), with *Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 607 F.2d 1100, 1100 (5th Cir. 1979) (per curiam) (articulating that appeal from a judgment freely consented to by both parties—even if the consent judgment explicitly reserves one party’s right to appeal—is precluded).

⁸⁶ *Schopler*, *supra* note 11, § 3.

⁸⁷ *Petition for Writ of Certiorari at 1, Ruppert v. Principal Life Ins. Co.*, 134 S. Ct. 152 (2013) (No. 12-1425), 2013 WL 2470139, at *1.

⁸⁸ *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) (stating that a party to a consent judgment may appeal from that judgment if it explicitly reserves the right to do so); *Dorse v. Armstrong World Indus., Inc.*, 798 F.2d 1372, 1376–77 (11th Cir. 1986) (noting that there is no reason to frustrate the intent of parties who reserve the right to appeal a consent judgment).

⁸⁹ *Amstar*, 607 F.2d at 1100 (holding that appeal from a judgment freely consented to by both parties is precluded); see *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 842–43 (8th Cir. 2013) (denying appeal from a consent judgment that explicitly reserved the plaintiff’s right to appeal).

voluntary dismissal, is supported by the Second Circuit.⁹⁰ Another view, that a conditional voluntary dismissal renders a judgment non-final, is supported by the Eighth Circuit's recent holding.⁹¹

The Eighth Circuit confronted these issues of appealability in *Ruppert v. Principal Life Insurance Co.*⁹² The consent judgment in *Ruppert* went further than just reserving a right to appeal an adverse summary judgment ruling, as it also provided for the plaintiff to reassert a voluntarily dismissed claim on condition that a prior ruling be reversed on appeal.⁹³ The court recognized that its decision to dismiss the appeal for lack of finality created a split with the Second Circuit.

There are compelling reasons for both strict as well as more flexible interpretations and applications of the finality requirement. This section's discussion of the circuit splits begins by providing factual background on *Ruppert* to illustrate the circumstances in which issues of finality are raised with respect to consent judgments. The discussion proceeds to the split regarding finality following voluntary dismissals, and concludes by detailing the split as to the permissibility of appeals from conditional consent judgments that allow for litigation to continue upon reversal and remand.

A. *Split One: Effect of Conditional Voluntary Dismissal on Finality*

In *Ruppert*, the Eighth Circuit held that a consent judgment was not final, and thus not appealable, because it provided for a voluntarily dismissed claim to "spring back to life" upon reversal and remand.⁹⁴ Joseph Ruppert, as trustee of the Fairmount Park Inc. Retirement Savings Plan ("Fairmount Park"), a 401(k) plan, brought suit against the plan's service provider, Principal Life Insurance Co. ("Principal").⁹⁵ Ruppert alleged that Principal breached its fiduciary duty to the plan by receiving and failing to

⁹⁰ Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003) (holding that a decision is final for purposes of appeal notwithstanding a plaintiff's potential to reassert a dismissed claim in the event of remand).

⁹¹ See *Ruppert*, 705 F.3d at 842 (stating that because the consent agreement provided for the plaintiff's claim to "spring back to life," the judgment was non-final).

⁹² 705 F.3d 839.

⁹³ *Id.* at 841.

⁹⁴ *Id.* at 842.

⁹⁵ *Id.* at 840.

disclose the receipt of revenue-sharing funds and engaging in other transactions prohibited by the Employee Retirement Income Security (“ERISA”).⁹⁶ After Ruppert moved to certify a class comprised of trustees of similarly situated 401(k) plans provided by Principal, the district court denied the motion.⁹⁷

Following the denial of class certification, Ruppert proceeded with the case on an individual basis.⁹⁸ After determining the cost of trial would be too substantial for a single plan’s claims, Ruppert and Principal entered into a confidential settlement agreement upon which Ruppert agreed to voluntarily dismiss Fairmount Park’s individual claim in return for \$80,000.⁹⁹ The parties jointly, and successfully, petitioned the court to enter a consent judgment on those terms.¹⁰⁰ The parties’ agreement and the consent judgment expressly reserved Ruppert’s right to appeal the denial of certification, providing that “the Trustee explicitly reserves, on behalf of the Plan, his right to appeal the Court’s denial of class certification.”¹⁰¹ The consent judgment provided further that upon reversal, and subsequent class certification on remand, Ruppert would be able to participate in any eventual recovery of the class in excess of the \$80,000 provided for by the parties’ agreement.¹⁰²

Ruppert appealed to the Eighth Circuit, arguing that the denial of class certification was an abuse of the district court’s discretion.¹⁰³ The Eighth Circuit dismissed the appeal, holding that Ruppert’s individual claims had not been fully resolved since he would be permitted to petition the district court for additional recovery if the denial of certification was reversed and the case

⁹⁶ *Id.* at 841.

⁹⁷ *Id.* at 840. The court found that two of the requirements of Federal Rule of Civil Procedure 23(a) were not satisfied. First, “that there are questions of law or fact common to the class,” and second, “that the claims or defenses of the representative party are typical of the claims or defenses of the class.” *Id.* at 841.

⁹⁸ *Id.* at 840.

⁹⁹ *Id.* at 841.

¹⁰⁰ *Id.* at 840.

