

**FINALITY OF JUDGMENTS
AND OTHER APPELLATE TRIGGER ISSUES**

Courtesy of Appellate Practice Committee,
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Association

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MISCELLANEOUS

Md. Const., Art. IV, § 22 42

I. Note on Scope

A. This presentation generally concerns appeals in civil cases from circuit court to the Court of Special Appeals. It does not specifically address issues unique to appeals from district court, appeals from orphans' court, petitions for certiorari in Court of Appeals, and petitions for judicial review of decisions by administrative agencies. Nonetheless, many of the principles discussed here may apply in those other forms of appellate or quasi-appellate review.

II. Nature of Appellate Jurisdiction

A. The right to appellate review exists only by statute or rule.

B. General rule: The Final Judgment Rule — a person generally may appeal only from a final judgment. Section 12-301 of the Courts and Judicial Proceedings Article.

1. Exceptions:

a. Narrow statutory exceptions in §§ 12-302 and 12-303 of the Courts and Judicial Proceedings Article.

b. Collateral orders (which are really considered to be interlocutory only in appearance but final judgments in substance).

c. Appeals under Rule 2-602(b) of rulings that dispose of more than one but less than all the "claims" in the case or all of the claims against one or more but less than all parties in the case, where the circuit court has determined that there is no just reason to delay the entry of final judgment.

d. Maryland has no provision akin to 28 U.S.C. § 1292(b), which permits a federal district court judge to certify "a controlling question of law" for an immediate, interlocutory appeal if there is "substantial ground for difference of opinion" as to the issue and if "an immediate appeal . . . may materially advance the ultimate determination of the litigation."

2. Absent one of these limited exceptions to the final judgment, an appeal will lie only from a final judgment; without a final judgment, the appellate court lacks jurisdiction.

C. The existence of appellate jurisdiction is akin to the existence of federal jurisdiction in federal courts. Appellate courts, like federal courts, are courts of limited jurisdiction. Hence, the question of appellate jurisdiction may be raised at any time by any party. Furthermore, the appellate court itself, on its own motion, may (and frequently does) raise the question of whether it has appellate jurisdiction, of whether the court below entered a final judgment, and of whether the case is properly before the court on appeal.

III. What is a "final judgment"?

A. One determines finality by the effect of the ruling. Houghton v. County Comm'rs of Kent County, 307 Md. 216, 221 (1986) (Houghton II).

1. "If a ruling of the court is to constitute a final judgment, it must have at least three attributes: (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601." Rohrbeck v. Rohrbeck, 318 Md. 28, 41 (1989).

2. The test for finality is whether the court's ruling had the effect of putting the parties out of court and denying them the means of further prosecuting the case or the defense. See Houghton v. County Comm'rs of Kent County, 307 Md. at 221.

3. A judgment is final if it is "unqualified" and if "nothing in the circuit court's action suggested any contemplation that a further order be issued or that anything more be done." Doehring v. Wagner, 311 Md. 272, 275 (1987).

4. If the record suggests that it remains for the circuit court to take some action to dispose of the case on the merits, an order is not final.

a. Thus, for example, in Anderson v. Anderson, 349 Md. 294, 297-98 (1998), the Court of Appeals dismissed an appeal because the record did not contain a child support worksheet that circuit court appeared to have expected a domestic master to complete before the ruling would become final.

b. Similarly, in Forward v. McNeily, 148 Md. App. 290, 308 (2002), the circuit court had not entered an appealable, final judgment where the plaintiffs had requested a declaratory judgment, among other forms of relief, but the court had never declared the parties' rights.

B. Rule 2-602(a) distinguishes between final judgments and mere interlocutory orders: Generally, "an order or other form of decision, however, designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

1. is not a final judgment;
2. does not terminate the action as to any of the claims or any of the parties; and
3. is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties."

C. By its nature, an interlocutory ruling — *i.e.*, anything short of a final judgment — is subject to revision by the circuit court at any time. Gertz v. Anne Arundel County, 339 Md. 261 (1995); Quartermtime Video & Vending Corp. v. Hanna, 321 Md. 59 (1993).

1. Interlocutory circuit court rulings and the "law of the case": during the course of litigation in circuit courts, courts and litigants often mistakenly refer to an earlier circuit court ruling as constituting the "law of the case." It does not. The law of the case doctrine, properly speaking, applies to the effect that an appellate court's rulings have on remand of a case to a circuit court. "[T]he law of the case doctrine does not apply to circuit court decisions in Maryland unless a statute or rule renders the decision binding or when no appeal is taken from the final judgment." Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 637, *cert. denied*, 348 Md. 205 (1997) (quoting Ralkey v. Minnesota Mining & Mfg. Co., 63 Md. App. 515, 522 (1985)). Thus, "[w]hile the trial judges may choose to respect a prior ruling in a case, they are not required to do so." *Id.* (quoting Ralkey v. Minnesota Mining & Mfg. Co., 63 Md. App. at 522-23).

D. We determine whether a ruling is final by the ruling's effect of putting the parties out of court and denying them the means of further prosecuting the case or the defense. No magic words are necessary to make a judgment a final judgment. Houghton v. County Comm'rs of Kent County, 305 Md. 407 (1986) (Houghton I).

1. Before Houghton I, many thought that, for a judgment to be final, the clerk had to inscribe the word "judgment" on the docket entries. The Houghton decisions expressly reject that concept. Under Houghton, one determines the finality, and thus the appealability of a ruling, by determining its effect — does it put the parties out of court

and deny them the means of further prosecuting or defending the case, and has the court issued an "unqualified" order with no suggestion that a further order may be issued or that anything more may be done?

2. As of October 1, 1997, Rule 2-601(a) expressly requires that each judgment be set forth on a separate document.

a. "The language of Md. Rule 2-602(a), as adopted, is borrowed, with style changes, from Fed. R. Civ. P. 58. The purpose of the federal rule, according to the notes of the Advisory Committee on the Federal Rules of Civil Procedure, was to eliminate uncertainty as to when a purported entry of judgment was effective." Suburban Hosp., Inc. v. Kirson, 362 Md. 140, 154 (2000) (citing Byrum v. Horning, 360 Md. 23, 25-26 (2000)).

b. The time for an appeal runs only from the date when the clerk enters the separate document on the docket. Consequently, if the clerk docketed an oral ruling that predates the signing and docketing of the separate document, the time for appeal runs from the date of the docketing of the separate document, not the date when the clerk docketed the oral ruling. Byrum v. Horning, 360 Md. at 29.

c. There was no final judgment in the absence of a docket entry reflecting the denial of a post-judgment motion and a separate document evidencing the court's ruling on the motion; therefore the appellate courts had no jurisdiction to proceed with the appeal. Taha v. Southern Mgmt. Corp., 367 Md. 564, 567 (2002).

d. See Tierco Maryland, Inc. v. Williams, 381 Md. 378, 394 (2004). The separate document need not be labeled a "judgment." Nor is it necessary that the judge's signature appear on the document. For example, a stipulation of voluntary dismissal can be the separate document required for a judgment even though the judge need not sign it.

e. Following federal precedent, the Court of Appeals has said that, under certain circumstances, parties can waive the requirement of a separate document by failing to object on appeal. Suburban Hosp. v. Kirson, 362 Md. at 156. Waiver can occur, however, only where the clerk entered the final judgment on the record. Id.; Taha v. Southern Mgmt. Corp., 367 Md. 564, 569 (2002); Forward v. McNeily, 148 Md. App. 290, 306 (2002).

E. To be a final judgment, a ruling does not need to resolve all claims on the merits.

1. Brewster v. Woodhaven Bldg. & Dev., Inc., 360 Md. 602 (2000): A ruling transferring a case from one circuit court to another is a final judgment because it terminated the proceedings in the court in which the plaintiff had brought it.

2. Ferrell v. Benson, 352 Md. 2 (1998): A ruling transferring a case from a circuit court to a district court was a final judgment because it terminated the case and denied the plaintiff the means of prosecuting it in that court.

3. Montgomery County v. Revere Nat'l Corp., 341 Md. 366 (1996): An order incorporating a settlement agreement is a final judgment even though the circuit court did not actually adjudicate any of the issues before it. See also Jones v. Hubbard, 356 Md. 513 (1999) (while a settlement agreement is not a judgment, it can become the basis of a consent judgment if the parties ask the circuit court to enter judgment based on their agreement, if the court does so, and if the clerk indexes the ruling on the docket).

4. Claibourne v. Willis, 347 Md. 684, 690-92 (1997): a stipulation of dismissal with prejudice, if signed by all parties and entered on the docket, is a final judgment.

F. To become final, it is necessary that a judgment be entered on the docket: In Maryland, a judgment does not become final and properly appealable until the clerk enters it on the docket. Waller v. Maryland Nat'l Bank, 332 Md. 375 (1993); Jenkins v. Jenkins, 112 Md. App. 390, 405 (1996).

