THE GROWING CIRCUIT SPLIT OVER WHETHER PREMATURE NOTICES OF APPEAL PRESERVE APPELLATE REVIEW

By Peter R. Afrasiabi

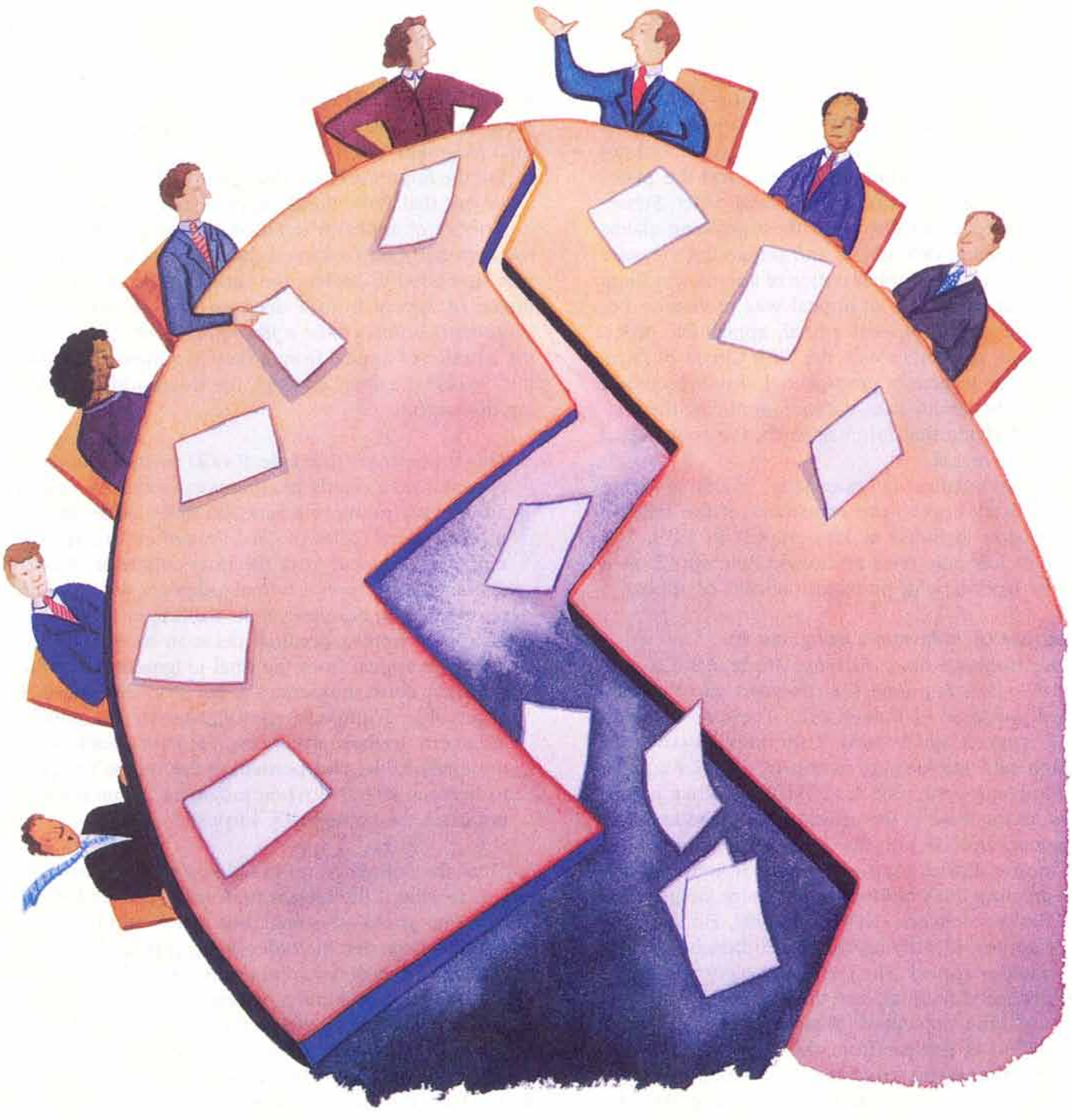
Filing a notice of appeal early—an act often done out of an abundance of caution—can, in fact, be fatal because, in certain cases, a premature notice of appeal will not ripen into a valid notice of appeal upon entry of the final, appealable order or judgment. The stakes are high, of course, because, if a notice of appeal does not ripen, by the time the practitioner learns of this deficiency the jurisdictional deadline for filing a proper notice of appeal will have passed, precluding appellate review (and necessitating difficult calls to one's client). Accordingly, it is important for the federal appellant practitioner to be wary of the often stated aphorism that the "early bird catches the worm."

