

DISARMING THE FINALITY TRAP

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The federal courts of appeals have created—and acknowledged that they've created—a finality trap for would-be appellants. Litigants risk falling into the trap when they voluntarily dismiss some of their claims without prejudice and then try to appeal the district court's resolution of other claims. Most courts of appeals see this as an attempted end run around the general rule that appeals must wait until all claims are resolved. After all, the without-prejudice dismissal means that the voluntarily dismissed claims might resurface at some future point. Most courts of appeals accordingly hold that the voluntary, without-prejudice dismissal does not result in a final, appealable decision. The trap springs when those courts then don't provide a straightforward means for fixing the finality problem. Litigants are then left in litigation limbo. Their case is over and unchangeable in the district court. But the case is not final—and never will become final—for purposes of appeal.

The finality trap is asinine. And there's an easy fix: Give would-be appellants the choice of either disclaiming the right to refile the voluntarily dismissed claims or returning to the district court to continue the action. This choice obviates any refiling concerns and ensures that the right to appeal is not lost due to a small procedural misstep.

Recent struggles with the finality trap also hint at an alternative approach to finality. When determining whether a district court has issued a final, appealable decision, courts normally look to the substance of the district court's decision. That is, they ask whether the district court has actually resolved all of the claims. An alternative approach might ask only whether the district court is finished with an action. At that point—regardless of what the district court has done—the district court has entered a final decision. This shift in focus from what a district court has done to whether the district court is done might bring some much-needed clarity and simplicity to this area of the law.

INTRODUCTION

The federal courts have created what is—by their own admission—a

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procedural trap for unwary litigants. It's called the finality trap. And the last few years have seen courts repeatedly wrestle with it.¹ The trap stems from the general rule that in multyclaim actions, appeals must wait until the district court has resolved all of the claims.² Delaying appeals in these actions ensures that district court litigation can proceed uninterrupted and allows the court of appeals to address all issues at once rather than piecemeal. And if immediate appellate review of some claims is warranted, Federal Rule of Civil Procedure 54(b) permits the district court to enter a partial judgment on the resolution of some (but not all) claims, which an aggrieved party can immediately appeal.³

Litigants don't always want to wait for the district court to resolve all claims. And sometimes these impatient litigants can't or don't obtain a Rule 54(b) partial judgment. These litigants risk falling into the finality trap. The trap involves three steps. First, the would-be appellant makes the mistake of voluntarily dismissing some of its claims without prejudice, intending to then appeal the district court's resolution of other claims.⁴ Second, the court of appeals dismisses the case for lack of jurisdiction, holding that the voluntary, without-prejudice dismissal did not produce a final, appealable decision.⁵ Third, the district court refuses to let the would-be appellant fix the finality problem. This series of events leaves litigants in jurisdictional limbo. Their case is over and done with in the district court. But it is not final—and never will become final—for purposes of appeal.

Consider the repeated attempts to secure an appeal in *Waltman v. Georgia-Pacific, LLC*.⁶ The plaintiff in *Waltman* brought two claims, and the district court granted defendant's motion for summary judgment on one of

¹ E.g., Corley v. Long-Lewis, Inc., 965 F.3d 1222 (11th Cir. 2020); CBX Res., L.L.C. v. Ace American Ins. Co., 959 F.3d 175 (5th Cir. 2020); Williams v. Taylor Seidenbach, Inc., 958 F.3d 341 (5th Cir. 2020) (en banc); Galaza v. Wolf, 954 F.3d 1267 (9th Cir. 2020).

² FED. R. CIV. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties."); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434 (1956).

³ FED. R. CIV. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.").

⁴ E.g., Marshall v. Kan. City S. Ry. Co., 378 F.3d 495, 499 (5th Cir. 2004).

⁵ E.g., Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 438 (3d Cir. 2003) ("Given the strong policy against piecemeal litigation that underlies the finality requirement of § 1291, we have adhered consistently to the general rule that we lack appellate jurisdiction over partial adjudications when certain of the claims before the district court have been dismissed without prejudice." (emphasis omitted)).

⁶ 590 F. App'x 799 (10th Cir. 2014). The case began with a single claim for negligence, but the district court (at the defendant's request) split the claim into two: a claim for negligence and a claim for aggravating the plaintiff's injuries. *Id.* at 801. The district court granted summary judgment on the negligence claim. *Id.* at 802.

them.⁷ The parties then stipulated to dismiss the remaining claim without prejudice, thinking that doing so would allow an appeal from the district court's decision.⁸ But that voluntary dismissal, the Tenth Circuit concluded, meant that the district court had not issued a final, appealable decision.⁹ The parties then tried in vain to create such a decision in the following ways:

- Returning to the district court, the defendant asked the district court to grant summary judgment on the voluntarily dismissed claim. But the district court denied that motion because that claim was no longer before the court.¹⁰
- The plaintiff asked the district court to reopen the case. But the district court refused, concluding that it had no authority to reopen the action.¹¹
- The plaintiff sought reconsideration, contending that the Tenth Circuit's conclusion regarding the lack of a final, appealable decision meant that the district court action was not yet over. The district court stuck by its original decision.¹²
- The plaintiff sought relief from the judgment. The district court denied that request, too.¹³

As a last resort, the parties jointly asked the district court to enter a partial judgment under Rule 54(b).¹⁴ The district court relented and entered the judgment.¹⁵ But in the subsequent appeal, the Tenth Circuit held that the Rule 54(b) partial judgment was improper and again dismissed the appeal for a lack of jurisdiction.¹⁶ The Tenth Circuit noted the "grim" prospects of the plaintiff ever being able to appeal.¹⁷ Indeed, the "numerous procedural vehicles [that had] already been duly examined and rejected" left the court "in grave doubt as to whether [the plaintiff] has any further recourse."¹⁸

The finality trap is asinine. It stems from appellate courts' concern that litigants might use voluntary, without-prejudice dismissals to circumvent the general rule that appeals must wait until all claims have been resolved.¹⁹ That

⁷ *Id.* at 802.

⁸ *Id.*

⁹ *Id.* at 803–04.

¹⁰ *Id.* at 804.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 814.

¹⁵ *Id.* at 804.

¹⁶ *Id.* at 810. The court determined that the resolved and voluntarily dismissed claims were not sufficiently separate, and the district court had not explained its reasons for entering the partial judgment. *Id.*

¹⁷ *Id.* at 817.

¹⁸ *Id.* at 817 n.13. The only thing the parties did not try—and which the district court had suggested—was asking the district court to convert the dismissal to one with prejudice. *Id.* at 806.

¹⁹ See, e.g., Great Rivers Coop. of Se. Iowa v. Farmland Indus., 198 F.3d 685, 688 (8th Cir.

is, courts fear that litigants will voluntarily dismiss some claims, appeal the resolution of other claims, and later reinstate the voluntarily dismissed claims.²⁰ Since the voluntarily dismissed claims might resurface, courts of appeals suspect that the action is not actually over.²¹ These appeals thus raise the specter of piecemeal review, in which an appellate court reviews parts of a single action in multiple appeals. To prevent these manufactured appeals and avoid piecemeal review, most courts hold that the voluntary, without-prejudice dismissal does not result in a final, appealable decision.