1. An erroneous docket entry can sometimes prevent a judgment from becoming final. E.g., Waller v. Maryland Nat'l Bank, 332 Md. at 377-80: The court made an oral ruling in which it granted summary judgment in favor of the defendants, and clearly intended its ruling to finally dispose of all claims. The clerk, however, suggested a lack of finality by entering on the docket that an "order" was "to follow." The Court of Appeals dismissed the case, on its own motion, for lack of final judgment and thus lack of appellate jurisdiction.

a. Note, however, that as of October 1, 1997, Rule 2-601(a) addresses the specific problem that arose in Waller. Under Rule 2-601(a), a court can no longer dispose of a case merely by making an oral ruling that the clerk subsequently enters on the docket. The judgment must now appear as a separate, written document. Nonetheless, the problem in Waller can reemerge if, in docketing the order, the clerk makes an entry inconsistent with the written order itself.

b. Another problem can arise if the docket entry does not accurately reflect the court's ruling. For example, in Walk v. Hartford Cas. Ins. Co., 382

Md. 1, 11 n. 4 (2004), after the circuit court directed the entry of summary judgment, but the clerk made an incoherent docket entry stating: "ordered from Judge without file January 7th, 03." Rather than take a protective appeal within 30 days of the incoherent docket entry, the losing party moved the circuit court to enter "final judgment" – i.e., to order the clerk to clarify what had happened. Several months later, the court granted the motion and effectively ordered the clerk to clarify the docket entries. The losing party then appealed within 30 days of the docketing of that order. Although far more than 30 days had passed from the original grant of summary judgment and the incoherent docket entry that failed to reflect it, the Court of Appeals allowed the appeal to proceed because the original entry did not comply with Rule 2-601.

2. The clerk's entry of judgment on the docket serves a jurisdictional function: Starting the running of the clock for aggrieved party to note appeal.

a. The aggrieved party has 30 days from clerk's entry of the judgment on the docket to appeal from circuit court to Court of Special Appeals. Md. R. 8-202(a).

b. If one party appeals, the adversary then has an additional 10 days to appeal if he or she wishes to do so. Md. R. 8-202(e).

c. The failure to note an appeal within these time periods prevents appellate jurisdiction from vesting.

(1) The problem with cross-appeals: An adversary's appeal may or may not cover substance of a cross-appeal. If not, the substance of the cross-appeal is not covered by the adversary's appeal and if the cross-appellant does not note a cross-appeal within 10 days after the adversary appeals, appellate court generally will not entertain issues raised in cross-appeal. Maxwell v. Ingerman, 107 Md. App. 677 (1996).

(2) According to Court of Special Appeals, however, Rule 8-202(e), concerning the time for filing cross-appeals, is not a jurisdictional requirement. If an appellant notes a timely appeal, the appellate court acquires jurisdiction over the entire case. If the opposing party notes no cross-appeal, the appellate court will ordinarily limit its review to issues raised by the appellant. If opposing party notes an untimely cross-appeal, the appellate court will ordinarily dismiss it and limit appellate review to issues raised by appellant. Nonetheless, if the cross-appellant demonstrates "exceedingly good cause" for an untimely cross-appeal, the appellate court may, in its discretion, excuse the untimeliness and consider issues raised in cross-appeal. Id. at 681.

(3) The Court of Special Appeals found "exceedingly good cause" where the undisputed facts showed that the appellant had failed to serve the notice of appeal on the adversary. The adversary, thus, did not promptly learn of appeal and did not have time to note a timely cross-appeal within the 10 days set forth in Rule 8-202(e). Id. at 683.

3. If a party has not filed a timely notice of appeal, the opposing party, or court on its own motion, may raise the defect and have the appeal dismissed. Md. R. 8-203(a).

4. Note that a party takes an appeal by filing the notice of appeal in the circuit court, not in the appellate court. Md. R. 8-201(a).

IV. Specific Problems Regarding Determining Finality of Judgments

A. Voluntary dismissal of unadjudicated claims; questionable or erroneous conclusions by the Court of Special Appeals about the finality of a judgment subject to appeal: Houghton v. County Comm'rs of Kent County, 305 Md. 407 (1986) (Houghton I).

1. Facts:

a. Plaintiffs brought a three-count complaint. The circuit court dismissed two of the three counts. Plaintiffs then voluntarily dismissed the only remaining count, the clerk entered the dismissal on the docket, and plaintiffs appealed to the Court of Special Appeals.

b. The Court of Special Appeals dismissed the appeal, reasoning, erroneously, that the lower court had not entered a final judgment because the clerk had not used the word "judgment" in the docket entry.

c. The case returned to circuit court, where the clerk corrected the "defect" and entered magic word "judgment" on the docket. Plaintiffs then took a second appeal, which, because of the delay in the aborted first round of appellate review, they noted far more than 30 days after the recordation of the voluntary dismissal of the unadjudicated count of the complaint.

d. The Court of Appeals granted a petition for certiorari to consider the merits of the case, but wound up dismissing the case for lack of appellate jurisdiction.

2. Ruling:

a. The final judgment, according to the Court of Appeals, occurred when plaintiffs voluntarily dismissed the third count of complaint. The voluntary dismissal of only the unadjudicated count put plaintiffs out of court and deprived them of the means of further prosecuting the case; therefore, the voluntary dismissal gave rise to a final, appealable judgment.

b. Contrary to Court of Special Appeals' ruling, plaintiffs had initially taken a timely appeal of final judgment — the judgment was not deprived of finality merely because the clerk had failed to use magic word "judgment" in making the docket entry reflecting the voluntary dismissal of the unadjudicated count.

c. But the appeal before the Court of Appeals was not a timely appeal from a final judgment. Because of the delay in the initial appeal to the Court of Special Appeals, the appeal before Court of Appeals had been noted more than four months after the real final judgment — the docketing of the voluntary dismissal of the final, unadjudicated count of the complaint.

d. Plaintiffs were victimized by Court of Special Appeals' erroneous interpretation of the final judgment rule — and also by their acquiescence in that interpretation by returning to the circuit court to correct putative "defect" identified by Court of Special Appeals instead of petitioning for certiorari to ask Court of Appeals to decide the accuracy of the Court of Special Appeals' assessment regarding the finality of judgment being appealed.

3. What the Houghton plaintiffs should have done (and what careful litigants should consider doing if Court of Special Appeals issues a questionable decision dismissing a case for want of jurisdiction): Do not return at once to circuit court, but rather petition for certiorari, asking Court of Appeals to decide issue of existence of appellate jurisdiction.

a. E.g., Johnson v. Borg-Warner Acceptance Corp., 303 Md. 617 (1985): A year before Houghton, the Court of Special Appeals had dismissed an appeal on the same ground as in Houghton — the putative lack of finality because of a clerk's failure to use the word "judgment" in docketing the dismissal of a complaint. But rather than return to circuit court after Court of Special Appeals' ruling, the plaintiff petitioned for certiorari. The Court of Appeals reversed and remanded the appeal to the Court of Special Appeals for consideration of the merits (albeit in a decision that did not give the Houghton plaintiffs notice of the court's rationale).

B. A second problem: Unadjudicated claims for attorneys' fees.

1. A court may appear to have disposed of the case on merits, but still have pending before it unadjudicated claims for attorneys' fees under a statute, a rule (such as Md. R. 1-341), or a contract. Is the judgment final where such claims remain pending?

2. It appears that if the claims for attorneys' fees derive from statute or rule, the courts regard them as "collateral" to the subject matter of the action; hence, the pendency of those claims does not deprive a ruling of its status as a final appealable judgment, and an aggrieved party may have to note an appeal even where motions for attorneys' fees remain pending. On the other hand, if the claims for attorneys' fees derive from a contract (e.g., a lease, a loan agreement, etc.), the court will not have entered a final judgment until it has decided how much, if any, attorneys' fees to award.

3. E.g., Blake v. Blake, 341 Md. 326 (1996): Divorce case — under the Family Law Article, circuit court has power to order one party to pay the other's attorneys' fees.

a. An order granting a divorce is docketed on August 9, 1993; the statutory right to attorneys' fees remains unadjudicated.

b. The wife notes an appeal in May 1994, after the denial of her revisory motion under Rule 2-535.

c. The husband moves to dismiss the appeal, contending that the wife noted it more than 30 days after the entry of final judgment on August 9, 1993; the wife appears to argue that circuit court had not entered any final, appealable judgment because it had yet to decide whether to award attorneys' fees.

d. Held: An award of attorneys' fees under a statute is "collateral" to the merits of action. The pendency of a request for attorneys' fees under some statute (e.g., the Family Law Article, the Federal Civil Rights Acts, the Magnuson-Moss Warranty Act, etc.) does not deprive a ruling on the merits of its status as a final judgment. The aggrieved party, therefore, must note an appeal within 30 days of the final ruling on merits despite the pendency of a statutorily-authorized claim for attorneys' fees. Because she had failed to do so, the wife in Blake v. Blake had not noted a timely appeal.

4. E.g., Johnson v. Wright, 92 Md. App. 179 (1992): Unadjudicated request for costs, expenses, and attorneys' fees under Rule 1-341.

a. On July 12, 1991, the circuit court dismissed defendants' counterclaim — the last unadjudicated claim in the case. Still pending, however, was defendants' motion for counsel fees under Rule 1-341.

b. On July 16, 1991, the circuit court denied the motion for counsel fees.

c. Plaintiffs noted an appeal from the rulings on the merits on August 14, 1991 — less than 30 days after the ruling on the motion for counsel fees but more than 30 days after the ruling disposing of merits of action.

d. Held: The appellate court lacked jurisdiction to consider the merits. A rule-based claim for attorneys' fees was "collateral" to merits of action. Hence, the circuit court entered a final, appealable judgment when it disposed of last issue pertinent to merits of dispute — defendants' counterclaim. The pendency of a "collateral" motion for attorneys' fees did not deprive the ruling on the merits of its status as a final, appealable judgment. Therefore, because plaintiffs did not appeal within 30 days of the final judgment on the merits but instead waited to appeal until after the ruling on the "collateral" issue regarding the right to attorneys' fees under Rule 1-341, the appellate court did not acquire jurisdiction to review the merits.