The Federal Rules of Appellate Procedure's "Relation Forward" Provision and the Cumulative or Pragmatic Finality Doctrine

Under 28 U.S.C. § 1291, federal courts of appeals have jurisdiction only over final orders or judgments.[1] To trigger appellate review, a notice of appeal must be filed. Generally, a party files a notice of appeal after entry of the final, appealable order or judgment. But sometimes a party files a notice of appeal before entry of the final order or judgment. Sometimes that premature notice of appeal will suffice. The Federal Rules of Appellate Procedure envision that much. Specifically, Rule 4(a)(2) of the Federal Rules of Appellate Procedure outlines a "relation forward" provision that seeks to protect certain notices of appeal that have been filed prematurely: "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

Before Rule 4(a)(2) was adopted in 1979, the federal courts had developed a general practice of treating certain notices of appeal as effective even though they were filed prematurely. As such, and in general, a notice of appeal filed on an order that was not final would ripen when a final, appealable order or judgment was entered. That approach was called "pragmatic finality" or "cumulative finality"—so named because courts analyzed the concept of finality with a pragmatic, nontechnical approach in order to achieve the "just, speedy, and inexpensive determination of every action."[2]

Indeed, the U.S. Supreme Court mandated that flexible approach to finality. In *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964), the Court held that "the requirement of finality is to be given a 'practical rather than a technical construction.'" Similarly, in *Lemke v. United States*, 346 U.S. 325, 326 (1953), the Supreme Court considered the problem of an appeal taken before a final judgment was entered and one in which no further notice of appeal was filed after the final judgment was entered. The Ninth Circuit dismissed the appeal, but the Supreme Court reversed the decision. *Lemke's* fundamental proposition is simple: when there is no prejudice, an appeal on the merits of a case should be heard so as not to damage the appellant's rights. That mandate to adopt a flexible approach to finality and notices of appeal—and specifically to consider the issue of prejudice within this flexible framework—formed



the backdrop for courts of appeals in the 1960s and 1970s in considering the issue of whether premature notices of appeal could ripen.

The Fifth Circuit's decision in *Jetco Electronic Indus. Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973), is instructive of this pragmatic approach that the courts of appeals adopted at that time. In that case, the district court had granted one defendant's motion to dismiss, and the plaintiff filed a notice of appeal from that order. That order, however, is a quintessential nonfinal, nonappealable order; indeed, it is the paradigmatic case that requires Rule 54(b) certification if an appeal is to be taken. Several months later, the plaintiff and the remaining defendants reached a stipulated judgment, and the district court dismissed the entire action.[3] No subsequent notice of appeal was filed. Rejecting the argument that the premature notice of appeal never ripened, the Fifth Circuit held the following:

> Nevertheless, these two 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. Mindful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality, *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), we decline appellee's invitation to exalt form over substance by dismissing this appeal. We hold that the March order dismissing appellants' suit against ETL [Engineers Testing Laboratories Inc.] is, under the circumstances of this case, within our appellate jurisdiction. Therefore, we turn to the merits.

The Ninth Circuit's decision in *Anderson v. Allstate Insur. Co.*, 630 F.2d 677 (9th Cir. 1980), is also instructive of the doctrine. There, the district court granted some, but not all, of the defendants' motions to dismiss, and the plaintiffs filed a notice of appeal of that nonfinal order. Subsequently, the district court dismissed the remaining claims against the remaining defendants and remanded the state claims to state court.[4] No further notice of appeal was filed. Recognizing that the notice of appeal was premature because it did not seek to appeal a final, appealable order, the Ninth Circuit, consistent with the Fifth Circuit in *Jetco*, nonetheless chose to give "a practical rather than technical construction to the finality rule, without sacrificing the considerations underlying that rule." As such, the court heard the appeal on its merits.