To be sure, litigants share some of the blame when they fall into the finality trap. Ideally, they would be aware of appellate courts' rule that voluntary, without-prejudice dismissals do not produce a final, appealable decision. But most of the blame falls on the courts, both district and appellate. Whatever the wisdom of courts' concerns over manufactured appeals—and there is reason to question that wisdom²²—voluntarily dismissing all remaining claims without prejudice is a small procedural misstep. The punishment, however, is immense: the forfeiture of the right to appeal. Courts must disarm the finality trap. There is a simple way to do so: allow litigants to fix the appellate-jurisdiction problem by either disclaiming the right to refile the voluntarily dismissed claims or returning to the district court to finish the action.²³

Any discussion of the finality trap must also include the Eleventh Circuit's recent holding that voluntary, without-prejudice dismissals of all outstanding claims result in a final, appealable decision.²⁴ There is some sense to this rule. Although litigants might try to refile the voluntarily dismissed claims, there is normally no certainty that they will. The district court thus seems finished with the case. And there might be some wisdom to saying that the district court has issued a final, appealable decision when it is finished with a case. This conception of finality is uncommon, as modern finality jurisprudence focuses on the substance of a district court's decision. That is, appellate courts normally ask whether the district court has issued a judgment that actually resolves all claims in an action. But it might be better—simpler, clearer, and more straightforward—to ask only whether the district court is done. This rethinking of finality might be radical. But it might

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.”).

²⁰ See, e.g., *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 211 (2d Cir. 2005).

²¹ See, e.g., *Horwitz v. Alloy Auto. Co.*, 957 F.2d 1431, 1436 (7th Cir. 1992) (noting that a voluntary, without-prejudice dismissal “did not terminate the litigation and no one contemplated that it would”; indeed, “[e]verybody, including the district court, expect[ed] to see this case again”).

²² See *infra* Section I.A.

²³ See *infra* Part II.

²⁴ *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1231 (11th Cir. 2020).

also be a big step towards improving the current system of federal appellate jurisdiction.

In this Essay, I present a solution to the finality trap and suggest a possible refocusing of finality. In Part I, I use a line of recent Fifth Circuit decisions to illustrate the finality trap and courts' failures to disarm the trap. In Part II, I urge the courts of appeals to disarm the finality trap by giving litigants a choice: disclaim their right to refile the voluntarily dismissed claims, or return to the district court to continue the action. And in Part III, I explore the possibility of refocusing finality on *whether* the district court is done, not *what* the district court has done.

I THE FINALITY TRAP

The finality trap comes from courts' attempts to prevent litigants from manufacturing interlocutory appeals in multyclaim actions.²⁵ Interlocutory appeals are the exception in federal practice. That's because federal litigants must wait until the end of proceedings—when all issues have been decided and all that remains is enforcing the judgment—before appealing any interlocutory decisions.²⁶ So most federal actions produce, at most, a single appeal. This rule—often called the “final-judgment rule”—comes from 28 U.S.C. § 1291’s general grant of appellate jurisdiction over “final decisions” of the district courts.²⁷ Courts normally define a “final decision” as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²⁸

The final-judgment rule is thought to strike the proper balance between the interests that underlie the timing of appeals.²⁹ Of particular relevance to

²⁵ The term “finality trap” first appeared in an appellate court opinion in *Marshall v. Kan. City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004). That case quoted the title of one of two articles by Terry W. Schackmann and Barry L. Pickens on the topic. See Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part I)*, 58 J. MO. B. 78 (2002); Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part II)*, 58 J. MO. B. 138 (2002).

²⁶ See 28 U.S.C. § 1291; *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408 (2015) (“A ‘final decision’ is one ‘by which a district court disassociates itself from a case.’” (quoting *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 42 (1995))); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (“A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”).

²⁷ See, e.g., *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

²⁸ *Ritzen Grp., Inc. v. Jackson Masonry, L.L.C.*, 140 S. Ct. 582, 586 (2020) (quoting *Catlin*, 324 U.S. at 233); see also *United States v. Williams*, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a judgment was appealable if it “end[ed] the litigation and [left] nothing but execution of the court’s decision, the standard definition of ‘final’ under § 1291”).

²⁹ See Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157–58 (1984); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547–48 (2000).

the present discussion, postponing appellate review avoids piecemeal review. District court litigation can proceed uninterrupted by multiple appeals, which not only would add expense and delay but also could be used to harass lesser-resourced parties. Consolidating all issues into a single appeal also requires only a single panel of judges to learn the case, and that panel can resolve all issues in a single opinion. But the final-judgment rule also has costs. Again, of particular relevance to the present discussion, immediate review of a district court decision can avoid what later turn out to be flawed or unnecessary proceedings. Imagine that a district court erroneously dismisses some of a plaintiff's claims, after which the parties proceed to trial on the remaining claims. Correcting that dismissal after a final judgment might require a second trial, while immediate review would have corrected the course of district court proceedings. In this way, the delay between an erroneous district court decision and vindication on appeal can result in substantial costs.

By typically postponing appeals until the end of district court proceedings, the final-judgment rule reflects a belief that in most cases the benefits of delaying appeals outweigh the costs. But like most rules, the final-judgment rule has exceptions that apply when the general cost-benefit analysis is thought to shift.

In multicclaim actions—that is, actions that involve multiple claims against a single party, claims against multiple parties, or both—a final decision normally does not come until all claims have been resolved.³⁰ That's because the resolution of only some claims in a multicclaim action leaves more to be done—namely, resolution of the other claims.

But there's an exception to this general rule. If litigants want to appeal the resolution of some claims without waiting for the resolution of the others, they can turn to Federal Rule of Civil Procedure 54(b).³¹ Sometimes it makes sense to allow an immediate appeal after the district court's resolution of some (but not all) of the claims. For example, if one party is involved only in the resolved claims, it might make practical sense to allow an immediate appeal of that claim rather than force that party to wait until all other issues are decided. Enter Rule 54(b), which allows the district court to enter a partial judgment on the resolution of some claims. That partial judgment is final and appealable.

A. *Manufactured Appeals via Voluntary, Without-Prejudice Dismissals*

Litigants don't always take the Rule 54(b) route. The reasons for doing

³⁰ FED. R. CIV. P. 54(b); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434 (1956).

³¹ For an in-depth study of Rule 54(b), see Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013).

so aren't clear. There are probably some litigants who simply aren't aware of Rule 54(b). But I imagine that in most cases, the litigants cannot obtain a Rule 54(b) partial judgment. The courts of appeals require that the resolved and unresolved claims be sufficiently separate, such that the issues covered in the Rule 54(b) appeal will not overlap with those covered in a later final-judgment appeal.³² So when the resolved and unresolved claims are related, litigants might not seek a Rule 54(b) partial judgment, or the district court might reject those efforts. But these are also instances in which the litigants might especially want immediate review. If the district court erred in its resolution of some claims and the other claims proceed to trial, correction on appeal might require a second trial covering some or much of the same ground as the first.