5. See also Gallagher v. Gallagher, 118 Md. App. 567 (1997), which held that the noting of an appeal of a marital award and counsel fees did not deprive the circuit court of the ability to reduce such award to judgment while the appeal was pending, as the entry of such a judgment was deemed a collateral matter.

6. Compare Mattvidi Assocs. Ltd. P'ship v. Nationsbank of Va., N.A., 100 Md. App. 71, 78 n. 1, cert. denied, 336 Md. 277 (1994): Where the claim for attorneys' fees derives from a contract or agreement, the judgment does not become final until circuit court has determined how much, if any, attorneys' fees to award.

a. Mattvidi concerned a lender's attempt to collect on a loan agreement. The court conducted a trial, found in favor of the lender, and calculated the amounts due in principal, interest, and late charges.

b. The lender then moved for attorneys' fees under a provision in the loan agreement. The circuit court conducted a hearing and awarded fees. Defendant then appealed.

c. On appeal, the Court of Special Appeals noted, parenthetically, that because the lender had the right to attorneys' fees as part of its

damages claim, the circuit court had not entered final judgment on the merits until it had computed the amount of attorneys' fees, if any, to award.

7. Northern Assurance Co. v. EDP Floors, Inc., 311 Md. 217 (1987): Attorneys' fees as component of a claim against an insurer for breaching duty to defend and indemnify.

a. EDP sued its insurer, Northern, requesting a declaration that Northern had a duty to defend and indemnify. Note that EDP appears not to have specifically sued for breach of the duty, nor to have demanded damages (including the attorneys' fees to which it would be entitled under Maryland law) for the breach.

b. The Court of Appeals nonetheless treated the case as one where EDP had sued for breach of the insurer's contractual duties, i.e., as one where one component of EDP's damages would be the attorneys' fees that it incurred in prosecuting the suit to secure insurance coverage.

c. Held: Because counsel fees were part of the merits of EDP's claim, the circuit court had not entered a final, appealable judgment until it had determined the amount of counsel fees to award.

d. Note that the Court of Appeals considered counsel fees to form part of EDP's action even though it had styled its case as one for declaratory relief and not, as in Mattvidi, one for damages for breach of contract.

8. Sea Watch Stores L.L.C. v. Council of Unit Owners of Sea Watch Condominium, 115 Md. App. 5, cert. granted, 347 Md. 253, cert. dismissed, 347 Md. 622 (1997): Request for attorneys' fees under Rule 1-341 and as part of the merits of the case, where plaintiff sued not for damages but for an injunction to enforce a contractual agreement that gave the prevailing party the right to attorneys' fees incurred in enforcing agreement.

a. The plaintiff condominium association sued the defendant unit owners for violating restrictive covenants and restrictions in by-laws and declarations; those documents gave the prevailing party the right to the attorneys' fees incurred in enforcing the agreements.

b. The circuit court ruled substantially in plaintiff's favor and entered injunctions in accordance with its ruling on the merits; six months later, the court awarded plaintiff the attorneys' fees incurred in prosecuting the case. While the basis of the ruling was unclear, the court seemed to base the award both on the agreements and on

Rule 1-341. Defendants did not appeal until after the award of attorneys' fees — many months after the entry of injunctive relief.

c. On appeal, defendants initially seemed to challenge the award of fees only on ground that Rule 1-341 did not justify award. Plaintiff responded with a motion to dismiss. In its motion, plaintiff cited Blake v. Blake and Johnson v. Wright to contend that the appeal as to merits was untimely. If the court had awarded the fees exclusively under Rule 1-341, the award was collateral to the merits — and plaintiff, having waited to appeal until after that collateral ruling and until six months after grant of injunctive relief on the merits, had not noted a timely appeal from the decision on the merits.

d. Defendants then abandoned their assertion that the court had awarded fees under Rule 1-341, shifting ground to contend instead that the court had awarded fees under the agreements — and to challenge propriety of award under agreements.

e. The Court of Special Appeals agreed that the appeal would have been untimely if the court had awarded fees only on basis of Rule 1-341. But the court held that because plaintiff had a contractual right to attorneys' fees, the circuit court had not effectively adjudicated plaintiff's claim on the merits until it had awarded the fees. Hence, because the defendants had appealed within 30 days of that award, the appeal vested the appellate court with jurisdiction to consider the entire case.

f. Note that in Sea Watch the merits of the claim included the right to attorneys' fees even though the plaintiff, unlike the lender in Mattvidi, had not sued for monetary damages, but rather had sued only for nonmonetary, injunctive relief.

9. Carr v. Lee, 135 Md. App. 213 (2000): Where the claim for attorneys' fees was part of a contractual claim for indemnification, the circuit court had not entered a final judgment until it had adjudicated and decided the issue of fees.

C. Unserved defendants: If the circuit court has entered judgment against all of the defendants who have been served with process, the judgment is final. See, e.g., Burns v. Scottish Dev. Co., 141 Md. App. 679, 690 (2001) (collecting authorities).

D. Another problem: Premature appeals — Jenkins v. Jenkins, 112 Md. App. 390 (1996).

1. Facts:

a. In a divorce case that included a claim for declaratory relief, the circuit court issued a written opinion on the merits on October 24, 1995. The final paragraph of the opinion stated that counsel should prepare an appropriate declaration and, if necessary, a qualified domestic relations order or QDRO.

b. On October 27, 1995, the clerk docketed the opinion with a note that the declaratory judgment prepared by counsel should follow.

c. On November 8, 1995, the husband noted an appeal.

d. On January 31, 1996, the circuit court signed an order prepared by the wife's attorney.

e. On February 9, 1996, the clerk docketed that order.

2. Held: The husband appealed prematurely when he noted an appeal from the opinion that expressly contemplated the entry of a subsequent order to effectuate it. The Court of Special Appeals had no appellate jurisdiction because the husband had appealed prematurely and because he had not taken a subsequent appeal from the final judgment entered on February 9, 1996, when the clerk docketed the order contemplated in the circuit court's earlier opinion.

a. Note: In case of bona fide uncertainty regarding what constituted the final judgment, the husband could have protected himself by noting a second appeal within 30 days after the docketing of the written order. The husband would then have noted a timely appeal from what the appellate court later determined to be a final, appealable judgment.

3. As a general rule, appeals are properly taken not from opinions but from judgments.

a. "When a written or oral opinion indicates that a written embodiment of the judgment will follow, the opinion cannot be a final, unqualified disposition." It is not ripe, therefore, for appeal. Id. at 403.

b. Hence, where the court announces its ruling either in written or in oral form, but then specifically requests that counsel prepare an order to effectuate the ruling, the ruling cannot constitute a final judgment until (1) the court has signed the order prepared by counsel and (2) the clerk has entered that order on the docket. If a party appeals before the court has signed the order prepared by counsel, then the appellate court acquires no appellate jurisdiction.

(1) But note the effect of the savings provisions in the rules where a party appeals after the execution of an order but before the clerk has entered the order on the docket. Md. R. 8-602(d).

4. In some instances, however, one may properly appeal simply from a written or oral opinion, at least once it is entered on the docket.

a. Doehring v. Wagner, 311 Md. 272 (1987): The court issued a memorandum opinion granting summary judgment. The clerk docketed the opinion. Unlike in Jenkins, the opinion did not contemplate any further action, such as the drafting and execution of a formal order effectuating opinion. Hence, the opinion, when docketed, constituted a final, appealable judgment.

5. QDROs and issues of appealability: In some circumstances, the court enters a QDRO in connection with the judgment of divorce for the purpose of effecting the disposition of the parties' property. In other circumstances, however, the parties and the court may not appreciate the need for a QDRO at the time of the final judgment.

a. In the first set of circumstances, the QDRO forms an integral part of the judgment. Hence, where the court contemplates the issuance of a QDRO in connection with the disposition of the parties' property at the time of the divorce, a judgment of divorce cannot constitute a final, appealable judgment until (1) the court has executed the QDRO and (2) the clerk has entered it on the docket.

b. However, in the second set of circumstances, where no one foresees the need for a QDRO at the time of the ruling regarding the divorce, the QDRO is collateral to the ruling on the merits; the court's order becomes a final, appealable judgment without regard to the timing of the execution and docketing of the QDRO.

6. Note that the rules governing premature appeals do not apply to the review of decisions by administrative agencies, including the Maryland Tax court. Strictly speaking, a party does not "appeal" from the ruling of such an agency; rather, a party files an original action known as a petition for judicial review of the agency's ruling. As an original action, a petition for judicial review does not implicate a court's appellate jurisdiction. Therefore, even if a party petitions for judicial review before an agency has formally rendered its ruling, the circuit court may nonetheless have the power to consider the petition. See, e.g., Kim v. Comptroller of the Treasury, 350 Md. 527 (1998).

E. Savings provisions for premature appeals:

1. What if a party files a notice of appeal before the formal docketing of final judgment? Although the appeal generally would be ineffective, it becomes effective upon entry of final judgment, and is treated as though it were filed on the same day as the final judgment. Md. R. 8-602(d).

a. But note the ruling in Jenkins v. Jenkins: The savings provision of Rule 8-602(d) applies only where a party notes the appeal before the docketing of final judgment but after the court performs the act that, when docketed, will constitute final judgment.

(1) I.e., under Jenkins v. Jenkins, the savings provision of Rule 8-602(d) applies only if a party notes an appeal after the court signs an unqualified order disposing of case but before the clerk formally docketed such an order. Thus, if, as in Jenkins, a party appeals after the court does nothing more than merely announce a ruling that the court clearly contemplates is to be memorialized in a subsequent written order, the appeal is premature, and Rule 8-602(d) does not save it.