Thus, this cumulative or pragmatic finality doctrine served as the backdrop to the enactment of the relation forward provision included in Rule 4(a)(2) in 1979. The Supreme Court has only once addressed Rule 4(a)(2) as it applies to the landscape of premature notices of appeal.

FirsTier Mortgage Co. v. Investors Mortg. Ins. Co.

In *FirsTier Mortgage Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269 (1991), the Supreme Court waded into the relation forward provision of Rule 4(a)(2). The case involved a breach of contract and breach of the implied covenant of good faith and fair dealing action by FirsTier against Investors Mortgage Insurance Co. (IMI); no other parties or claims were involved in the action. IMI moved for summary judgment, and on Jan. 26, 1989, at the hearing on IMI's motion, the district court announced from the bench that it was granting IMI's motion for summary judgment as to both of FirsTier's claims. On Feb. 9, 1989, FirsTier filed its notice of appeal, identifying the Jan. 26 bench ruling as the decision under appeal. The prevailing party was asked to prepare proposed findings, and the aggrieved party was permitted to submit objections. Whether any such documents were filed is unclear from the opinion. Then, on March 3, 1989, the district court issued its findings of fact and conclusions of law and entered judgment in IMI's favor. No other notice of appeal was filed.

The Tenth Circuit dismissed the appeal on the ground that the Jan. 26 bench ruling was not a final, appealable order, and the circuit court refused to consider the Feb. 9 notice of appeal effective as to the March 3 judgment. That is, the court refused to hold that the premature notice of appeal ripened on March 3 under relation forward provision contained in Rule 4(a)(2). The Supreme Court reversed this decision.

Noting both that "Rule 4(a)(2) was intended to codify a general practice in the courts of appeals of deeming certain premature notices of appeal effective" and that Rule 4(a)(2) "recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee," the Supreme Court held that, under Rule 4(a)(2)'s relation forward provision, FirsTier's Feb. 8 notice of appeal ripened when the March 3 final judgment was entered. As such, and rejecting IMI's argument that the bench ruling was not final, the Supreme Court held that "Rule 4(a)(2) permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment."

But the Supreme Court did not stop there. To rebut IMI's argument that Rule 4(a)(2) applied only to save a premature notice of appeal when filed as against a final decision, the Supreme Court adopted the rationale that Rule 4(a)(2) was "intended to protect the unskilled litigant who files a notice of appeal from a decision *that he reasonably but mistakenly believes to be a final judgment*, while failing to file a notice of appeal from a final judgment."[5] Building on this "reasonableness" concept, the Court added the following discussion:

> This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise.[6]

Thus, the Supreme Court held that a premature notice of appeal is valid if the litigant reasonably concludes that the order being appealed is final, but, if it would be unreasonable to conclude that the order being appealed is final, then the notice of appeal would not necessarily ripen under Rule 4(a)(2)'s relation forward provision. According to this rationale, then, "FirsTier's belief in the finality of the January 26 bench ruling was reasonable, and its premature February 8 notice therefore should be treated as an effective notice of appeal from the judgment entered on March 3."[7]

The test, then, was subtly altered from a strictly textual analysis of whether the language of Rule 4(a)(2) applies (it did) to include an analysis of whether the appellant was reasonable and whether any confusion is understandable in light of what issues remained. Although the two analyses may often yield the same answer, that is not always the case. Thus, it is this "reasonable belief" gloss on Rule 4(a)(2) that in the subsequent years has given birth to conflicting circuit court opinions that have struggled to decide whether premature notices of appeals should ripen.

Post-*FirsTier* Decisions

Since *FirsTier*, the courts of appeals have interpreted *FirsTier's* application of Rule 4(a)(2) in different ways, causing a seeming circuit split over the viability of premature notices of appeal in certain cases. Several different, yet common, fact patterns exist that illustrate differing applications of *FirsTier*.