So litigants don't always use Rule 54(b) to appeal the resolution of some (but not all) of the claims in an action. They instead try to create a final, appealable decision by voluntarily dismissing all unresolved claims without prejudice.³³ The plan is to dismiss those claims, and thereby end district court proceedings, and then appeal the decision resolving the other claims.³⁴ The litigants might plan on reinstating the voluntarily dismissed claims if the court of appeals reverses the district court's judgment. Or they might plan to reinstate those voluntarily dismissed claims and continue litigating them at some future time, regardless of the appeal's outcome. Or they might intend to abandon those voluntarily dismissed claims entirely.

Whatever the intent, most courts of appeals see this tactic as an attempted end run around Section 1291 and Rule 54(b).³⁵ To prevent this end run, they invoke the rule that dismissals without prejudice do not result in a final decision.³⁶ The concern is that claims voluntarily dismissed without prejudice can be reinstated.³⁷ So the action isn't really over; it might look over, but it's actually just paused.³⁸

This rule—that dismissals without prejudice do not result in a final decision—is not entirely accurate.³⁹ Lots of dismissals without prejudice produce a final decision. Consider jurisdictional dismissals. The dismissal is

³² See, e.g., *Rankins v. Sys. Sols. of Ky., LLC*, 40 F.4th 589, 592 (7th Cir. 2022); *Kinsale Ins. Co. v. JDBC Holdings*, 31 F.4th 870, 876–77 (4th Cir. 2022).

³³ See, e.g., *Cincinnati Specialty Underwriters Ins. Co. v. Wood*, 856 F. App'x 695, 699 (9th Cir. 2021); *Firefighters' Ret. Sys. v. Citco Grp.*, 963 F.3d 491, 491 (5th Cir. 2020).

³⁴ E.g., *Rowland v. S. Health Partners, Inc.*, 4 F.4th 422, 428 (6th Cir. 2021).

³⁵ See, e.g., *Blue v. D.C. Pub. Schs.*, 764 F.3d 11, 18 (D.C. Cir. 2014); *Marshall v. Kan. City S. Ry.*, 378 F.3d 495, 500 (5th Cir. 2004).

³⁶ E.g., *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 438 (3d Cir. 2003); *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 801 (7th Cir. 2001); *Chappelle v. Beacon Commc'n's Corp.*, 84 F.3d 652, 654 (2d Cir. 1996).

³⁷ See *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 211 (2d Cir. 2005).

³⁸ See *Horwitz v. Alloy Auto. Co.*, 957 F.2d 1431, 1436 (7th Cir. 1992).

³⁹ See *Carter v. Buesgen*, 10 F.4th 715, 720 (7th Cir. 2021) (noting that this rule is only “a general and highly imperfect rule”).

necessarily without prejudice, as the district court lacks jurisdiction to do anything else with the case.⁴⁰ And no one questions that a dismissal for lack of jurisdiction is final and thus appealable.⁴¹ The same goes for dismissals due to improper venue or for failure to join a party under Rule 19.⁴²

The real concern is that a dismissal without prejudice might leave more to be done in the district court.⁴³ This can happen when a district court dismisses a complaint for failure to state a claim.⁴⁴ If the dismissal is without prejudice, the plaintiff can try to amend the deficient pleading and continue the action. So dismissals with leave to amend are normally not final.⁴⁵ The same is true for dismissals for failure to exhaust state or administrative remedies.⁴⁶ Those dismissals can be without prejudice so that the plaintiff can exhaust those remedies and then return to the district court.⁴⁷ In either scenario, district court proceedings are not actually over. The plaintiffs can amend their pleading or exhaust their remedies and then return to the district court.

The courts of appeals have a similar concern when litigants voluntarily dismiss all outstanding claims without prejudice. After the appeal, the litigants might refile the voluntarily dismissed claims. So the voluntary, without-prejudice dismissal might not actually have ended district court proceedings.

This refiling concern is likely overblown. For one thing, a voluntary, without-prejudice dismissal does not necessarily mean that the litigants will be able to reinstate the claim. Refiling might be met with new defenses, such

⁴⁰ *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216–17 (10th Cir. 2006).

⁴¹ Or almost no one. *See G.W. v. Ringwood Bd. of Educ.*, 28 F.4th 465, 468 n.2 (3d Cir. 2022) (“Though the Board argues that the dismissal without prejudice [for a lack of subject-matter jurisdiction] is not an appealable final order, its contention is without merit.”).

⁴² *Johnson v. W. & S. Life Ins. Co.* 598 F. App’x 454, 456 (7th Cir. 2015); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012); *see also FED. R. CIV. P.* 41(b) (“Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”).

⁴³ *See Carter v. Buesgen*, 10 F.4th 715, 724–25 (7th Cir. 2021) (Easterbrook, J., concurring).

⁴⁴ *See, e.g., Wilcox v. Georgetown Univ.*, 987 F.3d 143, 151 (D.C. Cir. 2021); *see also Bryan Lammon, Cumulative Finality*, 52 GA. L. REV. 767, 782 (2018) (explaining dismissals of a complaint but not an action).

⁴⁵ *See, e.g., Furnace v. Bd. of Trs. of S. Ill. Univ.*, 218 F.3d 666, 669–70 (7th Cir. 2000). There are situations in which courts will treat as final a without-prejudice dismissal of a complaint, such as when the plaintiff is not able to amend the complaint to cure the defect. *See, e.g., Larkin v. Galloway*, 266 F.3d 718, 721 (7th Cir. 2001). The courts of appeals have split on what subsequent events—such as the passage of the time to amend or the plaintiff’s decision to stand on the complaint—can render the dismissal final. *See N.A. Butterfly Ass’n v. Wolf*, 977 F.3d 1244, 1256 (D.C. Cir. 2020) (noting the split); *WMX Tech., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*) (collecting cases).

⁴⁶ *See Maddox v. Love*, 655 F.3d 709, 716 (7th Cir. 2011).

⁴⁷ *See Carter*, 10 F.4th at 721.

as a statute of limitations.⁴⁸ Or the law of preclusion might prevent a party from reasserting the claim.⁴⁹ To be sure, these defenses will not always apply.⁵⁰ And parties have sometimes agreed not to raise them.⁵¹ But refiling is hardly inevitable.