2. Rule 8-202(c): An appeal does not divest circuit court of jurisdiction to entertain a properly-filed 10-day motion (i.e., a motion for j.n.o.v. under Rule 2-532, a motion for a new trial under Rule 2-533, or a motion to alter or amend under Rule 2-534).

a. Edsall v. Anne Arundel County, 332 Md. 502 (1993): An appeal noted during the pendency of 10-day motion is effective, but its processing is delayed until after the circuit court has ruled on the motion. The circuit court retains jurisdiction to consider the motion despite the notice of appeal. If the circuit court denies the 10-day motion, the aggrieved party need not note a new appeal. See also Folk v. State, 142 Md. App. 590, 599-602 (2002).

3. Rule 8-602(e): Savings provision for defective appeals that might be proper under Rule 2-602(b) if defect is cured.

a. Rule 2-602(b), which is based on Fed. R. Civ. P. 54(b), deals with cases involving multiple "claims" or multiple parties.

(1) Before the adoption of modern, liberal rules of pleading and joinder, cases involving multiple "claims" or multiple parties would have been impossible — each claim and each action against each different party would have to take place in the context of a separate lawsuit.

(2) Modern rules of pleading allow a party to bring multiple "claims" and multiple defendants into single lawsuit. But, whereas in the past the adjudication of an entire "claim" or all "claims" against a single defendant would result in a final, appealable judgment, the same is not true under the modern system, under which additional "claims" or additional defendants remain in the case.

(3) Rule 2-602(b) permits a circuit court, in its discretion, to restore matters to where they stood before advent of modern rules of pleading and joinder. Under Rule 2-602(b), a court may direct the entry of a final judgment with respect to a ruling that disposes of one or more, but fewer than all, of the "claims" or all of the claims against one or more, but fewer than all, of the parties in the case. To effectuate the right of appeal, however, the court must expressly determine in a written order that "there is no just reason to delay" the entry of final judgment.

b. Because of its obscure substantive and technical requirements, Rule 2-602(b) is a fertile ground for litigation concerning the existence vel non of appellate jurisdiction. One frequently occurring problem arises when, in an appeal otherwise proper under the rule, the circuit court fails to find, in a written order, that there is no just reason to delay the entry of final judgment. See, e.g., Lang v. Catterton, 267 Md. 268 (1972); Tall v. Board of School Comm'rs, 120 Md. App. 236 (1998).

c. Rule 8-602(e) attempts to address this problem. Under the rule, if a party has appealed from an interlocutory order that the circuit court could properly have certified as final, the appellate court may: (1) remand the case to the circuit court for it to decide whether to certify the appeal as final under Rule 2-602(b); (2) enter final judgment on its own initiative and accept the case for appeal; (3) accept the case as properly before it if the lower court has corrected the procedural defect and certified the case as final; or (4) simply dismiss the appeal (as if the savings provision did not exist).

d. For an application of Rule 8-602(e), see In re Adoption/Guardianship No. TPR970011, 122 Md. App. 462 (1998). There, the circuit court disposed of claims against one, but fewer than all, of the defendants, thereby making the option certification available under Rule 2-602(b). The aggrieved defendant, however, appealed before the circuit court had made the requisite certification. Nonetheless, because the circuit court corrected the procedural defect and properly exercised its discretion in certifying its ruling as final, the Court of Special Appeals agreed to entertain the appeal.

F. Effect of 10-day motions (motions for j.n.o.v., motions for new trial, and motions to alter or amend under Rules 2-532 to -534, respectively) and motions for reconsideration (motions under Rule 2-535).

1. If properly filed within 10 days after entry of judgment, the 10-day motions stay the time for noting an appeal until the withdrawal or disposition of the motions. See, e.g., Pickett v. Noba, Inc., 114 Md. App. 552, 555 (1997) (citing Unnamed Attorney v. Attorney Grievance Comm'n, 303 Md. 473 (1985); Sieck v. Sieck, 66 Md. App. 37 (1986)).

a. In cases involving multiple claims or multiple parties, a party need not await the entry of final judgment as to all claims and all parties before filing a post-judgment motion under Rule 2-532. Tierco Maryland, Inc. v. Williams, 381 Md. 378, 396 (2004) (disapproving Atlantic Food & Beverage Sys., Inc. v. Annapolis, 70 Md. App. 721 (1987)). Rather, the party may file such a motion after the entry of "any order final in its nature" (id. at 399), such as an order adjudicating all the claims against that particular party. Alternatively, the party may await the entry of a final judgment before filing a post-judgment motion. Id. at 397-98.

b. Thus, where a defendant filed a Rule 2-532 motion for a new trial after the entry of judgment on a jury verdict on all of the claims against it, but before the entry of final judgment on all claims against all parties, the filing of the motion operated to toll the time for noting an appeal until the circuit court decided the motion for a new trial. Id. at 397-98. In other words, in these circumstances, the motion for a new trial tolled the time for noting an appeal even though the party filed the motion before the entry of a final judgment.

c. A motion filed within 10 days of ruling stays the time for noting an appeal even if styled as a motion for reconsideration or for exercise of the court's revisory power under Rule 2-535. Sieck v. Sieck, 66 Md. App. at 43. The circuit court treats such a motion as a motion to alter or amend under Rule 2-534. Id. at 44. Furthermore, a timely 10-day motion negates the effect of any notice of appeal filed before adjudication thereof (id. at 45), subject, however, to the savings provision in Rule 8-202(c).

d. By contrast, even if styled as a 10-day motion under Rules 2-532 to -534, a motion does not stay the time for noting appeal if it is filed more than 10 days after judgment. Pickett v. Noba, Inc., 114 Md. App. at 556 (citing Stephenson v. Goins, 99 Md. App. 220, cert. denied, 335 Md. 229 (1994)); Leese v. Department of Labor, Licensing and Regulation, 115 Md. App. 442 (1997). In that event, a party must appeal within 30 days of the judgment if he or she wishes to preserve the right to appellate review of the ruling on the merits. See Pickett v. Noba, Inc., 114 Md. App. at 556.

e. Nonetheless, if a party files a post-trial revisory motion more than 10 days after judgment and if, in ruling on motion, the court does revise its earlier ruling in some respect, the revised ruling becomes the final judgment. Thus, parties gain a renewed right to appeal if they appeal within 30 days after the docketing of the revised judgment. Gluckstern v. Sutton, 319 Md. 634, 651 (1990) (citing Yarema v. Exxon Corp., 305 Md. 219, 240-41 (1986)).

f. If a party appeals from the circuit court's denial of a motion to revise a judgment under Rule 2-535(a), the only issue on appeal is whether the circuit court abused its discretion in refusing to revise the judgment; the propriety of the judgment itself is an issue on appeal. Stuples v. Baltimore City Police Dep't, 119 Md. App. 221, 231-32 (1998).

2. What if the case involves multiple parties, only one of which files a 10-day motion? Must other aggrieved parties note appeal? Or does one party's 10-day motion stay everyone's time for noting an appeal?

a. Waters v. Whiting, 113 Md. App. 464, 470, cert. denied, 345 Md. 237 (1997): "[T]he timely filing of a post[-]judgment motion pursuant to Rules 2-532, 2-533, or 2-534 by any single party in a multi-party case extends the time for noting an appeal for all parties."

b. Rationale: To effectuate the policy of the final judgment rule, which is to avoid piecemeal appeals. It makes no sense for multiple parties in the same case to note different appeals at different times depending on whether they did or did not file proper 10-day motions after the adjudication of the merits.

3. What happens if a party moves for reconsideration of a court's ruling before the court carries through with its expressed intent of memorializing the ruling in a written order? I.e., what happens when events occur in this sequence: (1) the court announces how it intends to rule; (2) one party asks the court to reconsider; and (3) the court enters an order effectuating its earlier statements about how it intended to rule?

a. If the party made the motion within 10 days after the clerk had docketed the order, it would deprive the order of finality.

b. But if the party makes the motion before the court has even signed the order (much less had it docketed by the clerk), the motion has no effect on finality. The ruling becomes a final judgment after the court signs the order and the clerk docketed it. The signing and docketing of the order moots any motion to reconsider

asserted after the court announces its ruling but before it signs a contemplated order embodying the ruling. Popham v. State Farm Mut. Ins. Co., 333 Md. 136, 143-44 (1993).

4. Leese v. Department of Labor, Licensing and Regulation, 115 Md. App. 442 (1997): What happens if a court signs an order granting a motion for reconsideration under Rule 2-535, but the moving party, not knowing of the grant of reconsideration, notes an appeal before the docketing of the order granting reconsideration?

a. The circuit court ruled against an employee in an unemployment dispute. The employee filed a 10-day motion, which the court denies on April 13, 1995.

b. On April 24, 1995, the employee purported to file another 10-day motion; however, under Pickett v. Noba, Inc., that second 10-day motion is to be treated as a motion for reconsideration under Rule 2-535.

c. On May 4, 1995, the court granted the second motion for reconsideration.

d. On May 11, 1995, the employee, not knowing of the recent ruling in her favor on the second motion for reconsideration, appealed from the denial of the first motion for reconsideration.

e. On May 31, 1995, well after the employee had noted her appeal from the order denying the first motion for reconsideration, the clerk finally docketed the order granting the second motion for reconsideration.

f. Held:

(1) Although filed within 10 days of the denial of the first motion, the second motion for reconsideration was to be treated not as a motion under Rules 2-532 to 2-534 (which would have stayed the time for an appeal), but as a motion under Rule 2-535; therefore, the second motion did not stay the time for noting an appeal.