¹⁰¹ *Id.* at 841. Principal agreed that it would not take any position on appellate jurisdiction, and thus, as the Eighth Circuit noted, on appeal “Principal [was] silent on the question of jurisdiction.” *Id.* at 842.

¹⁰² *Id.* at 841. The consent judgment also provided the potential for Ruppert to shift a percentage of the litigation costs he incurred to future class members. *Id.* at 841–42.

¹⁰³ *Id.* at 842.

remanded to the district court.¹⁰⁴ The court cited Eighth Circuit precedent that “rejected an attempt ‘to manufacture appellate jurisdiction by crafting a stipulation in which [the appellant] tied the fate of his remaining claim to the outcome of his appeal.’”¹⁰⁵

The Eighth Circuit recognized that its holding conflicted with a Second Circuit case, *Purdy v. Zeldes*,¹⁰⁶ in which the Second Circuit permitted appellate review despite the potential for the plaintiff to reassert a claim upon reversal and remand.¹⁰⁷ In *Purdy*, the plaintiff brought a malpractice suit against his former attorney regarding presentencing representation, alleging three claims.¹⁰⁸ After receiving adverse summary judgment rulings on two of his claims and engaging in limited discovery, Purdy decided his remaining claim was not worth pursuing by itself.¹⁰⁹ Purdy moved for, and was granted, dismissal of his claim without prejudice, allowing for refile of the claim only upon reversal of the summary judgment on his other two claims.¹¹⁰

On appeal, the Second Circuit determined that the final judgment rule was not violated and that the case was reviewable.¹¹¹ In applying a relatively flexible interpretation of finality, the Second Circuit supported its holding by stating that

¹⁰⁴ *Id.* The class would, of course, have to be awarded damages for Ruppert to seek a share of the recovery. However, it is not clear that class certification would be required to shift some of the legal fees Ruppert incurred.

¹⁰⁵ *Id.* at 842–43 (alteration in original) (quoting *Clos v. Corr. Corp. of Am.*, 597 F.3d 925, 928 (8th Cir. 2010)). In case the court was “wrong about finality,” its additional holding was that the consent judgment resolved Ruppert’s claim, therefore leaving him with no personal stake in the case and rendering the case moot. *Id.* at 843. The court also acknowledged that this backup holding created a split with the D.C. Circuit. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006) (finding “no difference between those who voluntarily settle individual claims and those who have their individual claims involuntarily extinguished,” as long as the party maintained an interest in shifting expenses related to the class action litigation). Further discussion of the backup mootness holding and the circuit split it created is beyond the scope of this Note.

¹⁰⁶ 337 F.3d 253 (2d Cir. 2003). The Second Circuit held that a decision is final for purposes of appeal irrespective of a plaintiff’s potential to reassert a dismissed claim in the event of remand, so long as the “plaintiff’s ability to reassert a claim is made conditional on obtaining a reversal from [the court of appeals].” *Id.* at 258.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 257.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* One thing worth noting is that *Purdy* did not involve a consent judgment. Rather, the court dismissed the remaining claim “without prejudice to refile it if, but only if, the dismissal of his first two claims was reversed on appeal.” *Id.*

¹¹¹ *Id.* at 258.

the final judgment rule was not implicated because the dismissed claim could only be reasserted following a reversal, rather than at the unfettered discretion of the plaintiff, and that upon affirmance the case would come to an end.¹¹² The court reasoned that tying the reassertion of the claim to appellate reversal “furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claim[] while accepting the risk that if the appeal is unsuccessful, the litigation will end.”¹¹³ However, according to the court, when reassertion is not tied to a reversal, the cost-benefit analysis is not nearly the same since the court cannot determine what resources may be saved, even upon an affirmance.¹¹⁴

Despite recognizing the Second Circuit’s holding, the Eighth Circuit declined to follow it.¹¹⁵ Instead, the Eighth Circuit applied a more strict view of finality. Notwithstanding the fact that Ruppert’s dismissal of Fairmount Park’s individual claim left nothing more for the district court to decide, the court held that the potential for Ruppert’s claim to “spring back to life,”¹¹⁶ even if conditioned on a reversal, left Ruppert’s claims unresolved and thus violated the final judgment rule.¹¹⁷

B. Split Two: Effect of the Potential for Litigation To Continue upon Reversal and Remand on the Appealability of Consent Judgments

Next, it is appropriate to consider how a broader reading of *Ruppert’s* holding—that a consent judgment that provides for continued litigation upon reversal and remand is not a final judgment for purposes of appeal—conforms with Fifth Circuit precedent and conflicts with precedent of the Seventh and Eleventh Circuits.

The view that appeal from a conditional consent judgment is prohibited is supported by the Fifth Circuit. In *Amstar Corp. v. Southern Pacific Transport Co. of Texas & Louisiana*,¹¹⁸ the

¹¹² *Id.*

¹¹³ *Id.* at 257–58.(quoting *Chappelle v. Beacon Commc’ns Corp.*, 84 F.3d 652, 654 (2d Cir. 1996)).

¹¹⁴ *See id.* at 258.

¹¹⁵ *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 842–43 (8th Cir. 2013).

¹¹⁶ *Id.* at 842.