For another thing, a with-prejudice dismissal would not necessarily solve the refiling concern.⁵² Courts often say that a with-prejudice dismissal will preclude any refiling.⁵³ But that's not right. The with-/without-prejudice distinction comes from Federal Rule of Civil Procedure 41, which governs dismissals.⁵⁴ The Supreme Court said in *Semtek International Inc. v. Lockheed Martin Corp.* that a dismissal without prejudice under Rule 41(a) “is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.”⁵⁵ Its opposite, a dismissal with prejudice, is thus what Rule 41 refers to as “an adjudication on the merits.”⁵⁶ And an “adjudication on the merits” bars only the refiling of a claim in the same district court.⁵⁷ While an adjudication on the merits “is undoubtedly a necessary condition, . . . it is not a sufficient one, for claim-preclusive effect in other courts.”⁵⁸

The with-/without-prejudice distinction thus does not determine the preclusive effect of a dismissal.⁵⁹ That instead comes from the substantive law of preclusion. Indeed, were Rule 41 read to affect preclusion, it might violate the Rules Enabling Act’s provision that procedural rules cannot “abridge, enlarge or modify any substantive right.”⁶⁰

⁴⁸ See, e.g., Ahmed v. Dragovich, 297 F.3d 201, 207 (3d Cir. 2002).

⁴⁹ See Allen v. McCurry, 499 U.S. 90, 94 (1980) (noting that “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action”).

⁵⁰ See, e.g., CBX Res., L.L.C. v. ACE Am. Ins. Co., 959 F.3d 175, 176 (5th Cir. 2020) (noting that preclusion would not apply if the court of appeals reversed).

⁵¹ See, e.g., Page Plus of Atlanta, Inc. v. Owl Wireless, LLC, 733 F.3d 658, 660 (6th Cir. 2013) (holding that there was no final decision when parties agreed that the defendant would “dismiss its remaining counterclaim on the condition that the plaintiffs would allow [the defendant] to revive its counterclaim and forgo any time-based affirmative defenses if the case returned to the district court”); Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 438–40 (3d Cir. 2003) (holding that there was no final decision when a consent judgment kept two counts “alive by dismissing them *without prejudice*, and specifically allowed their reinstatement if” the Third Circuit vacated and remanded the appealed order).

⁵² My thanks to Rory Ryan for this point.

⁵³ See, e.g., Vikas WSP, Ltd. v. Econ. Mud Prods. Co., 23 F.4th 442, 454 (5th Cir. 2022) (“Dismissals with prejudice are final orders with preclusive effect. They end the suit and preclude its relitigation.” (citation omitted)).

⁵⁴ See FED. R. CIV. P. 41.

⁵⁵ 531 U.S. 497, 505 (2001).

⁵⁶ See *id.* (noting that Rule 41(a) uses “adjudication on the merits” as the opposite of a “dismissal without prejudice”).

⁵⁷ See *id.* at 506.

⁵⁸ *Id.*

⁵⁹ See *id.* at 502–03.

⁶⁰ *Id.* at 503.

Still, a without-prejudice dismissal means that nothing prevents the litigants from *trying* to reinstate the voluntarily dismissed claims in the same district court. And litigants occasionally agree—via “conditional dismissals”—not to raise any objections to refiling such as statutes of limitations or preclusion.⁶¹ So the courts of appeals are not entirely wrong in viewing these manufactured appeals as potentially problematic, even if these appeals are not as bad as most courts appear to think.

B. The Trap

The problem—indeed, the trap—comes when courts (district or appellate) don’t provide a simple, straightforward means for fixing the jurisdictional defect. This happens when the court of appeals dismisses the appeal and the parties return to the district court, but the district court thinks that it lacks the power to change the terms of the dismissal and thus refuses to do so. This leaves litigants in jurisdictional limbo. The district court’s decision is “final” in the sense that the district court is done with the case. But there is no “final” decision that would give the court of appeals jurisdiction, and there never will be.

The finality trap exists as a theoretical risk in any circuit that adheres to the general rule that the voluntary, without-prejudice dismissal of unresolved claims does not result in a final decision.⁶² Recognizing the peril in which this rule might place litigants, several courts have developed exceptions to the general rule or methods for fixing the finality problem, which have ameliorated the finality trap’s harshness.⁶³ But not everyone seems willing to disarm it.

⁶¹ See sources cited *supra* note 51.

⁶² Although the case law in this area is rife with qualifications, exceptions, and conflicts, most courts say that the voluntary, without-prejudice dismissal of unresolved claims does not produce a final decision. See 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.8 (2d ed. 1992) (“[A] voluntary dismissal without prejudice generally fails to achieve finality.”). But some circuits have case law saying, seemingly without qualification, that these dismissals are final. See, e.g., *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1231 (11th Cir. 2020); *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 689 (8th Cir. 1999).

⁶³ See, e.g., *Rowland v. S. Health Partners, Inc.*, 4 F.4th 422, 429–30 (6th Cir. 2021) (noting that the plaintiff had other options for immediate review: convert her dismissal to one with prejudice, obtain a Rule 54(b) partial judgment, request an interlocutory appeal under 28 U.S.C. § 1292(b), or reinstate the voluntarily dismissed claims and litigate them to a final judgment); *Corley*, 965 F.3d at 1231 (holding that the voluntary, without-prejudice dismissal of unresolved claims produces a final, appealable decision); *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (allowing plaintiffs to disclaim their right to refile a voluntarily dismissed claim in their appellate briefing, thereby creating a final decision). For overviews of the case law in this area, see *Corley*, 965 F.3d at 1236–37 (Pryor, C.J., concurring); *Robinson-Reeder v. Am. Council on Educ.*, 571 F.3d 1333, 1338–40 (D.C. Cir. 2009); *Doe v. United States*, 513 F.3d 1348, 1352–54 (Fed. Cir. 2008); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776 (7th Cir. 1999).

Consider the Fifth Circuit's recent series of appeals and opinions in *Williams v. Taylor Siedenbach, Inc.*, in which the court eventually pointed to Rule 54(b) partial judgments as a path around the finality trap.⁶⁴ *Williams* involved asbestos-related claims against several defendants.⁶⁵ The district court granted summary judgment in favor of some of the defendants.⁶⁶ The plaintiffs then voluntarily dismissed their claims against the remaining defendants without prejudice and attempted to appeal the adverse summary judgment decision.⁶⁷

The Fifth Circuit dismissed this first appeal for a lack of jurisdiction.⁶⁸ The voluntary, without-prejudice dismissal, the court of appeals determined, meant that the district court had not made a final, appealable decision.⁶⁹ The *Williams* plaintiffs then returned to the district court and asked that court to change the terms of their voluntary dismissals to be with prejudice.⁷⁰ The district court agreed and apparently entered a Rule 54(b) partial judgment for the summary judgment decision.⁷¹ The plaintiffs appealed once more.⁷²

Back before the Fifth Circuit, the court again held that it lacked jurisdiction.⁷³ According to the Fifth Circuit, the district court could not alter the terms of the dismissal after the voluntarily dismissed defendants had left the case.⁷⁴ The district court also could no longer enter a partial judgment under Rule 54(b), as the case was over.⁷⁵ So the district court's subsequent order did not retroactively change the terms of the prior dismissal.⁷⁶ Its decision was still not final.⁷⁷

⁶⁴ As detailed below, the Fifth Circuit has issued three opinions in the *Williams* litigation: two panel opinions—*Williams v. Taylor-Seidenbach, Inc.* (*Williams I*), 748 F. App'x 584 (5th Cir. 2018) (per curiam); *Williams v. Taylor Seidenbach, Inc.* (*Williams II*), Inc. 935 F.3d 358 (5th Cir. 2019)—and an en banc opinion—*Williams v. Taylor Seidenbach, Inc.* (*Williams III*), 958 F.3d 341 (5th Cir. 2020) (en banc). The en banc opinion overruled the second panel opinion.