(2) The circuit court had the power to reconsider its denial of the first motion for reconsideration, because at the time it signed the order reconsidering its denial of the first motion, the employee had not yet noted an appeal.

(3) Because the circuit court had the power to reconsider its denial of the first motion at the time when the second motion for reconsideration came

before it, the grant of the second motion for reconsideration was effective — and it was effective even though the clerk did not finally docket the grant of the second motion until after the employee had appealed.

(4) The final judgment was entered on May 31, 1995 — the date when the clerk docketed the order granting the second motion for reconsideration. Neither party had appealed from that judgment. Hence, the merits of the case were not before the court.

5. Hercules, Inc. v. Comptroller, 117 Md. App. 29 (1997): What happens if a court agrees to reconsider an order, vacates it, but then reinstates it — does the aggrieved party have 30 full days from the date of the reinstated order in which to appeal, or does the party have 30 days minus however many days passed before the party moved for reconsideration?

a. On January 3, 1995, the tax court adjudicated a tax dispute. The taxpayer moved for reconsideration 24 days later, on January 27, 1995. The court withdrew its order pending its decision on the motion for reconsideration.

b. On March 16, 1995, the court reinstated its initial order. Eight calendar days later, on March 24, 1997, the taxpayer petitioned for judicial review.

c. The Comptroller contended that the taxpayer had waited too long. In the Comptroller's view, the 24 days between the initial ruling and the order vacating the initial ruling should count against the 30-day appeal period. Therefore, the taxpayer would only have another six days to appeal. Because the taxpayer had waited eight days to appeal, the Comptroller argued that the appeal had come too late.

d. Held, on the Comptroller's motion to dismiss: The court had appellate jurisdiction. The 24 days between the entry of the initial order and the order withdrawing the initial order did not count against the time for appeal. The taxpayer had 30 days to appeal from the date of the reinstated ruling.

G. Another problem: Timing of appeals from the dismissal of a complaint.

1. In the case of dismissal with leave to amend, a ruling does not become final until the time to amend has passed. Thus, if the court grants plaintiff leave to amend but plaintiff chooses to stand or fall on the pleading that the court has deemed insufficient, plaintiff may appeal after passage of time for amendment. See Moore v. Pomory, 329 Md. 428, 431 (1993); Makovi v. Sherwin-Williams Co., 311 Md. 278, 283-84 (1987) (citing Jung v. K.D. Mining Co., 356 U.S. 335 (1958)).

2. On the other hand, the dismissal of a complaint without prejudice but without leave to amend constitutes a final judgment (provided that case does not involve counterclaims, cross-claims, etc.). Moore v. Pomory, 329 Md. at 431-32.

V. Effect of Improper Interlocutory Appeal

A. Generally, an interlocutory appeal does not divest the circuit court of jurisdiction in the sense of power to proceed. Makovi v. Sherwin-Williams Co., 311 Md. 278, 283 (1987): A premature order of appeal has no force or effect and, thus, for example, does not divest circuit court of the power to enter final judgment and thereby to correct defects in appellate jurisdiction.

1. E.g., criminal cases may proceed to trial despite a defendant's interlocutory appeal. Pulley v. State, 287 Md. 406 (1980) (circuit court may proceed to try criminal defendant despite interlocutory appeal from ruling denying motion to dismiss on grounds of double jeopardy); See also Jackson v. State, 358 Md. 612 (2000) (despite pendency of appeal, circuit court had fundamental jurisdiction to consider motion for new trial in criminal case); Raimondi v. State, 8 Md. App. 468, 475-76, cert. denied, 256 Md. 747 (1970) (circuit court retained jurisdiction to try defendant despite improper interlocutory appeal of motion complaining of pretrial publicity); Powers v. State, 8 Md. App. 487, 490 (1970) (circuit court retained jurisdiction to try criminal defendant despite improper interlocutory appeal of motion to dismiss indictment).

2. Therefore, a premature appeal, or an improper interlocutory appeal, does not divest the circuit court of the power to enter an appropriate final judgment, from which party may take proper appeal. Makovi v. Sherwin-Williams Co., 311 Md. 278, 283 (1987).

3. In fact, even a timely appeal from a final judgment does not divest the circuit court of "fundamental jurisdiction" to proceed with certain aspects of the case. Pulley v. State, 287 Md. at 417; see also Jackson v. State, 358 Md. at 619-20; In re Emileigh F., 355 Md. 198, 202-03 (1999); State v. Peterson, 315 Md. 73, 80 (1989).

a. The circuit court's "fundamental jurisdiction" permits it to proceed with the action despite an appeal, but the power to do so may be interrupted by (1) a statute or rule, (2) the posting of an appeal bond, or (3) a stay granted by the trial or appellate court. Pulley v. State, 287 Md. at 417.

b. An appeal merely prevents a circuit court from acting to frustrate the appellate court's exercise of jurisdiction. Pulley v. State, 287 Md. at 417;

Jackson v. State, 358 Md. at 620 ("What the court may not do is to exercise that jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself – that, in effect, precludes or hampers the appellate court from acting on the matter before it"); Folk v. State, 142 Md. App. 590, 597 (2002) (same).

(1) If the circuit court makes a post-judgment ruling that has the effect of "preclud[ing] or hamper[ing] the appellate court from acting on the matter before it," its ruling "may be subject to reversal on appeal, but it is not void ab initio for lack of jurisdiction to enter it." Jackson v. State, 358 Md. at 620.

(2) Thus, for example, after a mother had appealed from an order denying her custody in CINA case, the circuit court could not close the case and terminate the CINA proceeding. By doing so, the circuit court acted to frustrate the Court of Appeals' ability to review and, if necessary, reverse the order regarding custody. See In re Emileigh F., 355 Md. at 204.

(3) By contrast, in a case where a defendant moved for a new trial after noting an appeal, the circuit court could deny the motion, as the denial would have no impact on the appellate court's ability to act on the matter before it. Jackson v. State, 358 Md. at 621.

(4) See also Folk v. State, 142 Md. App. at 598: The filing of a notice of appeal did not divest a criminal defendant of the right to move for a new trial. Nor did it divest the circuit court of "fundamental jurisdiction" to consider the motion.

4. An appeal does divest a circuit court of the power to reconsider the ruling that is subject of the appeal. Thus, where a party both moves for reconsideration and notes an appeal, the appeal divests circuit court of power (i.e., "jurisdiction") to consider motion to revise. Visnich v. Washington Sub. San. Comm'n, 226 Md. 589, 590 (1961); Tiller v. Elfenbein, 205 Md. 14, 21 (1954); Eisenbeiss v. Jarrell, 52 Md. App. 677, 683-85 (1982).

a. If the revisory motion comes up for a hearing before the appellate court has considered the appeal, appellant must choose between pursuing the revisory motion or pursuing the appeal. See, e.g., Tiller v. Elfenbein, 205 Md. at 21.

VI. Collateral order doctrine

A. Note: Maryland has nothing like 28 U.S.C. § 1292(b), which allows circuit court to certify interesting questions for appellate review. The collateral order doctrine does not take the place of § 1292(b).

B. The collateral order doctrine was adopted from Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-547 (1949).

C. Elements — An appealable collateral order:

1. conclusively determines a disputed issue;
2. resolves an important issue;
3. the issue is completely separate from the merits (i.e., collateral); and
4. the ruling deciding that issue is effectively unreviewable on appeal from a final judgment.

D. Note: Most cases appealed under the collateral order doctrine — indeed, most cases involving any attempt to appeal what would otherwise be an interlocutory order — will probably be subject to intense judicial scrutiny in light of Maryland's strong and often-stated policy against allowing piecemeal appeals. Maryland's appellate courts regularly reiterate that policy, which, the courts say, serves to prevent the confusion, delay, and expense that results from having two or more appeals in the same suit. Maryland courts may be as strict as any other courts in the country in enforcing that policy.

E. Note: The collateral order doctrine is not an exception to the final judgment rule — collateral orders are considered to be final judgments within the meaning of the statutory final judgment rule. Collateral orders "are immediately appealable as 'final judgments' without regard to the posture of the case." Harris v. Harris, 310 Md. 310, 315 (1987). As the Court of Appeals has put it, the doctrine "is based upon a judicially created fiction, under which certain interlocutory orders are considered to be final judgments, even though such orders clearly are not final judgments." Dawkins v. Baltimore City Police Dep't, 376 Md. 53, 64 (2003).

F. Examples of cases appealable and not appealable under the collateral order doctrine:

1. Cases appealable:

a. Denial of a motion to dismiss on grounds of double jeopardy is immediately appealable. Anderson v. State, 385 Md. 123, 128 (2005); Parrott v. State, 301 Md. 411, 421 (1984); accord Abney v. United States, 431 U.S. 651 (1977).

b. Denial of an ex-governor's motion to dismiss on grounds of absolute immunity from claims for common-law torts based on official actions taken as governor is immediately appealable. Mandel v. O'Hara, 320 Md. 103 (1990); see Nixon v. Fitzgerald, 457 U.S. 731 (1982) (same for President of the United States); but see § VI(H), below, which concerns the ability to invoke the collateral order doctrine to appeal interlocutory rulings concerning ordinary claims of sovereign immunity, governmental immunity, or public official immunity.

c. An order requiring a governmental organization to comply with a subpoena purportedly requiring it to disclose confidential information is immediately appealable. Department of Social Servs. v. Stein, 328 Md. 1 (1992). Unlike other litigants in discovery disputes, the government need not wait to appeal until after it has been in contempt for refusing to comply with an order compelling discovery. Cf. Goodwich v. Nolan, 343 Md. 130, 150 (1996) (Legislature's decision to prescribe, as part of the statutory scheme, that judicial review occur *after* a final HCAO decision is reached, evinces a legislative intent to prevent interruption of ongoing HCAO proceedings); Sigma Reproductive Health Ctr. v. State, 297 Md. 660, 671-74 (1983) (Only an appeal from a contempt order, as opposed to an order to produce documents pursuant to the subpoena, is final enough and separable enough from the merits to confer the power of review on an appellate court).

d. The denial of a petition to stay arbitration is immediately appealable. Town of Chesapeake Beach v. Pessoa, 330 Md. 744 (1993). In other words, if a party claims the right to proceed in court rather than in arbitration, the party can use the collateral order doctrine to take an immediate appeal from the denial of that right.

e. Parties may immediately appeal from a circuit court's refusal to accept a stipulation of dismissal signed by all parties. Milburn v. Milburn, 142 Md. App. 518, 530-31 (2002).