¹¹⁷ *See id.*

¹¹⁸ 607 F.2d 1100 (5th Cir. 1979) (per curiam). For *Amstar’s* facts, see *supra* Introduction.

parties agreed to a stipulation of facts and submitted a request to the court to enter a consent judgment on the parties' terms.¹¹⁹ The parties stipulated that Southern Pacific was liable and that it would pay the damages determined by the court's partial summary judgment ruling.¹²⁰ Despite the clear reservation of Amstar's right to appeal the determination of damages, the Fifth Circuit dismissed an appeal from the consent judgment.¹²¹ Relying on its own precedent, the Fifth Circuit reasoned that "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it."¹²² The Fifth Circuit recently affirmed that review is precluded from a judgment that both parties freely consent to.¹²³

Arguably, the Eighth Circuit's holding in *Ruppert* and Fifth Circuit precedent together stand for the proposition that appeal from a consent judgment is not warranted—despite the consent judgment's reservation of the right to appeal—when the judgment is entered with the actual consent of both parties and would result in continued litigation at the trial level upon reversal and remand.

While consistent with Fifth Circuit precedent, a broader reading of the Eighth Circuit's holding in *Ruppert*—that appeal is prohibited from a conditional consent judgment in which litigation will continue upon reversal and remand—conflicts with established precedent in the Seventh and Eleventh circuits.¹²⁴

¹¹⁹ *Amstar Corp. v. S. Pac. Transp. Co. of Tex. & La.*, 449 U.S. 924, 925 (1980) (Blackmun, J., dissenting).

¹²⁰ *Id.* at 924–25.

¹²¹ *See Amstar*, 607 F.2d at 1100.

¹²² *Id.*

¹²³ *Jones v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 422 F. App'x. 315, 316 (5th Cir. 2011) (per curiam) (affirming *Amstar*, 607 F.2d 1100).

¹²⁴ Arguably, this broader reading with respect to the appealability of conditional consent judgments also creates a split with the First and Third Circuits which have held similar to the Seventh and Eleventh Circuits. *See Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 223 (3d Cir. 2000) (“[A] party to a consent decree or other judgment entered by consent may appeal from that decree or judgment if it explicitly reserves the right to do so.”); *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am.*, 132 F.3d 824, 828 (1st Cir. 1997) (“[A] party to a consent judgment is thereby deemed to waive any objections it has to matters within the scope of the judgment” (quoting *Coughlin v. Regan*, 768 F.2d 468, 469–70 (1st Cir. 1985) (internal quotation marks omitted)). However, the First and Third Circuits' precedents are not discussed further in this section to avoid unnecessary repetition.

1. Seventh Circuit Precedent

Contrary to the Fifth Circuit, the Seventh Circuit supports the view that appeals from conditional consent judgments are permissible.¹²⁵ After recognizing “a split among the circuits with respect to whether a stipulated judgment may be appealed,”¹²⁶ the Seventh Circuit soon answered in the affirmative in *INB Banking Co. v. Iron Peddlers, Inc.*¹²⁷ *INB Banking* involved a conversion action in which INB Banking Company (“INB Bank”) sought to recover possession of two trucks that it had leased to a third party, B&P Excavating, Inc., which traded the trucks to Iron Peddlers.¹²⁸ After the district court’s evidentiary ruling on a motion in limine, Iron Peddlers was effectively left without a defense.¹²⁹ Iron Peddlers then consented to a judgment in favor of INB Bank but specifically sought to reserve a right to appeal the exclusion of evidence.¹³⁰ Judgment was entered by the court “without waiving the right of the defendant to appeal the exclusion of the above evidence.”¹³¹ On appeal, the Seventh Circuit decided to adopt Eleventh Circuit precedent and “follow the same rule”¹³² that “a party who consents to judgment while explicitly reserving the right to appeal preserves that right.”¹³³ The Seventh Circuit granted appeal despite the defendant’s consent to the district court’s judgment, as well as the potential for litigation to continue at the district court upon a reversal of the exclusion of evidence.¹³⁴

The Seventh Circuit affirmed *INB Banking* and “provid[ed] a more complete explanation of the existence of appellate jurisdiction over consent judgments that reserve a right of

¹²⁵ *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) (holding that a party to a consent decree or other judgment entered by consent may appeal from that decree or judgment if that party explicitly reserves the right to do so).

¹²⁶ *Hudson v. Chi. Teachers Union, Local No. 1*, 922 F.2d 1306, 1312 (7th Cir. 1991).

¹²⁷ 993 F.2d 1291.

¹²⁸ *Id.* at 1291.

¹²⁹ *Id.* at 1292.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (citing *Shores v. Sklar*, 885 F.2d 760, 764 n.7 (11th Cir. 1989)).