Where a notice of appeal is filed from an order that leaves open the issue of the calculation of interest: the Fourth, Eighth, and Ninth Circuits

One prototypical fact pattern is as follows: an order granting the plaintiff the relief sought is entered, but further calculations are required to assess the amount of interest (or calculate the exact amount of the damages); a notice of appeal is filed; a subsequent order is issued calculating the amount of interest owed; judgment is entered; no new notice of appeal is filed. Does the notice of appeal ripen such that appellate jurisdiction exists? It depends upon the circuit in which the case is heard.

In *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000), the defendant sought enforcement of an arbitration award entered after the original action had been stayed in favor of an arbitration proceeding. The district court entered an order enforcing the arbitration award, and the plaintiff filed a notice of appeal. Subsequently, the district court entered a final order assessing interest. Citing *FirsTier*, the Fourth Circuit held that the appeal was valid.

In contrast, the Eighth Circuit reached a different conclusion. In *Dieser v. Continental Cas. Co.*, 440 F.3d 920 (8th Cir. 2006), the district court granted a summary judgment in an ERISA benefits claim to the plaintiff with orders assessing statutory penalties, costs, attorneys' fees, and benefits. The defendant filed a notice of appeal. The district court subsequently entered an order assessing the exact amount of prejudgment interest that was owed—roughly $3,000. No new notice of appeal was filed. The Eighth Circuit held that the notice of appeal was invalid and did not ripen under Rule 4(a)(2) and *FirsTier*. Specifically, *Dieser* held that that the order appealed from would not be immediately appealable if it was followed by an entry of judgment, because outstanding issues remained—namely the calculation of prejudgment interest, which was not a mere ministerial act. The Ninth Circuit reached the same result as the Eighth Circuit did.[8]

Given this calculus employed by the Eighth and Ninth Circuits, the obvious question is whether *FirsTier* included any substantive analysis and whether any work was conducted after the bench ruling by way of the proposed findings of fact and conclusions of law. *FirsTier* does not explain what exactly occurred procedurally, but if there was such contested briefing, it would certainly imply either that the premature notice should not ripen under this methodology or that the methodology of the Eighth and Ninth Circuits is arguably wrong. In any event, what is clear is that appellate review rights are lost when such a case is heard by the Eighth and Ninth Circuits; however, on essentially the same set of facts, appellate review is not lost when heard by the Fourth Circuit.

Where a notice of appeal is filed from an order dismissing all claims but where counterclaims remain: the Seventh, Eighth, and D.C. Circuits

Another typical fact pattern is the following: the plaintiff sues the defendant, and the defendant files counterclaims; one of the parties secures a summary judgment on its or the other's claims, leaving only one side's set of claims remaining, *or* some but not all claims are dismissed; the aggrieved party files a notice of appeal; subsequently the remaining claims are dismissed and judgment is entered; no new notice of appeal is filed. Does the notice of appeal ripen such that appellate jurisdiction exists? Again, the result depends on which circuit is ruling on the case.

For example, in *Outlaw v. Airtech Air Conditioning & Heating Inc.*, 412 F.3d 156, 158–160 (D.C. Cir. 2005), the district court entered an order granting summary judgment. A notice of appeal was filed, and remaining claims against another party were subsequently resolved and a final order and judgment was entered. The D.C. Circuit held that notice of appeal was valid under Rule 4(a)(2) and *FirsTier*.[9] The Seventh Circuit agrees with the D.C. Circuit.[10]

However, the Eighth Circuit reached the opposite conclusion. For example, in *Miller v. Special Weapons LLC*, 369 F.3d 1033, 1033–1035 (8th Cir. 2004), the court held that a premature notice of appeal could not be saved by Rule 4(a)(2) when the notice of appeal was filed after the district court entered summary judgment but before the district court entered a judgment on a pending counterclaim, because the summary judgment order entered was not one that "would be appealable" under *FirsTier*. "The infirmity in Mr. Miller's appeal ... does not lie in the fact that the district court had failed to issue its final order on the summary judgment that it announced but rather in the fact that there was an unresolved claim pending in the district court when Mr. Miller filed his notice of appeal."