⁶⁵ *Williams III*, 958 F.3d at 344; *Williams I*, 748 F. App'x at 585.

⁶⁶ *Williams III*, 958 F.3d at 344.

⁶⁷ See *id.* The voluntary dismissals were silent as to prejudice, meaning that they were without prejudice. See FED. R. CIV. P. 41; *Williams I*, 748 F. App'x at 587.

⁶⁸ *Williams I*, 748 F. App'x at 588.

⁶⁹ *Id.* at 587.

⁷⁰ *Williams II*, 935 F.3d 358, 360 (5th Cir. 2019).

⁷¹ *Id.* It's not clear what exactly the district court did. (Thanks to Howard Bashman for pointing this out.) The en banc opinion said the district court entered a partial final judgment for "various defendants," including the defendants who had been dismissed at summary judgment. *Williams III*, 958 F.3d at 344. The second *Williams* decision said that the district court entered "a final judgment under Rule 54(b)" for the voluntarily dismissed defendants (who were not parties to the appeal). *Williams II*, 935 F.3d at 360. It appears that the district court did not change the terms of the voluntary dismissal to be one with prejudice.

⁷² *Williams II*, 935 F.3d at 360.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Judge Haynes concurred.⁷⁸ She acknowledged that the decision was consistent with Fifth Circuit case law.⁷⁹ But she also said that this case law is at best “muddled”; at worst, it’s “simply wrong and illogical.”⁸⁰ She colorfully explained the nonsense of deeming the district court’s decision “both final and not final”:

In the John Minor Wisdom Courthouse (housing the Fifth Circuit), this decision was “not final.” But as the case traipses along the courtyard of fewer than 100 feet to the Hale Boggs Federal Building (housing this district court), it suddenly becomes final again. How does that make any sense?

New Orleans tourists often revel in the numerous ghost tours available throughout the city. But, as courts, we should not allow ghostly magic to transform a decision from not final to final and vice-versa merely because it crosses (virtually) a courtyard between a district court building and circuit court building.⁸¹

Judge Haynes accordingly called for the case to be reheard en banc.⁸² The en banc Fifth Circuit took Judge Haynes’s suggestion, reheard the case, and held that the district court’s Rule 54(b) partial judgment after the first appeal saved the plaintiffs from the finality trap.⁸³ According to the court, “[e]ntry of a partial final judgment is proper under Rule 54(b) regardless of whether it occurs before or after the voluntary dismissal of any remaining defendants under Rule 41(a).”⁸⁴ The district court thus could enter a Rule 54(b) partial judgment after the first appeal.⁸⁵ The majority did not, however, disarm the trap. It instead plotted an odd path around it, relying on an odd reading of Rule 54(b) to create finality.

Key to this decision was the premise that an action is still pending even after all claims have been dismissed. (Put a pin into whether this premise makes sense; I’ll come back to it.) The majority seemed to say that voluntarily dismissed claims, whether dismissed with prejudice or without, remain part of the action.⁸⁶ Indeed, all claims remain pending before the district court despite all of them being dismissed, voluntarily or involuntarily:

A dismissed claim remains a part of the case, absent amendment of the complaint under Rule 15. And that is so regardless of when the Rule 41(a) dismissal occurs. Likewise, the fully litigated claims—such as the partial

⁷⁸ *Id.* at 361 (Haynes, J., concurring).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 361–62.

⁸³ *Williams III*, 958 F.3d 341, 347 (5th Cir. 2020) (en banc).

⁸⁴ *Id.*

⁸⁵ *Id.* at 348.

⁸⁶ See *id.* at 347.

summary judgment claims that the Williamses hope to appeal here—naturally remain pending before the court as well.⁸⁷

That's why the *Williams* action was not over: All claims remained pending in the district court, despite the district court's and the plaintiff's dismissal of them all. Since the case wasn't over, the district court could still enter a partial judgment under Rule 54(b).

The majority found this premise in Rule 54(b) itself.⁸⁸ The rule contains two clauses. The first provides that in multyclaim or multiparty suits, Rule 54(b) permits the district court to enter a judgment on the resolution of some (but not all) claims.⁸⁹ The rule then goes on to say that a decision resolving fewer than all of the claims does not resolve the action.⁹⁰ The Fifth Circuit apparently read this second provision to mean that an action is not over unless all claims, rights, and liabilities are resolved simultaneously.⁹¹ That is, an action decided piecemeal is never over.⁹² And so long as an action is not over, all claims—whether resolved by the district court or voluntarily dismissed—remain pending in the district court. Since the claims are still pending, the district court can enter a Rule 54(b) partial judgment on some of them. Indeed, *Williams* suggests that the district court *must* enter that partial judgment if anyone wants to appeal.⁹³

The Fifth Circuit's approach is nonsense. For one thing, courts (including the Fifth Circuit) have long held that a series of district court orders, each resolving some but not all of the claims in action, can combine into a final decision.⁹⁴ And for good reason. Once all claims have been resolved—via decision by the district court or voluntary dismissal or whatever—nothing remains for the district court to do but enforce the judgment. The action is over. Does the Fifth Circuit seriously think that there's no final decision when the district court resolves some claims at the

⁸⁷ *Id.*

⁸⁸ See *id.* at 348–49.

⁸⁹ See FED. R. CIV. P. 54(b) (“When an action presents more than one claim for relief . . . or when multiple parties are involved,” the court can “direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”).

⁹⁰ *Id.* (“[A]ny order or other decision . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.”).

⁹¹ See *Williams III*, 958 F.3d at 348–49.

⁹² Judge Ho reiterated this point in his concurrence, saying that it was “unclear to [him] how a series of interlocutory orders ends the entire action when Rule 54(b) says the opposite.” *Id.* at 352 (Ho, J., concurring).

⁹³ See *Williams III*, 958 F.3d at 347.

⁹⁴ See *Jetco Elec. Indus. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973) (“[T]wo orders, considered together, terminated this litigation just as effectively as would have been the case had the district judge gone through the motions of entering a single order formally reciting the substance of the earlier two orders.”); see also WRIGHT ET AL., *supra* note 62, § 3914.9 (discussing how appeals taken after a series of district court decisions can cumulatively resolve all issues in the case).

pleading stage and resolves the rest at summary judgment? I can't imagine that's the case. But *Williams*'s approach to the finality trap seems to mean that the plaintiff in such a case would have to obtain a Rule 54(b) partial judgment to appeal either order (or both of them).