2. Cases not appealable:

a. The denial of a motion to dismiss on account of the alleged denial of speedy trial rights is not immediately appealable. United States v. MacDonald, 435 U.S. 850 (1978); Stewart v. State, 282 Md. 557 (1978).

b. The denial of a motion to disqualify counsel is not immediately appealable. Peat & Co. v. Los Angeles Rams, 284 Md. 86 (1978); accord Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

c. The grant of a motion to disqualify counsel in a civil case is not immediately appealable. Harris v. Harris, 310 Md. 310 (1987); accord Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985).

d. The denial of a motion to dismiss on grounds of forum non conveniens is effectively reviewable on appeal; therefore it is not immediately appealable under the collateral order doctrine. Pittsburgh Corning Corp. v. James, 353 Md. 657 (1999).

e. An order striking a jury demand is effectively reviewable on appeal from a final judgment; therefore it is not immediately appealable under the collateral order doctrine. Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256 (2002).

f. In a CINA proceeding, a mother could not use the collateral order doctrine to appeal an order denying her motion to appoint an expert to evaluate the degree of her "bonding" with her children; the order did not finally resolve the question, it was not separate from the merits, and it was effectively reviewable on appeal from a final judgment. In re Samone H., 385 Md. 282 (2005).

g. Most discovery orders are not immediately appealable. See, e.g., In re Foley, 373 Md. 627 (2003) (order requiring that incompetent person submit to medical examination was effectively reviewable on appeal; therefore it was not a collateral order).

(1) To take an appeal from an adverse discovery ruling (such as a ruling compelling discovery), a party's sole option ordinarily is to refuse to comply with the order and to be held in contempt. Because the finding of contempt is, itself, a final judgment, the party may then appeal. See, e.g., Goodwich v. Nolan, 343 Md. at 141-42; Sigma Reproductive Health Center v. State, 297 Md. at 671-74. But see Ashcraft & Gerel v. Shaw, 126 Md. App. 325 (1999), which arguably defies precedent by permitting a party to take an immediate appeal from order requiring it to produce allegedly privileged information and thus effectively excusing the party from the obligation to take the appeal only after being held in contempt for failing to comply with the order.

G. In applying the collateral order doctrine, often the most decisive element is the last one — whether the order is effectively reviewable on appeal from a final judgment on the merits.

1. Examples: If refusing to hear an immediate appeal would effectively divest the appellant of a right not to have to go through proceedings in the lower court, the ruling is not effectively reviewable on appeal, and the court should permit an immediate appeal.

2. Double jeopardy is the classic example — unless an appellate court grants immediate review of an order denying a motion to dismiss on grounds of double jeopardy, the right in question — the right not to stand trial — will be irrevocably lost.

H. In the past, many collateral order doctrine cases involved questions of sovereign immunity, especially including public officials' qualified immunity from suit under the Maryland Tort Claims Act and other provisions. The Court of Appeals, however, has now decided that virtually all claims of immunity are effectively reviewable on appeal. Consequently, it has explicitly overruled former decisions concerning the right to an immediate appeal from rulings concerning sovereign immunity. Dawkins v. Baltimore City Police Dep't, 376 Md. 53 (2003).

1. In State v. Hogg, 311 Md. 446, 455-57 (1988), the Court of Appeals had proceeded from the premise that the State of Maryland's sovereign immunity consists of the right to avoid suit altogether and not merely a right to avoid paying damages. Consequently, the Court held that under the collateral order doctrine the State could immediately appeal the denial of a motion to dismiss on grounds of sovereign immunity. The Hogg case arguably permits an immediate appeal whenever a court makes an interlocutory ruling denying a defense of sovereign immunity.

2. Within months of Hogg, however, the Court began to cut back. In Bunting v. State, 312 Md. 472 (1988), the Court made it clear that it would not look kindly upon an attempt to broaden and extend the collateral order doctrine by contending that miscellaneous pretrial rulings effectively deny an appellant the right not to stand trial. "[T]he idea that an issue is not effectively reviewable after the termination of the trial on the merits because it involves a 'right' to avoid the trial itself, should be limited to double jeopardy claims and a very few other extraordinary situations. Otherwise, . . . there would be a proliferation of appeals under the collateral order doctrine." Bunting v. State, 312 Md. at 482.

a. Thus a criminal defendant does not have the "right" not to stand trial merely because he or she may have the right to have the charges dismissed as a

sanction for some sort of alleged misconduct (such as denial of the right to a speedy trial, the pursuit of charges under a defective indictment, the pursuit of criminal charges based solely on illegally obtained evidence, or a violation of the "single transfer rule" of the Interstate Compact on Detainers). Id. at 479 (quoting United States v. MacDonald, 435 U.S. at 860 n. 7). On an appeal from a final judgment, an appellate court can effectively review the denial of that right — and, if the defendant is correct, award the appropriate relief, a reversal of the conviction and an order requiring dismissal of the charges.

b. The Supreme Court, which originated the collateral order doctrine, sees the issues the same way.

(1) E.g., Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994). In holding that the collateral order doctrine did not authorize an immediate appeal of an order refusing to enforce a settlement agreement and allowing a case to proceed to trial, the Court said that courts "should view claims of a "right not to be tried with skepticism, if not with a jaundiced eye."

(2) E.g., Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 501 (1989) (quoting United States v. MacDonald, 435 U.S. at 860 n. 7). In holding that the collateral order doctrine did not authorize an immediate appeal of an order denying the defendant's purported contractual right to stand trial in Italy, the Court said, "It is always true . . . that 'there is value . . . in triumphing before trial rather than after it.'" It does not follow, however, that the right to have a case dismissed equates to the right not to stand trial in the first place. Denial of the first right is effectively reviewable on appeal; denial of the second is not.

3. Within months of Bunting, the Court of Appeals seemed to limit Hogg to cases involving the State's common-law immunity from suit. Similarly, in State v. Jett, 316 Md. 248 (1989), the Court held that where the question of sovereign immunity involves the construction or application of the Maryland Tort Claims Act, the State could not employ the collateral order doctrine to appeal the denial of a motion to dismiss.

(1) Jett concerned whether a county deputy sheriff was a State agent and thus whether the State had waived liability for his torts under the Maryland Tort Claims Act. The Tort Claims Act, unlike the common-law doctrine of sovereign immunity, contains a "broad consent to suit." Id. at 257. Hence, "[w]hen the alleged denial of a sovereign immunity defense turns on the construction or application of the Act, the rationale underlying Hogg's reliance on the collateral order doctrine disappears." Id.

4. Over the next few years, the Court of Special Appeals regularly considered appeals from the denial of an official's dispositive motion on grounds of public official immunity. See, e.g., Nelson v. Kenny, 121 Md. App. 482 (1998); Bradley v. Fisher, 113 Md. App. 603 (1997); Town of Port Deposit v. Petetit, 113 Md. App. 401 (1997).

5. In 1999, however, the Court of Appeals expressly held that the collateral order doctrine does not permit an appeal of the denial of a claim of immunity under the Maryland Tort Claims Act: Shoemaker v. Smith, 353 Md. 143 (1999). The Court reasoned not only that the question of immunity was effectively reviewable on appeal from a final judgment, but also that the denial of the motion did not conclusively resolve the issue and that the issue was separate from the merits only if a court could resolve it as a pure question of law. Finally, citing Bunting, the Court stated that "the claimed immunity from trial itself does not suffice to satisfy the 'unreviewability' requirement except in 'extraordinary situations.'" Id. at 170.

6. In the ensuing several years, the Court of Appeals summarily reversed the Court of Special Appeals for entertaining appeals from interlocutory orders that rejected immunity defenses. Dawkins, 376 Md. at 64 (citing Housing Auth. of Baltimore City v. Smalls, 369 Md. 224 (2002); Orthodox Jewish Council v. Abramson, 368 Md. 1 (2002); Peck v. DiMario, 362 Md. 660 (2001); Bowers v. Callahan, 359 Md. 395 (2000); Dennis v. Folkenberg, 354 Md. 412 (1999); Samuels v. Tschechtelin, 353 Md. 508 (1999)).