Other situations involving notices of appeal filed before costs are assessed, before Magistrate Judge Reports are adopted, and before post-trial calculations are finalized: the Third, Fifth, Ninth, and Federal Circuits

Other scenarios involve some remaining substantive consideration or analysis of issues by the court despite a seemingly final order. These situations include post-notice of appeal assessment of costs and adoption of Magistrate Judge Reports and Recommendations in both civil and criminal cases. For example, the Fifth Circuit has held that there was no appellate jurisdiction in a *criminal* appeal where the notice of appeal was filed as against the magistrate judge's report and recommendation on sentencing before the district court adopted that report and recommendation.[11] Similarly, in the Ninth Circuit, the court addressed an order granting fees and costs where a notice of appeal was filed before a subsequent order was entered assessing the amount of fees and costs. No new notice of appeal was filed, and the court held that the notice of appeal was not sufficient to preserve appellate review and therefore the appeal was dismissed.[12]

But other circuits have found the premature notices of appeal valid even where seeming nonministerial, substantive matter remains. For example, in *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 585 (3d Cir. 1999), the Third Circuit addressed an order denying an allocation plan in a bankruptcy where a notice of appeal was filed by the aggrieved party. Subsequently, an order was entered approving a different

allocation plan. The court held, in light of *FirsTier*, that the notice of appeal was valid because there was no prejudice and key elements had been resolved initially. And in *Pods Inc. v. Porta Stor Inc.*, 484 F.3d 1359, 1365 (Fed. Cir. 2007), the Federal Circuit held that where a notice of appeal is filed after a jury verdict but before a trial court order doubling damages after post-trial briefing, the appeal of all issues was preserved because the notice of appeal did relate forward under *FirsTier*. Notably, *Pods* involved post-notice of appeal consideration of additional, disputed issues related to damages, but the issue was preserved, whereas in the Ninth Circuit the post-notice of appeal consideration of issues related to disputed costs precluded preservation of the appeal. The line between the two is quite thin.

Harmonizing the Opinions

Whether all these decisions made by the courts of appeals can be fully reconciled with *FirsTier* (putting aside the lack of harmony between them) is an open question. Moreover, *FirsTier's* reasonableness inquiry—whether the practitioner could reasonably believe the order being appealed was final—is not a factual question to be answered by the attorney's skills of persuasion before a jury; rather, it is a legal question to be posed to a panel of appellate jurists. And minds can differ. For example, according to *FirsTier*, interlocutory orders such as discovery sanctions orders cannot reasonably be believed to be final, because more remains than the mere ministerial entry of judgment. Other jurists have viewed at least the ultimate normative question—whether appellate review should remain on these facts—differently.[13]

The sanctions scenario aside, however, arguably the quintessential nonfinal, interlocutory order is an order either dismissing some claims or some parties. Indeed, for those types of orders, Rule 54 of the Federal Rules of Civil Procedure specifically exists to allow the potential for immediate appellate review, precisely because the orders are not otherwise final and susceptible upon entry to the invocation of appellate jurisdiction. Yet those orders apparently can be reasonably believed to be final under the *Outlaw-Garwood-Fadem* line of cases, such that a notice of appeal filed against them will ripen under *FirsTier* and Rule 4(a)(2). To be sure, this is why, in *Fadem*, Judge Wiggins of the Ninth Circuit dissented, arguing that a notice of appeal filed after an order dismissing one of several consolidated cases could not relate forward to operate as a timely notice of appeal after a final order was issued dismissing all cases. As Judge Wiggins argued, such an expansive reading of *FirsTier* effectively nullifies the necessity of Rule 54(b) certification that would otherwise exist and can create a situation of greater uncertainty about the existence of appellate jurisdiction, which ultimately wastes the resources of the parties and the court.

To some extent, it appears that the reasonableness issue with which the courts of appeals have grappled may be defined along different fault lines: whether, as to the issue resolved in the order, anything further remains vis-à-vis that issue beyond the ministerial act of an entry of judgment. Perhaps *Cooper* stated the analytical touchstone for this test most succinctly: "Only where the appealing party is fully certain of the Court's disposition, such that entry of final judgment is predictably a formality, will appeal be proper."[14]

If substantive work remains, as when assessing interest or costs in cases in which substantive decisions need to be made (such as the amount of the interest, the amount of the costs, and the like) in order to finalize that issue, then a premature notice of appeal will not relate forward and preserve appellate review. In such cases, substantive work remains to be done, rather than simply performing a ministerial act of entering a judgment. If, however, there is no substantive issue for court attention remaining vis-à-vis the dismissed defendant other than an ultimate entry of judgment as in the case of an order dismissing one of two defendants from a case, then a premature notice of appeal will suffice.