¹³⁴ *See id.* at 1292.

appeal”¹³⁵ in *Downey v. State Farm Fire & Casualty Co.*¹³⁶ In *Downey*, the Seventh Circuit explained that a consent judgment that reserves a right to appeal does not constitute a waiver of, but rather ensures the right to, appeal.¹³⁷ In holding a conditional consent judgment final, the court said that “for jurisdictional purposes there is no distinction between ‘consent’ and ‘adversarial’ judgments . . . and any party can appeal as of right from a final decision adverse to his interests.”¹³⁸ The court believed that distinguishing between judgments entered with the consent of both parties and judgments entered against the wishes of one party “would create an extra-statutory condition on appeal.”¹³⁹

2. Eleventh Circuit Precedent

As the Seventh Circuit made clear by adopting the Eleventh Circuit’s rule in *INB Banking*, the Seventh and Eleventh Circuits are in agreement concerning the appealability of conditional consent judgments. The Eleventh Circuit first confronted the issue in *Dorse v. Armstrong World Industries, Inc.*¹⁴⁰ *Dorse* involved a products liability claim.¹⁴¹ A partial summary judgment determined that the defendant was not privy to a government specification defense under applicable state law.¹⁴² Following the summary judgment ruling, the parties stipulated to the entry of a consent judgment in favor of Dorse, but expressly reserved the defendant’s right to appeal the summary judgment ruling.¹⁴³

The Eleventh Circuit contemplated how the terms of the consent judgment impacted review of the case. The court noted Fifth Circuit precedent from *Amstar* prohibiting appeals of this nature; however, the court determined that given the

¹³⁵ Petition for Writ of Certiorari at 17, *Ruppert v. Principal Life Ins. Co.*, 134 S. Ct. 152 (2013) (No. 12-1425), 2013 WL 2470139, at *17.

¹³⁶ 266 F.3d 675 (7th Cir. 2001).

¹³⁷ *Id.* at 683 (“[A]n express reservation of the right to appeal avoids waiver of contested issues that had been resolved earlier in the litigation.”).

¹³⁸ *Id.* at 682.

¹³⁹ *Id.*

¹⁴⁰ 798 F.2d 1372 (11th Cir. 1986).

¹⁴¹ *Id.* at 1373.

¹⁴² *Id.* at 1374.

¹⁴³ *Id.* at 1374–75. The rationale was that the defendant was willing to pay the settled upon amount of damages, but only on condition that the partial summary judgment be affirmed on appeal.

stipulation's clear recognition of the defendant's right to appeal, there was "no reason why that intent should be frustrated in this case."¹⁴⁴ The Eleventh Circuit held this way despite the possibility of continued litigation upon a reversal. In fact, a review on the merits led to a reversal and remand to the district court for further proceedings.¹⁴⁵

Recently, the Eleventh Circuit stated that the *Dorse* court granted appellate review because "the defendant expressly reserved the right to appeal," but distinguished the facts of the case at hand in which the defendant did not reserve—and thus the defendant was not entitled to—a right to appeal.¹⁴⁶

The Seventh and Eleventh Circuits are in agreement that appeal from a conditional consent judgment is permissible, as long as the judgment reserves a party's right to appeal.¹⁴⁷ This proposition stands in stark contrast to the Fifth Circuit which prohibits appeal from a judgment consented to by both parties.¹⁴⁸ It also appears to be a split from a broader reading of the Eighth Circuit's holding in *Ruppert*, which prohibits appellate review from a consent judgment despite an explicit reservation of the right to appeal, because of the potential for litigation to continue at the trial level on remand.¹⁴⁹

III. ARGUMENTS FOR AND AGAINST STRICT REQUIREMENT OF FINALITY FOR CONSENT JUDGMENTS

Hesitancy to grant appellate review—as displayed by the Fifth Circuit and recently the Eighth Circuit—is rooted in strict adherence to the requirement of finality.¹⁵⁰ Yet, granting review—as displayed by the Second, Seventh, and Eleventh Circuits—is based on more flexible and likely practical application of the finality requirement.¹⁵¹

¹⁴⁴ *Id.* at 1376–77.

¹⁴⁵ *Dorse v. Armstrong World Indus., Inc.*, 837 F.2d 957, 958 (11th Cir. 1988).

¹⁴⁶ *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 374 n.3 (11th Cir. 2012).

¹⁴⁷ *See supra* Part II.B.1.

¹⁴⁸ *See supra* Part II.B.

¹⁴⁹ *See supra* Part II.B.

¹⁵⁰ *See, e.g.*, *Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 688 (8th Cir. 1999) (“[A] dismissal without prejudice, coupled with the intent to refile the voluntarily dismissed claims after an appeal of the interlocutory order, is a clear evasion of the judicial and statutory limits on appellate jurisdiction.”); *see also supra* Part I.A.1.

¹⁵¹ *See supra* Parts II.A, II.B.1–2.

A. *Arguments for a Strict Requirement of Finality*

The Fifth and Eighth Circuits' allegiance to the final judgment rule is motivated by the policy of avoiding "piecemeal litigation"¹⁵² and the rule that "[a] case is not to be sent up in fragments."¹⁵³ Strict adherence to finality arguably achieves three objectives: protecting the roles of trial and appellate courts, ensuring smoother trials, and preserving scarce appellate resources.¹⁵⁴

First, a strict requirement of finality preserves the traditional allocation of power between the district courts and the circuit courts.¹⁵⁵ The trial process facilitates effective appellate review and thus helps ensure equitable results for the parties.¹⁵⁶ Delayed appellate review protects a trial judge's authority by allowing efficient governance of trials as well as attaching greater significance to district court rulings due to the inability to review interlocutory orders.¹⁵⁷ These benefits help a trial court satisfy its primary obligations of fact finding, applying legal standards, and ruling on procedural matters.¹⁵⁸ Fulfillment of these responsibilities benefits appellate courts by allowing them to focus solely on important substantive issues and also receive a well-developed record that presents these issues in a fuller setting.¹⁵⁹