For another thing, this is not what Rule 54(b) is for. Again, the rule exists to slice up for appeal an action that involves multiple claims or parties so that a resolved part of the case does not need to wait for a traditional end-of-proceedings appeal.⁹⁵ Before the Federal Rules of Civil Procedure allowed for the liberal joinder of claims and parties, many multclaim actions would have been brought as separate suits.⁹⁶ As separate suits, they were separately appealed. Now that these claims are brought together, they must generally be appealed together. And that normally makes sense. But sometimes it makes sense to allow an immediate appeal after the district court's resolution of some (but not all) of the claims. Through the steps in Rule 54(b).

The Fifth Circuit has accordingly assigned Rule 54(b) an awkward task. Once all claims have been resolved, there is nothing left to divide up in the district court. The Fifth Circuit instead uses Rule 54(b) to deem the actual end of district court proceedings final and appealable.

The Fifth Circuit's Rule 54(b) approach also fails to save litigants from the finality trap. Indeed, a mere week after the en banc *Williams* decision, the court held that another plaintiff had fallen into the finality trap, and this plaintiff had no way out.⁹⁷ The case—*CBX Resources, L.L.C. v. ACE American Insurance Co.*—involved two claims against a single defendant: one alleging that the defendant (an insurance company) had a duty to defend the plaintiff, and one under the Texas Insurance Code.⁹⁸ The district court held that the defendant did not have a duty to defend.⁹⁹ The plaintiff then voluntarily dismissed its Texas Insurance Code claim without prejudice and tried to appeal.¹⁰⁰ The Fifth Circuit held that it lacked jurisdiction because the plaintiff had not obtained a Rule 54(b) partial judgment.¹⁰¹ As the court recognized, its decision in *Williams* did “not free CBX from the trap.”¹⁰²

⁹⁵ See *supra* Part I.

⁹⁶ See WRIGHT ET AL., *supra* note 62, § 3914.7 (“The final judgment rule evolved for many years on the assumption that most litigation involved one plaintiff pursuing a single claim against one defendant.”).

⁹⁷ *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 175–76 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1372 (2021). The *CBX* plaintiff wasn’t the only one to fall into this trap soon after *Williams III*. *Firefighters’ Ret. Sys. v. Citco Grp. Ltd.*, 963 F.3d 491, 491 (5th Cir. 2020) (dismissing an appeal when the plaintiffs “voluntarily dismissed one defendant without prejudice and then adjudicated their claims against other defendants”).

⁹⁸ *CBX Res., L.L.C.*, 959 F.3d at 175.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 176.

¹⁰² *Id.*

According to the plaintiff's cert petition, the district court in *CBX Resources* subsequently refused to change the terms of the dismissal.¹⁰³ The plaintiff sought to reinstate its voluntarily dismissed claim, after which it would immediately dismiss that claim with prejudice.¹⁰⁴ But the district court denied that request.¹⁰⁵ According to the district court, it "lack[ed] jurisdiction to reopen the case and convert the voluntary dismissal without prejudice into a voluntary dismissal with prejudice."¹⁰⁶

II DISARMING THE FINALITY TRAP

There is a better approach to the finality trap—a simple solution that actually disarms the trap and ensures that litigants do not lose their right to appeal due to a procedural misstep. Courts of appeals should give litigants the choice of either disclaiming the right to refile the voluntarily dismissed claims or returning to the district court to finish out the action.¹⁰⁷

Disclaiming the right to refile is the most straightforward solution to the finality trap. Litigants are bound by the disclaimer, which effectively converts the dismissal to one with prejudice. This practice is flexible, as litigants can disclaim their right to refile in briefing, at oral argument, or even after oral argument (sometimes after the court has raised the finality problem during argument).¹⁰⁸ When appellants take this option, they keep the appeal—which has often been fully briefed and perhaps even argued—moving along to a decision on the merits.¹⁰⁹ And courts' concerns about manufacturing an interlocutory appeal disappear. Granted, disclaiming an intent to refile at oral argument might be awkward—counsel who did not realize the finality problem until the panel raised it might have to briefly consult with the client about giving up a claim. But rarely is there any harm in allowing parties to fix the finality problem in the course of an appeal.

Courts have used similar fixed-on-appeal procedures to resolve other

¹⁰³ Petition for Writ of Certiorari at 12, *CBX Res. L.L.C. v. ACE Am. Ins. Co.*, 141 S. Ct. 1372 (2021) (No. 20-478).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (alteration in original) (quoting Order Denying Motion to Set Status Conference and Denying Motion for Leave to File Second Amended Complaint at 7, *CBX Res., LLC v. Ace Am. Ins. Co.*, No. 5:17-cv-00017 (W.D. Tex. June 25, 2020)).

¹⁰⁷ See *Williams v. Taylor Seidenbach, Inc.*, 958 F.3d 341, 355–59 (5th Cir. 2020) (en banc) (Willett, J., concurring) (arguing in favor of allowing disclaimer on appeal).

¹⁰⁸ See, e.g., *Nat'l Inspection & Repairs, Inc. v. George S. May Int'l Co.*, 600 F.3d 878, 884 (7th Cir. 2010) (disclaiming in a post argument filing); *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (disclaiming in briefing); *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 802 (7th Cir. 2001) (disclaiming during argument).

¹⁰⁹ See, e.g., *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776–77 (7th Cir. 1999).

defects in appellate jurisdiction. For example, courts have allowed parties to cure the jurisdictional issues created when district courts dismiss complaints without prejudice and with leave to amend. Like voluntary dismissals without prejudice, these involuntary dismissals are often not final because the plaintiff can file an amended complaint.¹¹⁰ Yet plaintiffs sometimes appeal rather than amend. Courts have interpreted these appeals as the plaintiff's intent to disclaim the right to amend and stand on the dismissed complaint.¹¹¹ Any uncertainty as to the plaintiff's intent can be cleared up in the briefing or at oral argument.¹¹²

A similar practice can be seen in the context of courts allowing appellants to abandon entire claims to cure a jurisdictional defect. This occasionally becomes necessary when a district court resolves the main claims in an action, but some other claims (often counterclaims and cross-claims) remain outstanding. The parties nevertheless appeal. Only later do they realize that the district court's decision is not final due to the unresolved claims. The courts of appeals have allowed parties in this scenario to abandon entire claims—again, even at oral argument—to cure the jurisdictional defect.¹¹³ If parties can abandon unresolved claims while on appeal, there's little reason why they cannot also abandon claims that were voluntarily dismissed without prejudice.

There is, however, one potential hitch: Under what authority can parties change the terms of a voluntary dismissal while a case is on appeal? No statute or rule of procedure technically authorizes this practice. And some judges have suggested that this lack of express authority undermines the conversion-on-appeal tactic.¹¹⁴

I'm not bothered by the lack of express authority. After all, the general rule for voluntary dismissals without prejudice is itself a judicial construction. No statute or rule says that voluntary dismissals without prejudice preclude an action's finality. That general rule comes from judicial interpretation of 28 U.S.C. § 1291 and its grant of appellate jurisdiction over “final decisions.” The dismissals-without-prejudice rule—like much of the

¹¹⁰ See cases cited *supra* note 45.