This issue-transactional approach certainly undergirds the courts' decisions in terms of how they assess, under *FirsTier*, (1) whether all that remains is ministerial action and (2) whether the premature notice of appeal is reasonable. But such an approach then reopens the sanctions order question, which order, according to *FirsTier*, is never susceptible to the benefit of Rule 4(a)(2) but which issue itself is certainly concluded as a discrete issue vis-à-vis the remaining issues in the litigation. Thus, whether such an issue-transactional approach can even itself be harmonized with *FirsTier's* reasonableness inquiry is ultimately unclear and only adds to the likelihood for continued disharmony among the courts of appeals applying *FirsTier*, all of which endangers the practitioner.

Finally, and adding to the confusion, many panel opinions decide the question by relying on the cumulative or pragmatic finality doctrine, never mentioning or citing either Rule 4(a)(2) or *FirsTier*, despite their obvious importance given the similar factual and procedural settings.[15] Still again, other opinions have noted that the expansive cumulative/pragmatic finality doctrine was in fact modified—or eliminated—as a result of Rule 4(a)(2) or *FirsTier*, rendering reliance on such doctrines dangerous to say the least.[16] It remains to be litigated whether Rule 4(a)(2) simply codified the cumulative/pragmatic finality doctrine that existed at the time or whether the rule codified a much narrower approach to allowing premature notices of appeal to ripen.

Accordingly, a review of *FirsTier* and of decisions made by the courts of appeals applying Rule 4(a)(2) yield one clear conclusion: not only are the rules under *FirsTier* different in each circuit, but whether it is *FirsTier* or the pragmatic/cumulative finality doctrine that is applied is sometimes an open question. And the stakes are high: losing appellate review on a basis like this is an obvious disaster for the client as well as for his or her attorney. Indeed, Mr. Cooper lost his *criminal* appeal because of reliance on cumulative finality when the Fifth Circuit held that, in light of *FirsTier's* constriction of the cumulative finality doctrine, his appeal of his criminal sentence was lost.

Conclusion: What All This Means to the Practitioner

Generally, being early and prompt is not a problem that

seems to plague the legal profession; rather, the perennial problem seems to be meeting deadlines at the last minute in order to avoid, usually just barely, being late. After all, the attorney who files a summary judgment motion well before the summary judgment cutoff date does not lose the right to have that motion heard; at best (or worst, depending on one's perspective) it gets delayed in order to obtain more discovery. But notices of appeal are one area of practice in which being early—instead of just being on time—can be fatal. Thus, these problems emerge, it seems to some extent, from counsel who are confused about what a final order is, who are then paranoid about losing appellate review while remaining issues percolate, and who then file a notice of appeal before the passage of 30 days out of a hypercautious, but often sadly misguided, desire for safety. As such, counsel then assumes that filing too early is not a problem and is, instead, the way to address the risk of losing an appeal if it is not filed within 30 days of the "issue" by which his or her client is aggrieved. As this discussion has shown, filing early and exhaling is not the solution.

All of this, then, can be distilled to one simple piece of advice for legal practitioners in federal appellate courts: if for whatever reason you file a notice of appeal before the entry of judgment or before the entry of another order addressing other issues in your case, do not assume Rule 4(a)(2) protects you. Rather, make sure you file another notice of appeal (in a timely manner, of course) after the entry of the final order or judgment so that you do not find yourself on the receiving end of a motion to dismiss or a court of appeals' request for briefing on jurisdiction. **TFL**

Peter Afrasiabi is a partner at Turner Green Afrasiabi & Arledge LLP in Costa Mesa, Calif. (www.turnergreen.com) and an adjunct professor at the Chapman University School of Law, where he teaches a course on federal appellate procedures. He is also an officer of the Orange County Chapter of the Federal Bar Association.