Second, in addition to the relatively abstract notion of preserving the functions of trial and appellate courts, a strict requirement of finality allows trial proceedings to progress more smoothly and efficiently.¹⁶⁰ Courts often speak of "efficiency" with respect to avoiding interference with and deliberate delay of trial court proceedings by having unnecessary matters reviewed

¹⁵² *Catlin v. United States*, 324 U.S. 229, 233–34 (1945); *see also* *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 425 n.4 (8th Cir. 2008) ("Despite our frequent warnings, many lawyers use this dismissal-without-prejudice tactic to evade the statute limiting our appellate jurisdiction to the review of final orders.").

¹⁵³ *Catlin*, 324 U.S. at 233–34 (quoting *Luxton v. N. River Bridge Co.*, 147 U.S. 337, 341 (1893)).

¹⁵⁴ *See* WRIGHT ET AL., *supra* note 28.

¹⁵⁵ *See id.* § 3907.

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* § 3905.

¹⁵⁸ *Id.* § 3907.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

on appeal.¹⁶¹ First and foremost, more efficient proceedings save litigants time and money. Next, a smoother trial process helps prevent the weakening of both testimonial and real evidence from the passing of time as well as time lapses in trial proceedings.¹⁶² Maintaining the strength and credibility of evidence is crucial to avoiding prejudice to the jury and ensuring the jury can perform its proper function.¹⁶³ Finally, by delaying review, issues may be resolved that could have resulted in numerous interlocutory appeals.¹⁶⁴ This delay in review allows cases to be decided more quickly and brings about closure for parties sooner.¹⁶⁵ Avoiding these interlocutory appeals also serves the third objective of finality—conserving appellate resources.

Third, a strict concept of finality is vital to ensuring the most efficient allocation of limited appellate resources. As the circuit courts become more burdened—case filings rose four percent in the federal circuit courts from 2011 to 2012¹⁶⁶—less and less time can be devoted to deciding more difficult cases correctly.¹⁶⁷ With less time allocated to difficult issues, less clearly articulated rules presumably will follow. Consequently, district courts may have trouble applying circuit court decisions correctly, which will lead to more appeals and further strain on appellate resources. This foreseeable problem supports relieving the burden on circuit courts. In the context of consent judgments, this can be achieved by denying appeals, or at most, applying the traditional waiver of

¹⁶¹ *Id.*; see also *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) (“[T]he finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.”) Unnecessary appellate lawmaking is also avoided. See *WRIGHT ET AL.*, *supra* note 28, § 3907.

¹⁶² See *WRIGHT ET AL.*, *supra* note 28, § 3907.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ *U.S. Courts of Appeals—Judicial Business 2012*, USCOURTS.GOV, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2012> (last visited Aug. 23, 2015).

¹⁶⁷ Harlon Leigh Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 *YALE L.J.* 62, 86 (1985).

error standard of review.¹⁶⁸ Doing so allows appellate courts to shift resources from judgments entered with the consent of both parties to nonconsensual judgments which intuitively involve more dispute.¹⁶⁹

B. Arguments for a More Flexible Interpretation of Finality

On the other hand, two important considerations arguably support a more flexible approach to the finality requirement in regards to consent judgments: facilitating settlements and conserving judicial resources.

Settlement remains a high priority in the federal court system.¹⁷⁰ In fact, district courts are granted a great deal of flexibility to encourage settlements which are “viewed as an efficient cure for the current backlog of cases and high costs of litigation.”¹⁷¹ Traditionally, the settlement rate has been recognized at about ninety-five percent of cases.¹⁷² Since a substantial majority of cases are settled, settlement is the model of civil litigation and provides a way to avoid the time and expense involved in a court’s application of strict legal rules and determinations of right and wrong.¹⁷³ Further, settlement generally provides the best outcome for plaintiffs, far exceeding success at trial in which plaintiffs are successful in “less than 5 percent of filed cases.”¹⁷⁴ Defendants also benefit by saving time and money by settling the case and may also protect their reputation and image, something important to companies and individuals alike. In addition to benefitting parties, settlement ultimately benefits the federal judicial system which would collapse without settlements serving to contain the district courts’ workload.

¹⁶⁸ Zitko, *supra* note 55, at 247–48. This standard subjects conditional consent judgments to a de facto rule of non-appealability. *See supra* Part I.B.

¹⁶⁹ *See* Zitko, *supra* note 55, at 247–48.

¹⁷⁰ *Id.* at 261; *see U.S. District Courts*, USCOURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx> (last visited Feb. 24, 2014).

¹⁷¹ Zitko, *supra* note 55, at 261 (footnote omitted).

¹⁷² Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009).

¹⁷³ WRIGHT ET AL., *supra* note 28, § 3907. Time is also saved on other aspects of a trial including jury selection.

¹⁷⁴ Eisenberg & Lanvers, *supra* note 172, at 112–13.