7. At last, in Dawkins, 376 Md. at 59-65, the Court recognized that it had undercut Hogg. Stating that Hogg itself did not involve the type of "extraordinary situation" in which the collateral order doctrine might permit an appeal, the Court "explicitly overrule[d] the collateral order doctrine holding of that case." Id. at 64. In addition, the Court rejected Jett's distinction between statutory sovereign immunity defenses (which were said not to be immediately appealable) and common-law sovereign immunity defenses (which, under Hogg, were said to be immediately appealable). Id. Thus the Court held that, "[a]s a general rule, interlocutory orders rejecting defenses of common law sovereign immunity, governmental immunity, public official immunity, statutory immunity, or any other type of immunity, are not appealable under the Maryland collateral order doctrine." Id.; see also Theurer v. Farrell, 376 Md. 65 (2003).

a. Nonetheless, comparing Mandel v. O'Hara, 321 Md. 103 (1990), the Dawkins Court reserved judgment on "[w]hether, and under what circumstances, interlocutory orders overruling immunity defenses asserted by the Governor, Lieutenant Governor, Comptroller, Treasurer, Attorney General, Speaker of the House, President of the Senate, or judges as defined in Article IV, § 2, of the

Maryland Constitution, are immediately appealable under the collateral order doctrine." Dawkins, 376 Md. at 65.

8. In some rare instances, a high-ranking decision-maker's right not to be subjected to certain kinds of intrusive inquiries in discovery may be effectively unreviewable on appeal, after the discovery has gone forward and the right has been lost.

a. E.g., Public Serv. Comm'n v. Patuxent Valley Conservation League, 300 Md. 200, 207 (1984). A citizens' group attempted to depose individual commissioners of the Public Service Commission to determine their thought processes in rendering a challenged decision. When the circuit court allowed the depositions to proceed, the Court of Appeals permitted an immediate appeal under the collateral order doctrine. In reaching its decision, the Court reasoned: "[T]he claim that Commission members should not be routinely subjected to extensive probing of their individual decisional thought processes would be irretrievably lost" absent immediate judicial review. Id.

b. E.g., Montgomery County v. Stevens, 337 Md. 471, 478-79 (1995). A police officer challenging a disciplinary sanction attempted to depose the chief of police. Following Patuxent Valley, the Court of Appeals permitted immediate review under the collateral order doctrine, reasoning that "the harm will become effectively unreviewable later, because the harm would occur when the deposition was taken, and there would be no effective remedy thereafter."

VII. Rule 2-602(b)

A. Rule 2-602(b) permits a court to certify an otherwise interlocutory ruling as final, provided that certain specific circumstances apply:

1. the order must dispose of (a) one or more but fewer than all of the "claims" in the case or (b) all claims against one or more but fewer than all of the parties in the case; or pursuant to Rule 2-501(e)(3), the order grants some but less than all of the amount of monetary damages (in an action for money damages only), and the court reserves disposition of the balance sought; and

2. the court expressly determines in a written order that there is no just reason to delay the entry of final judgment.

B. Rule 2-602(b) is a consequence of modern, liberal rules for joinder of claims and parties. In essence, the rule permits a court to direct the entry of final judgment with respect to an order that would have been final but for the addition of

multiple parties or multiple claims under modern pleading rules. The rule views "an action involving multiple claims or multiple parties as a single judicial unit ordinarily requiring complete disposition before a final appealable judgment may be entered." Planning Bd. of Howard County v. Mortimer, 310 Md. 639, 647 (1987). Nonetheless, the rule "envisio[n]s exceptions to this design and invest[s] in the trial judge discretionary authority to manage complex cases by acting as a 'dispatcher' of final orders." Id. at 647 (citing Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8 (1980)).

1. The rule derives from Fed. R. Civ. P. 54(b). Consequently, in interpreting Rule 2-602(b), Maryland courts will look to federal decisions interpreting Rule 54(b). See, e.g., Allstate Ins. Co. v. Angeletti, 71 Md. App. 210, 215 (1987).

2. For an order to become appealable under Rule 2-602(b), the court must expressly determine in a written order that there is no just reason to delay the entry of final judgment. If the court fails to make such a determination, the appellate court acquires no jurisdiction — even if the appeal would otherwise have been proper under the rule. Planning Bd. of Howard County v. Mortimer, 310 Md. at 653; see also Waters v. United States Fid. & Guar. Co., 328 Md. 700, 707-09 (1992) (dismissing appeal where, even though the trial judge signed a written order certifying his ruling as final, he failed to make a determination that there was no just reason to delay the entry of final judgment); Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. 548, 559-60 (1998) (same); see also Tall v. Board of School Comm'rs, 120 Md. App. 236, 243 (1998) (although order under Rule 2-602(b) was defective because it did not include an express finding of "no just reason for delay," court entertained appeal under savings provision of Rule 8-602(e)); Tyrone W. v. Danielle R., 129 Md. App. 260, 270 (1999) (same).

C. Consistent with Maryland's strong policy against permitting piecemeal appeals, the State's appellate courts have cautioned against the overuse of Rule 2-602(b). Courts should use certification "sparingly," Maryland-Nat'l Capital Park and Planning Comm'n v. Smith, 333 Md. 3, 7 (1993), reserving it for the "very infrequent and harsh case." See, e.g., Diener Enterprises, Inc. v. Miller, 266 Md. 551, 556 (1972). Courts and parties may not use Rule 2-602(b) as a convenient device to certify questions of law from the circuit court to the appellate courts. Allstate Ins. Co. v. Angeletti, 71 Md. App. at 224. While the rule is designed to advance the cause of judicial economy, its concern is judicial economy for the appellate courts, not the circuit courts. See, e.g., Murphy v. Steele Software Sys. Corp., 144 Md. App. at 392; Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. at 566.

D. "A proper exercise of discretion under [the rule] requires the [trial] court to do more than just recite the ... formula of 'no just reason for delay.' The court should clearly articulate the reasons and factors underlying its decision to grant . . . certification.

'It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.'" Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. 635, 640 (1985) (quoting Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir.1975) (which quoted Protective Comm. v. Anderson, 390 U.S. 414, 434 (1968)); see also Murphy v. Steele Software Sys. Corp., 144 Md. App. 384, 393 (2002).

1. The most common basis for finding "no just reason to delay" the entry of final judgment is that delay will cause financial hardship to one of the litigants.

a. See, e.g., Matta v. GEICO, 119 Md. App. 334, 338 n. 1 (1998). After entering summary judgment against the plaintiff on all claims against one of the defendants, the plaintiff's uninsured motorist carrier, the circuit court permitted an immediate appeal. The Court of Special Appeals permitted the appeal to proceed, reasoning that, absent a claim against the insurer, the expense of litigation would outweigh the plaintiff's likely recovery from any other party.

E. Appellate courts can and will act, on their own motion, to review the formal and substantive propriety of certification under Rule 2-602(b), including whether the circuit court properly exercised its discretion in certifying a ruling as final. See, e.g., Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. at 557 (citing, among other cases, Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. 635, 640 (1985); Harford Sands v. Levitt, 27 Md. App. 702, 706 (1975)).

1. In an appropriate case, a circuit court has some discretion about whether to certify a ruling as final, but the circuit court may abuse that discretion without giving due consideration to the State's strong "policy against piecemeal appeals" and balancing against "the exigencies of the case." See, e.g., Diener Enterprises, Inc. v. Miller, 266 Md. at 556; Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. at 562-64.

a. In making that determination, the permissible scope of the circuit court's discretion is "far more narrow" than that applicable in, for example, appellate review of a trial judge's evidentiary rulings at trial. Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. at 563-64 (quoting Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. at 648).

b. Thus, if, after certification, the remainder of the case will involve the adjudication (and possibly the appeal) of some of the same issues that the

circuit court has certified as final, the circuit court abuses its discretion by ordering certification. See, e.g., Tharp v. Disabled American Veterans Dep't of Md., Inc., 121 Md. App. at 566-67; Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. at 654; Allstate Ins. Co. v. Angeletti, 71 Md. App. at 224. In that event, the appellate court will probably dismiss the appeal. See, e.g., Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. at 648.

F. A court may use Rule 2-602(b) only where it has made a ruling that disposes of one entire claim or of all claims against a party. Under Rule 2-602(b), a court may not certify as final a ruling denying a motion to dispose of an entire claim or of all claims against a party. See, e.g., Planning Bd. of Howard County v. Mortimer, 310 Md. at 653-54 (court could not certify as final a ruling denying a motion to dismiss all claims asserted by one party).

G. Certification under Rule 2-602(b) presents the least difficulty where the circuit court has entered a judgment for or against one or more, but fewer than all, of the defendants in a case.

1. E.g., Wilde v. Swanson, 314 Md. 80, 83-88 (1988). The circuit court dismissed one of several defendants on the ground of improper venue. The case remained alive as to the remaining defendants. Certification was proper, because the order certified disposed of claims against one, but fewer than all, of the defendants.

2. E.g., In re: Adoption/Guardianship No. TPR970011, 122 Md. App. 462 (1998). The circuit court struck a father's arguably untimely objection to a guardianship petition filed by the Department of Social Services; the mother's objection to the petition remained pending. Certification was available under Rule 2-602(b), because the order disposed of claims against one, but fewer than all, of the defendants.

3. Compare Gindes v. Khan, 346 Md. 143 (1997). Plaintiffs brought suit against two defendants, one of which filed for bankruptcy. The automatic stay in bankruptcy prevented the proceedings from going forward against that defendant, but the court entered judgment against the second defendant, Gindes. Gindes appealed, but failed to obtain an order certifying the judgment as final against him alone. The Court of Appeals, on its own motion, issued a writ of certiorari to consider the issues raised by Gindes's appeal, but then dismissed the appeal because the circuit court had not entered a final judgment. Id. at 166-67.

H. Matters become much more complicated when a court certifies a ruling after purportedly adjudicating one or more, but fewer than all, of the "claims" in a case.