¹¹¹ See, e.g., Robert N. Clemens Tr. v. Morgan Stanley DW, Inc., 485 F.3d 840, 846 (6th Cir. 2007).

¹¹² See, e.g., Boxill v. O'Grady, 935 F.3d 510, 517 (6th Cir. 2019) (accepting plaintiff's supplemental briefing regarding intent to stand on dismissed complaint).

¹¹³ See, e.g., Amgen Inc. v. Amneal Pharmas. L.L.C., 945 F.3d 1368 (Fed. Cir. 2020); Rutherford v. Columbia Gas, 575 F.3d 616, 618 (6th Cir. 2009); Merchs. & Planters Bank of Newport v. Smith, 516 F.2d 355, 356 n.3 (8th Cir. 1975) (per curiam).

¹¹⁴ See Williams v. Taylor Seidenbach, Inc., 958 F.3d 341, 371 (5th Cir. 2020) (en banc) (Oldham, J., dissenting) (“I cannot find anything in the Federal Rules or § 1291 that allows a party's say-so to turn a non-final decision into a final one.”); Galaza v. Wolf, 954 F.3d 1267, 1276 (9th Cir. 2020) (Collins, J., concurring) (“[W]e have never allowed a party, who objectively kept his or her options open while pursuing an unauthorized appeal, to later invoke a change of heart as a basis for subsequently validating such an appeal.”).

law of federal appellate jurisdiction—comes from the various meanings of “final” that courts have given to Section 1291.¹¹⁵ So nothing should stand in the way of courts’ converting dismissals to be with prejudice, even while a case is on appeal.

But what if a litigant does not want to disclaim the right to refile the voluntarily dismissed claims? Or what if the court of appeals is uncomfortable with parties changing the terms of a dismissal while the case is on appeal? The court of appeals can at least allow the parties to return to the district court and allow the district court to fix the jurisdictional problem.¹¹⁶ There, the parties can change the terms of the dismissal to be with prejudice, resolving any refiling concerns. Or they can reinstate the dismissed claims and litigate them to a traditional final decision. In either scenario, the litigants can then appeal again.

The reasons for allowing this tactic are the same as those for allowing the conversion-on-appeal procedure. The only real difference is that returning to the district court to fix the jurisdictional defect takes more time and effort. If the action is not final for purposes of appeal, then the district court should be able to continue the proceedings. After all, deeming a case not final for appeal but final and unchangeable in the district court makes no sense. There might also be some more express authority for a district court to modify the terms of a dismissal, such as Federal Rule of Civil Procedure 60(b).¹¹⁷

III ANOTHER OPTION: RETHINKING FINALITY

There is yet another way of dealing with the finality trap: reject its very existence by allowing voluntary, without-prejudice dismissals to result in a final decision. This is what the Eleventh Circuit recently did. In *Corley v. Long-Lewis, Inc.*, the court held that a district court’s resolution of all claims was final and appealable despite the plaintiffs’ voluntary dismissal of some of those claims without prejudice.¹¹⁸ The decision was based on precedent—the Eleventh Circuit had two inconsistent lines of cases on whether voluntary, without-prejudice dismissals result in a final decision.¹¹⁹

¹¹⁵ See Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1818 (2018) [hereinafter Lammon, *Finality*] (explaining that much of the law of federal jurisdiction comes from interpretations of § 1291).

¹¹⁶ See, e.g., *Rowland v. S. Health Partners, Inc.*, 4 F.4th 422, 429–30 (6th Cir. 2021) (“Finally, Rowland can of course forgo an immediate appeal and first litigate the state-law claims at the district court.”); *Blue v. D.C. Pub. Schs.*, 764 F.3d 11, 19 (D.C. Cir. 2014).

¹¹⁷ FED. R. CIV. P. 60(b) (governing relief from a final judgment).

¹¹⁸ *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1231 (11th Cir. 2020).

¹¹⁹ See *id.* at 1228–31.

Following the rule that the first among conflicting cases controls,¹²⁰ *Corley* waded through these two lines of cases to find the oldest, which held that “[a]n order granting a plaintiff’s motion for voluntary dismissal pursuant to Rule 41(a)(2) qualifies as a final judgment for purposes of appeal.”¹²¹ In doing so, the Eleventh Circuit forever disarmed the finality trap in that circuit.

There might be something to allowing voluntary, without-prejudice dismissals to result in a final, appealable decision. After all, once a plaintiff voluntarily dismisses all outstanding claims, the district court’s work is done. District court proceedings aren’t going to get much more final than that. Granted, those voluntarily dismissed claims *might* pop up again on remand from the appeal or in another lawsuit. But they might not. A cleaner, more intuitive, bright-line rule would simply say that these dismissals create a final decision.

More generally, finality—at least when it comes to appeals at or near the end of district court proceedings¹²²—might refocus on whether the district court is done. Recall the common definition of a final decision: one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”¹²³ This definition looks to two events: the resolution of all claims (“ends the litigation on the merits”) and the end of district court proceedings (“leaves nothing for the court to do”).¹²⁴ These are distinct events. Granted, a merits resolution and the end of district court proceedings will often coincide. But not necessarily. There’s a difference between (an action) being over and (a district court) being done. A district court might think that it is done with an action despite not having resolved all of the claims in that action. And a district court might have more to do even after resolving an action’s merits.

Courts often focus on the first event—the substantive resolution of all

¹²⁰ See, e.g., CSX Transp., Inc. v. Gen. Mills, Inc., 846 F.3d 1333, 1340 (11th Cir. 2017).

¹²¹ McGregor v. Bd. of Comm’rs of Palm Beach Cnty, 956 F.2d 1017, 1020 (11th Cir. 1992) (quotation marks omitted).

¹²² Finality also plays a role in appeals that come well before or after the end of district court proceedings, as well as in the scope of those appeals. See Lammon, *Finality*, *supra* note 115, at 1837–50 (discussing finality’s role in rules governing appeals well before the end of district court proceedings and rules governing the scope of an appeal); Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 393–400 (2017) (discussing finality’s role in rules governing appeals in post-judgment proceedings).

¹²³ *Ritzen Grp., Inc. v. Jackson Masonry, L.L.C.*, 140 S. Ct. 582, 586 (2020) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); see also WRIGHT ET AL., *supra* note 62, § 3909, at 291 (noting that *Catlin*’s definition is “one of the most-quoted judicial statements” on the meaning of a final decision).

¹²⁴ *Ritzen Grp., Inc.*, 140 S. Ct. at 586. Note, a decision on the merits does not necessarily mean a decision on the merits of the parties’ claims. A district court decision that dismisses an action for a lack of subject-matter jurisdiction is final, even though a court without jurisdiction necessarily cannot determine an action’s merits.

claims—when determining finality.¹²⁵ The clearest example of this focus is the rule from *Budinich v. Becton Dickinson & Co.* that a decision on the merits of an action is final and appealable despite an unresolved issue of attorney fees.¹²⁶ The Supreme Court emphasized that a final decision is one that resolves an action’s merits.¹²⁷ Attorney fees are not part of the merits.¹²⁸ So a decision on the merits is final and appealable, despite the district court’s still having more to do—namely, determine fees.¹²⁹ This focus can also be seen in decisions dismissing an appeal because the district court—though entering a final judgment, closing the case, or otherwise indicating that it was done—overlooked one of the parties’ claims.¹³⁰ In these cases, the district court thought that it was finished with the case. But the failure to formally resolve all of the parties’ claims precluded finality.