Granting appeals on the merits from conditional consent judgments facilitates settlement by providing leverage in negotiations. When one party seeks to reserve a right to appeal, the other party essentially allows “a speedier and less costly road to appellate review” by consenting to an express reservation in the consent judgment.¹⁷⁵ As a result, the consenting party has “greater bargaining power in fashioning the terms of settlement.”¹⁷⁶ Similarly, a willingness to dispense with the right to appeal also provides a party with bargaining power in settlement discussions.

First, a party set on reserving a right to appeal will likely be willing to agree to a lower settlement amount. This scenario benefits both parties. One party is able to secure review of a ruling that is generally detrimental to the case and that one feels was decided incorrectly, while the other party receives the benefit of paying relatively less with the reasonable assurance that district court rulings are affirmed on appeal in the vast majority of cases.¹⁷⁷ A party wishing to secure appellate review would be motivated to agree to a relatively low settlement because the alternative means of securing a right to appeal—litigating to final judgment—would involve great time and expense.

On the other hand, a party may be able to secure more favorable settlement terms by offering to forgo, rather than reserve, the right of appeal. The ability to secure appellate review in a consent judgment may benefit settlement negotiations, even if the right is not reserved. For example, had settlement talks in *Ruppert* reached a stalemate, the plaintiff could have offered to dispense with his right to review of the denial of class certification, and thus his right to seek further relief from the defendant. Dispensing with this right, and thus not reserving a right to appeal, would have provided the defendant with certainty regarding its liability to the Fairmount Park fund—allowing more certainty in its financial planning going forward—and would also have saved the time, expense, and loss of reputation associated with fighting the claim on

¹⁷⁵ Zitko, *supra* note 55, at 262.

¹⁷⁶ *Id.*

¹⁷⁷ See Table B-1—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2012), USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B01Mar12.pdf>.

appeal. Consequently, a defendant may be willing to agree to a higher payout, thus helping the parties overcome an impasse in negotiations. Just how much leverage the plaintiff in *Ruppert*, or similarly situated parties, would have by offering to exclude a right to appeal from a consent judgment would likely depend on factors such as the party's confidence in obtaining a reversal as well as its willingness to incur the opportunity costs associated with bringing an appeal.¹⁷⁸

Next, facilitating appeal through a more flexible interpretation of finality promotes judicial economy. Judicial economy is a broad principle that the limited resources of the judicial system or a specific court should be efficiently managed and conserved.¹⁷⁹ The truth is that a very large majority of district court decisions are affirmed on appeal.¹⁸⁰ In 2012, for example, only 6.7% of district court decisions were reversed on appeal.¹⁸¹ Although conditional consent judgments may lead to continued litigation at the district court level, the rate of reversal ensures that this scenario will be quite limited. Further, it is likely that the resources expended on continued litigation on remand would be heavily outweighed by the resources saved by avoiding the motion practice and litigation that would otherwise be required to reach final judgment. Therefore, it is likely that in the aggregate, "whenever a party is willing to forego fully litigating its case at the district court level . . . to have a chance at getting certain findings reversed on appeal," judicial resources will be conserved.¹⁸²

To understand how judicial resources are conserved, consider a claim that a plaintiff prefers not to litigate as an individual claim after receiving adverse rulings on her two other claims.¹⁸³ This plaintiff may be willing to voluntarily dismiss the claim through a consent judgment and risk abdication of the claim upon affirmance, in exchange for a speedier road to appeal. If

¹⁷⁸ These opportunity costs include the time, money, and other resources that could be devoted elsewhere—something especially important when a plaintiff is suing multiple parties.

¹⁷⁹ BLACK'S LAW DICTIONARY 975 (10th ed. 2014).

¹⁸⁰ See Table B-1—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2012), USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B01Mar12.pdf>.

¹⁸¹ *Id.*

¹⁸² Zitko, *supra* note 55, at 262.

¹⁸³ See Purdy v. Zeldes, 337 F.3d 253, 257 (2d Cir. 2003).

this cost-benefit analysis with respect to securing appeal is not available, it may not be worth it for the plaintiff to dismiss the claim. Consequently, the plaintiff may litigate the individual claim by itself and then seek appellate review regarding her two other claims. That scenario seems to involve unnecessary time and costs, which is especially troubling when considered on a larger scale involving many similarly situated plaintiffs.

IV. SOLUTION

A clear split in authority exists with respect to finality regarding conditional voluntary dismissals as well as the appealability of consent judgments that reserve a right to appeal. Despite noting the conflicting views of other circuits, the Eighth Circuit appeared to have no intention of revisiting its position on these issues in *Ruppert*, and it is likely that other circuits will do the same when confronting similar finality issues.¹⁸⁴ Further, it remains unclear how circuits with limited or no exposure to these issues may decide.¹⁸⁵

A uniform approach will help resolve these discrepancies. The result should be a rule requiring appellate courts to recognize an express reservation of a right to appeal in a consent judgment, including in consent judgments in which reasserting a claim is conditioned on a reversal. This approach would combine Second Circuit precedent regarding appealability following conditional voluntary dismissals and precedent from both the Seventh and Eleventh Circuits regarding the appealability of consent judgments which reserve a right to appeal.