Endnotes

[1]Parties, of course, may seek appellate review before entry of a final, appealable order or judgment by various routes that function as exceptions to the need for a final order before appellate jurisdiction may attach. This article does not discuss those avenues of appellate relief, which include certification of an issue for interlocutory review (28 U.S.C. § 1292), certification by the district court under Federal Rule of Civil Procedure 54, collateral order review (*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949); *In re Baxter Healthcare Corp.*, 151 F.3d 1148, 1149 (9th Cir. 1998)), or exceptional mandamus relief (*Calderon v. United States Dist. Ct.*, 163 F.3d 530, 534–35 (9th Cir. 1998)).

[2]*Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).

[3]*Jetco*, 473 F.2d at 1230–1231.

[4]*Anderson*, 630 F.2d at 680.

[5]*FirsTier*, 498 U.S. at 276 (emphasis added).

[6]*Id.* at 276 (emphasis in original).

[7]*Id.* at 277.

[8]*Jack Raley v. Homestead Develop. Co.*, 17 F.3d 291, 293–294 (9th Cir. 1994) (order granting summary judgment entered; notice of appeal filed; order adjudicating the amount of interest filed; no new notice of appeal filed; the court held that the premature notice of appeal did not ripen and so dismissed the appeal).

[9]*Outlaw*, 412 F.3d at 159.

[10]*Garwood Packaging Inc. v. Allen & Co.*, 378 F.3d 698, 700–701 (7th Cir. 2004) (holding that the notice of appeal, filed after the district court entered judgment as to one defendant but before the court dismissed the claims against the other defendants, would have become effective when those defendants were later dismissed); *cf. TCI Group Life Ins. Co. v. Knoebber*, 244 F.3d 691 (9th Cir. 2001) (one cross-defendant's Rule 60(b) motion for relief from default vis-à-vis the other cross-defendant was denied and a notice of appeal filed; the plaintiff's case against both cross-defendants was resolved and a judgment was entered; no new notice of appeal was filed; appeal was held valid); *Fadem v. United States*, 42 F.3d 533, 534–35 (9th Cir. 1994) (notice of appeal on order dismissing some of several consolidated cases valid upon entry of final order adjudicating all consolidated cases).

[11]*See*, for example, *Cooper v. United States*, 135 F.3d 960, 962–963 (5th Cir. 1998). The Ninth Circuit is in accord with this opinion. *See Serine v. Peterson*, 989 F.2d 371, 372 (9th Cir. 1993) (holding that a notice of appeal from a magistrate's report and recommendation did not ripen upon the district court's adoption of the report).

[12]*Kennedy v. Applause Inc.*, 90 F.3d 1477, 1482–1483 (9th Cir. 1996). The party never argued that the notice of appeal should ripen as to the issue of whether fees/costs were appropriate (the first order) even if the notice of appeal did not ripen as to allow a challenge to the amount—that is, arguably as to the substantive question of entitlement to fees or costs, all that remained was the ministerial act of an entry of judgment. Fixing the amount is arguably a separate issue with a separate analysis, and so arguably the notice of appeal should have ripened as to the first issue even if not the latter.

[13]*Cato v. Fresno City*, 220 F.3d 1073, 1074–1075 (9th Cir. 2000) (sanctions order; notice of appeal; case later resolved with judgment entered; held, without citing *FirsTier*, that the premature notice of appeal was valid under the cumulative finality doctrine); *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120–1121 (8th Cir. 1997) (finding, without mention of *FirsTier*, that pursuant to Rule 4(a)(2), a notice of appeal filed from a sanctions order that did not quantify the amount of sanctions and from a final, appealable order of summary judgment later became effective as to the sanctions order when the amount of sanctions was eventually quantified). *Hill* is obviously wrong in light of *FirsTier*.

[14]*Cooper*, 135 F.3d at 963.

[15]*Cato*, 220 F.3d at 1074–1075; *Holden v. Hagopian*, 978 F.2d 1115 (9th Cir. 1992) (finding premature notice of appeal valid under cumulative finality doctrine without citing to Rule 4(a)(2) or *FirsTier*).

[16]*See*, for example, *Outlaw*, 412 F.3d at 160; *Cooper*, 135 F.3d at 963.