A different conception of finality might focus on the other event: when the district court is finished with a case. Judge Posner has probably made this point most clearly. Writing for the Seventh Circuit in *Chase Manhattan Mortgage Corp. v. Moore*, he said that the test for finality “is not the adequacy of the judgment but whether the district court has finished with the case.”¹³¹ There’s a difference, Judge Posner explained, between a “final order” and the “proper disposition” of an action.¹³² A judgment can be “radically defective” in not adjudicating all of the parties’ claims or in not awarding proper relief.¹³³ But neither of those would preclude finality. Once the district court has “end[ed] the lawsuit, the judgment can be appealed.”¹³⁴ Judge Easterbrook (also of the Seventh Circuit) recently made a similar point. Concurring in *Carter v. Buesgen* (which involved the appealability of an involuntary, without-prejudice dismissal), he said that “a decision closing the case *always* is final.”¹³⁵ Other cases have similarly emphasized the

¹²⁵ See, e.g., *id.* (“A ‘final decision’ within the meaning of § 1291 is normally limited to an order that resolves the entire case.”).

¹²⁶ *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988).

¹²⁷ *Id.* at 199.

¹²⁸ *Id.* at 200.

¹²⁹ *Id.* at 202–03; see also *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emps.*, 571 U.S. 177, 179 (2014) (reiterating the rule in *Budinich*).

¹³⁰ See, e.g., *SD Voice v. Noem*, 987 F.3d 1186, 1191–92 (8th Cir. 2021) (holding that even though a district court “signaled that the case was finished,” the court’s decision was not final—and the plaintiff’s appeal should be dismissed—because one of the plaintiff’s claims was unresolved); *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters.*, 170 F.3d 536, 538–39 (5th Cir. 1999) (noting that a district court’s decision was “[c]learly” not final, despite the district court’s entering a final judgment, due to unresolved claims and crossclaims). Cf. *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893 (7th Cir. 2011) (finding finality despite one claim not being expressly resolved because the district court’s decision necessarily resolved that claim).

¹³¹ *Chase Manhattan Mortg. Corp. v. Moore*, 446 F.3d 725, 726 (7th Cir. 2006).

¹³² *Id.* at 727.

¹³³ *Id.* at 726–27.

¹³⁴ *Id.* at 726.

¹³⁵ *Carter v. Buesgen*, 10 F.4th 715, 725 (7th Cir. 2021) (Easterbrook, J., concurring).

question of whether the district court is finished.¹³⁶

Shifting finality's focus to whether the district court is done with a case could have some benefits. For one thing, it's intuitive, as the district court's washing its hands of a case is probably what most lawyers would think of as a final decision.¹³⁷ Second, the rules for appellate jurisdiction should be clear, and focusing on whether a district court is finished can be a clear and easy test for finality.¹³⁸ Third, delaying final-judgment appeals until the district court has resolved all issues can avoid piecemeal appeals that the focus on resolving a case's merits has occasionally created.¹³⁹ And fourth, focusing on whether a district court is done avoids cases of jurisdictional limbo like the finality trap, where a district court has finished with a case, but that case is not final for purposes of appeal.

Granted, shifting the focus of finality to whether the district court is done with an action might require rethinking several existing rules of appellate jurisdiction. But appellate jurisdiction could use a shake-up. The existing system of federal appellate jurisdiction—consisting of a variety of statutory, rule-based, and court-created rules—is regularly maligned for its complexity, confusion, inconsistency, unpredictability, and rigidity.¹⁴⁰ The current law often leaves litigants and courts confused over whether appellate

¹³⁶ See, e.g., *Greenhill v. Vartanian*, 917 F.3d 984, 987 (7th Cir. 2019) ("This document [a judgment that did not provide the relief to which the prevailing party was entitled] . . . shows that the district court is done with the case, which permits an appeal, but it does not resolve the parties' dispute."); *Thornton v. M7 Aerospace LP*, 796 F.3d 757, 763 (7th Cir. 2015) ("Once a district court signals that it is finished with its work by entering final judgment under Rule 58, its order is final and appealable."); *Vona v. County of Niagara*, 119 F.3d 201, 206 (2d Cir. 1997) (holding that a decision is final, despite not resolving all claims, because the district court had closed the case).

¹³⁷ Cf. Note, *Finality of Decision for Purposes of Appeal*, 33 HARV. L. REV. 1076, 1076–77 (1920) (explaining that a "final" decision is the last in an action, not the final resolution of some particular issue).

¹³⁸ See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear."); *Carter v. Buesgen*, 10 F.4th at 724 (Easterbrook, J., concurring) ("Appellate jurisdiction is supposed to be determined using simple, bright-line rules."); *Cooper, supra* note 29, at 163 ("It is important that the rules for timing appeals be clear and well understood."). This is not to say that all jurisdictional rules should (or can) be clear. See generally Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011) (arguing that clarity in jurisdictional rules is not always attainable or preferable).

¹³⁹ The rule for attorney fees is the main example. Deeming the merits decision and attorney fees decision to be separate final decisions can mean two appeals in a single action: one on the merits and another on fees. Saving an appeal until after fees are resolved would mean only one appeal. See *Exch. Nat'l Bank of Chi. v. Daniels*, 763 F.2d 286, 291 (7th Cir. 1985) (suggesting a rule delaying appeals until after fees have been decided but acknowledging that pre-*Budinich* circuit precedent foreclosed that rule).

¹⁴⁰ See, e.g., Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS. 165, 165–66 (1984); Cooper, *supra* note 29, at 157; Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 291 (1999); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1651 (2011).

jurisdiction exists.¹⁴¹ One way to simplify matters might be to focus on what a final decision sounds like: a decision that marks the end of an action.

CONCLUSION

The convoluted system of judicially created and judicially managed appellate-jurisdiction rules provides a breeding ground for things like the finality trap. No good comes from the trap. It's time to disarm it. In the short term, every court of appeals could rid itself of the finality trap by giving litigants an option: disclaim the right to refile the voluntarily dismissed claims, or return to the district court to finish litigating those claims. In the long term, the finality trap is yet another reason to critically rethink appellate jurisdiction. And one part of that rethinking might be refocusing finality on what it sounds like: the actual end of district court proceedings.

¹⁴¹ See Cooper, *supra* note 29, at 157 (“Lawyers and judges who are expert in working with the system are able to identify the doctrinal rules and lines of argument, but often encounter elusive uncertainty in seeking clear answers to many problems. Those who are less than expert are apt to go far astray.”).