Four primary arguments support a solution to this effect. First, a uniform standard recognizing the right to appeal would provide transparency for courts and parties to settlement negotiations and thus further a consent judgment's facilitation of settlements. Second, it would promote judicial economy. Third, the solution would not violate the final judgment rule. Fourth, and finally, past flexibility in interpreting the limits of statutory appellate jurisdiction support adopting the solution.

¹⁸⁴ Petition for Writ of Certiorari at 25, *Ruppert v. Principal Life Ins. Co.*, 134 S. Ct. 152 (2013) (No. 12-1425), 2013 WL 2470139, at *25.

¹⁸⁵ For instance, will other circuits decide similarly to the Seventh Circuit and adopt another circuit's more flexible rule, or will they decide similarly to the Eighth Circuit and adhere to longstanding precedent within their respective circuit supporting a strict adherence to finality?

A. *Providing Certainty and Facilitating Settlement*

First, a uniform rule would provide courts and parties with more certainty and thus promote settlements. A current issue is that parties cannot be certain whether a reservation of a right to appeal in a consent judgment will be recognized. For example, Third Circuit precedent on the appealability of consent judgments has been very inconsistent. The Third Circuit has at times applied an even more liberal approach than the Seventh and Eleventh Circuits by considering the intent of the parties rather than requiring a right to appeal to be explicitly reserved in the consent judgment; yet, at other times the Third Circuit has applied a strict requirement of finality by denying appeal despite express reservation of a right to appeal in the consent judgment.¹⁸⁶

Assurance that a right to appeal will be recognized “will make all parties clearly aware of their respective rights under a consent judgment,” and will help avoid the type of inconsistency in the Third Circuit that limits the effectiveness of conditional consent judgments.¹⁸⁷ While negotiating, parties will be certain how the appellate court will interpret the right to appeal and what precedent it will apply. A consistent, predictable standard will allow parties to negotiate at arm’s length without speculation or uncertainty and to focus their concerns on arriving at speedy and equitable outcomes.

While assurance of how conditional consent judgments will be treated on appeal will likely be beneficial, it may be argued that the assurance should be that a right to appeal will be forfeited, rather than reserved. First, it may be in a party’s best interest to settle an issue once and for all rather than taking a risk by accepting a lesser payout in return for expediting appeal. Not having the ability to appeal as an option will force parties to act rationally and make sure to secure agreements that are in their best interest. Second, negotiating over the reservation or

¹⁸⁶ Compare *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 222–23 (3d Cir. 2000) (granting review because it was the parties’ intent to reserve a right of appeal, despite not explicitly doing so), and *Brzowski v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 176–77, 182 (3d Cir. 2004) (permitting review even when “[t]he intention to appeal was not included in the stipulation” and litigation would continue at the district level upon remand), with *Verzilli v. Flexon, Inc.*, 295 F.3d 421, 424–25 (3d Cir. 2002) (denying review despite an explicit reservation of the right to appeal because litigation would continue in the district court upon reversal).

¹⁸⁷ *Zitko*, *supra* note 55, at 263.

abdication of the right to appeal may actually derail negotiations. With all of the considerations that go into the determination of whether to pursue or forgo an appeal—such as the chances of success on appeal and the willingness to expend the resources to bring the appeal—negotiations may become more complicated. Therefore, negotiating over the reservation or forfeit of a right to appeal may actually prolong discussions as well as lead to an impasse, rather than help overcome one.

Notwithstanding these contentions, it is clear that direction is needed and it seems that a standard of recognizing appeals would be most beneficial. Despite the potential to prolong the final resolution of a case and to derail settlement talks, settlements would be encouraged by allowing appeal for two reasons. First, many consent judgments are entered because of the potential to reserve a right to appeal. Without being able to reserve such a right, parties may forgo entering a stipulation. Second, as discussed earlier, reserving a right to appeal presents important leverage in settlement negotiations.¹⁸⁸ A party persistent on reserving a right to appeal is more likely to agree to a relatively low settlement amount, while a party wishing for the other party to forgo appeal is more likely to agree to a relatively high settlement amount.

B. *Promoting Judicial Economy*

Second, a uniform rule recognizing the reservation of a right to appeal and to also reassert claims upon reversal would promote judicial economy. It is true that, in an initial sense, denying appeals from consent judgments would save appellate judicial resources.¹⁸⁹ However, the inability to bring an appeal may lead to a decrease in consent judgments and thus increased time spent adjudicating cases at the district court level.¹⁹⁰ Further, an increase in the number of cases litigated to final judgment may lead to an increase in requests for appellate review.¹⁹¹

It may be argued that judicial resources will not be conserved in the aggregate, because upon reversal, remand, and further litigation at the trial level, more resources will have been

¹⁸⁸ See *supra* Part III.B.

¹⁸⁹ Zitko, *supra* note 55, at 261.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

expended, which is a major issue raised in opposition to interlocutory appeals. Appellants face little downside to a purely interlocutory appeal because even if the appeal is unsuccessful, they remain in the same position that they would have been in had the appeal been prohibited.¹⁹² However, there is an important distinction with respect to purely interlocutory appeals and conditional consent judgments. In the case of conditional consent judgments, because a judgment has been entered, the case ends upon affirmance of the judgment.¹⁹³ The fact that the case ends upon affirmance protects against “an abusive appellant attempting to appeal each minor issue in a case.”¹⁹⁴ This is something that generally cannot be avoided with purely interlocutory appeals in which the case continues at the trial level following affirmance or denial.

Further, a clear requirement that a right to appeal must be reserved to secure appeal will benefit both trial and appellate judges. Trial judges will know what language a consent judgment must contain and will not waste time determining first, whether appeal will be granted, and second, what procedures are required to secure review. Appellate courts will also save time by not looking beyond the terms of the judgment and to the intent of the parties.¹⁹⁵ Further, a consistent standard will avoid the need for appellate courts to determine where they stand on the issue—including reviewing their respective precedent as well as other courts' precedent and determining which to follow.

Although there may be instances when an appellate court has to hear an appeal it may not otherwise have to allocate resources to, or a district court has to continue proceedings upon remand, a rule allowing for appeal from consent judgments expressly reserving the right to appeal will likely promote judicial economy. Judicial economy would be promoted because the rule would encourage parties to forego needless trial court litigation, there is a high likelihood of affirmance and thus an ending of the case, it would safeguard against abusive appeals of insignificant issues, and benefit trial and appellate judges.

¹⁹² *Id.* at 262.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See, e.g.,* Keefe v. Prudential Prop. & Cas. Ins. Co., 203 F.3d 218, 222–23 (3d Cir. 2000) (granting review because it was the parties' intent to reserve a right of appeal, despite not explicitly doing so).

C. *Remaining Faithful to the Final Judgment Rule*

Third, the proposed solution would not weaken the final judgment rule. The only way a dismissed claim could be reasserted is if the parties return to the trial court on remand following a reversal by the appellate court. In that case, because of the remand, the case would not have been fully resolved anyway.¹⁹⁶ The argument can be made, as discussed above, that Congress has made its intent concerning appellate jurisdiction clear and consequently, expediting appeal in a way not explicitly provided by statute is a run around of Congress's intent.¹⁹⁷ However, it is important to consider that finality jurisprudence has involved statutory interpretation by the Supreme Court. The collateral order doctrine, for instance, is a product of the Supreme Court's interpretation of the interlocutory appeals provision of § 1292 and finality requirement of § 1291.¹⁹⁸ Similarly, the Supreme Court can provide clarity on conditional consent judgments, not by rewriting the final judgment rule, but by articulating that conditional consent judgments fit within § 1291's requirement of a final judgment because these judgments resolve all outstanding issues and leave nothing for the trial court to decide.¹⁹⁹ In fact, these judgments fit squarely into the traditional definition of a final judgment—one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²⁰⁰

D. *Past Flexibility*

Finally, we have seen flexibility in applying the finality requirement. For example, the Second Circuit permits appeal following a voluntarily dismissal of a claim despite the ability to reassert the claim upon reversal.²⁰¹ Along the same lines, there have been numerous rule changes with respect to appellate jurisdiction including the adoption and eventual abandonment of

¹⁹⁶ Brief for Appellant at 17–18, *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003) (No. 02-7468), 2002 WL 32487715, at *17–18.

¹⁹⁷ See *supra* Part I.A.1.

¹⁹⁸ See *id.*

¹⁹⁹ See *supra* Part I.B.

²⁰⁰ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

²⁰¹ *Purdy*, 337 F.3d at 258. The Second Circuit held that a decision is final for purposes of appeal irrespective of a plaintiff's potential to reassert a dismissed claim in the event of remand, so long as the “plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from [the court of appeals].” *Id.*

the “death knell” doctrine which permitted interlocutory appeals following the denial of class certification.²⁰² Thus, further flexibility should be permitted to help promote the “efficient administration of justice in the federal courts.”²⁰³

CONCLUSION

It is clear that a uniform approach is needed in the context of conditional consent judgments because “[t]here is, still, too little finality about ‘finality.’”²⁰⁴ As established above, the right to appeal from a consent judgment is not only a central issue in cases involving denials of class certification, such as *Ruppert*, but also in a wide range of cases concerning a variety of issues.²⁰⁵ A rule that combines Second Circuit precedent with that of the Seventh and Eleventh Circuits,²⁰⁶ allowing appellate review from consent judgments that expressly reserve a right to appeal as well as the reassertion of claims upon a reversal, would provide stability in a very practical area of the law while serving the interests of the federal judiciary and litigants alike.

²⁰² WRIGHT ET AL., *supra* note 28, § 3907.

²⁰³ Petition for Writ of Certiorari at 1, *Ruppert v. Principal Life Ins. Co.*, 134 S. Ct. 152 (2013) (No. 12-1425), 2013 WL 2470139, at *1.

²⁰⁴ *Henry v. Lake Charles Am. Press, L.L.C.*, 556 F.3d 164, 172 (5th Cir. 2009) (quoting *United States v. 243.22 Acres of Land*, 129 F.2d 678, 680 (2d Cir. 1942)).

²⁰⁵ Petition for Writ of Certiorari at 28–29, *Ruppert*, 134 S. Ct. 152 (No. 12-1425) at *28–29; *see also supra* Part II.

²⁰⁶ Precedent concerning appellate jurisdiction with respect to conditional voluntary dismissals and precedent regarding conditional consent judgments, respectively.