1. For purposes of Rule 2-602(b), one analyzes the concept of a "claim" by using the same transactional approach used in analyzing the concept of a "claim" for purposes of res judicata. A "claim" under Rule 2-602(b) includes all of the alternative legal theories that a party may assert in order to obtain redress for a wrong suffered in a particular, discrete transaction. Hence, if a party merely puts forward several alternative legal theories, each of which will yield but a single recovery, he or she has asserted only one "claim" for purposes of Rule 2-602(b). On the other hand, if a party's possible recoveries are more than one in number, the party asserts more than one "claim" for purposes of Rule 2-602(b). See Diener Enterprises, Inc. v. Miller, 266 Md. at 556.

2. The Court of Appeals has expressed this concept in various ways. See, e.g., Diener Enterprises, Inc. v. Miller, 266 Md. at 556 ("the 'claims' stated by using two counts is actually but one claim that was framed in two ways so as to present either one of two legal theories for one recovery"); see also Med. Mut. Liab. Soc. v. B. Dixon Evander, Inc., 331 Md. 301, 310 (1993) ("[w]hen two counts are based upon the same facts, and merely represent different legal theories upon which the plaintiff can recover the same damages, the counts constitute a single claim"); East v. Gilchrist, 293 Md. 453, 459 (1982) ("[d]ifferent legal theories for the same recovery, based on the same facts or transaction, do not create separate 'claims' for purposes of the rule"; "where different items of damages or different remedies are sought for the same cause of action, multiple claims are not presented").

a. E.g., in a case challenging the firing of an employee for alleged dishonesty, if the plaintiff-employee brings claims for false imprisonment, malicious prosecution, defamation, abusive discharge, and intentional infliction of emotional distress, the plaintiff has brought only one "claim." Med. Mut. Liab. Soc. v. B. Dixon Evander, Inc., 331 Md. at 312. While the plaintiff may have set forth multiple legal theories to support the recovery of damages, the plaintiff seeks only one recovery. Hence, if the court dismisses one or more, but fewer than all of the counts, it has not thereby disposed of one or more, but fewer than all, of the "claims," within the meaning of Rule 2-602(b).

b. In fact, in those circumstances, the court will have disposed of less than an entire claim, because the case will still involve one or more other legal theories that support the single recovery that the plaintiff seeks. But where a court has disposed of less than one entire claim, it cannot properly certify its ruling as final under Rule 2-602(b).

c. If, however, the plaintiff also seeks to recover for a slip-and-fall injury sustained at a different time at the same employer's premises, the plaintiff has now brought a separate claim, because the plaintiff now seeks to recover for damages

sustained in a different transaction. If the court adjudicates that "claim" without adjudicating the "claims" arising from the firing, it may, in appropriate circumstances, certify its ruling for immediate appeal under Rule 2-602(b).

3. Because a "claim" under Rule 2-602(b) encompasses all the legal theories that might yield a single recovery for injuries arising out of a single transaction, the rule does not authorize certification merely because a circuit court may have entered judgment for or against a party on one or more, but fewer than all, of the counts or legal theories in a pleading. Med. Mut. Liab. Soc. v. B. Dixon Evander, Inc., 331 Md. at 312.

a. Note that a leading work on the Maryland Rules, Maryland Rules Commentary by Judge Paul Niemeyer and Linda Schuett, took the position that if a plaintiff plead the complaint in separate counts, the circuit court could certify the disposition of each separate count as a separate "claim" under Rule 2-602. The Court of Appeals rejected that position as "untenable." Med. Mut. Liab. Soc. v. B. Dixon Evander, Inc., 331 Md. at 312.

4. In many, if not most cases, a complaint may involve multiple counts, causes of action, or legal theories, but only one "claim" within the meaning of Rule 2-602(b). It is crucial to understand that "[w]hen there is but one claim the rule cannot be invoked so as to confer appellate jurisdiction upon an appellate court." Diener Enterprises, Inc. v. Miller, 266 Md. at 554-55; compare Town of Chesapeake Beach v. Pessoa, 330 Md. 744, 752-54 (1993) (because a petition to stay arbitration can be filed as a separate action and involves a special proceeding, it constitutes a separate and distinct claim from any other claims in the suit); NRT Mid-Atlantic, Inc. v. Innovative Props., Inc., 144 Md. App. 263, 275-78 (2002) (treating a petition to compel arbitration as a claim separate from the claim constituting the substantive dispute that is arguably subject to arbitration itself).

5. The Maryland Reports are full of cases in which a circuit court erroneously certified a ruling as final when, in the appellate court's view, the ruling had disposed of less than an entire "claim."

a. E.g., Diener Enterprises, Inc. v. Miller, 266 Md. at 553: The plaintiff pled two counts — one for fraud and one for breach of contract. The circuit court entered summary judgment against the plaintiff on the fraud count, but denied summary judgment on the breach of contract count. On certification under the predecessor of Rule 2-602(b), the Court of Appeals held it lacked appellate jurisdiction because the circuit court had adjudicated less than one entire claim. Id. at 556-67.

b. E.g., *Biro v. Schombert*, 285 Md. 290, 291-92 (1979): The plaintiffs filed a two-count complaint — one count for wrongful death and one count under the survival statute. The circuit court denied the defendant's motion for summary judgment on the wrongful death count, but entered summary judgment for the defendant on certain items of damages sought in the survival action. After the circuit court purported to certify its ruling as final under the predecessor of Rule 2-602(b), the Court of Appeals dismissed the appeal. In reaching its decision, the Court reasoned that, while the wrongful death and survival actions constituted separate "claims," the circuit court had disposed of only part of the "claim" made in the survival action; it had not disposed of the entire survival action and, thus, had not disposed of one entire claim. Id. at 294-95.

c. E.g., *Med. Mut. Liab. Soc. v. B. Dixon Evander, Inc.*, 331 Md. at 305: The plaintiff sued for defamation and tortious interference with contract. The jury could not reach a verdict on the defamation count, but found for the plaintiff on the count for tortious interference with contract. The circuit court certified the verdict under Rule 2-602(b), but the Court of Appeals concluded that it lacked appellate jurisdiction, reasoning that the two counts constituted only a single "claim."

d. E.g., *Shenasky v. Gunter*, 339 Md. 636 (1995): In a medical malpractice case, the circuit court decided the issue of liability in the plaintiff's favor, but left open the question of damages. The court then certified its ruling as final under Rule 2-602(b), and the defendants appealed. The Court of Appeals, however, dismissed the appeal because the ruling disposed of less than an entire claim. The Court explained: "In an action for money damages, an order which decides that there is liability, or which resolves some liability issues in favor of a party seeking damages, but fails to make a determination with regard to the amount of damages, does not dispose of an entire claim and cannot be made final and appealable under Rule [2]-602(b). Shenasky, 339 Md. at 638.

e. E.g., *Huber v. Nationwide Mut. Ins. Co.*, 347 Md. 415 (1997): Plaintiff brought suit against an underinsurance carrier for a declaratory judgment about the amount of the insurer's liability and for damages. The circuit court entered a declaratory judgment that established the maximum amount of coverage under the insured's policy. The court, however, did not adjudicate the amount of damages to which the insured was entitled. After the insured requested and obtained certification under Rule 2-602(b), the Court of Appeals dismissed the case on the ground that the ruling disposed of less than one entire claim. The Court reasoned that the plaintiff had requested several remedies (damages and a declaratory judgment), all of which arose from the same set of facts. Because it had adjudicated only one of those remedies (declaratory relief) but not the others (damages), the court had not decided an entire claim.

f. E.g., G-C P'ship v. Schaefer, 358 Md. 485, 488 (2000): Where the plaintiff had a contractual right to attorneys' fees, the circuit court would not have decided the plaintiff's entire "claim" until it adjudicated the issue of fees. Therefore, because the circuit court had not yet decided that issue, it could not certify its rulings as final under Rule 2-602(b).

I. Problems with claims and counterclaims: Generally, where a claim and counterclaim arise from the same transaction, a court will not dispose of an entire "claim" under Rule 2-602(b) merely because it has disposed of the complaint alone or the counterclaim alone.

1. East v. Gilchrist, 293 Md. 453 (1982): If a "counterclaim" amounts to nothing more than a request for the denial of the relief requested in the complaint, a court cannot use Rule 2-602(b) to certify its ruling on the counterclaim alone — the court will not have disposed of an entire "claim" until it has disposed of both the complaint and the counterclaim.

a. Facts: A group of taxpayers filed suit against county officials, challenging the expenditure of funds for the operation of a landfill on the ground that it violated the county charter. The plaintiffs demanded damages, mandamus, an injunction, and a declaration concerning the validity of the charter provision. The defendant officials filed what they called a "counterclaim" in which they requested a declaration that the charter provision in question was invalid. Without expressly adjudicating the claims in the plaintiffs' complaint, the circuit court entered the declaration that the defendants' "counterclaim" had requested. The circuit court then certified its ruling as final under the predecessor of Rule 2-602(b).

b. Ruling: The Court of Appeals dismissed the appeal on the ground that, on the facts of that case, the complaint and the counterclaim consisted of only one "claim": "[T]he 'counterclaim' was at best a defense or denial of the plaintiffs' demand. It was not a demand for different relief than that contained in plaintiffs' request for a declaratory judgment . . . [A] mere denial of a plaintiff's demand or of a plaintiff's claimed right, however denominated, is not a counterclaim." Id. In dicta, the Court also seemed to endorse the broader view that "a complaint and counterclaim constitute all one claim if they involve the same facts or the same cause of action." Id. at 347.

2. Washington Suburban Sanitary Comm'n v. Frankel, 302 Md. 301 (1985): If the plaintiff files a preemptive suit for a declaration that it owes no money to the defendants, if the defendants counterclaim both for a contrary declaration and for the money damages that they claim to be owed, and if the court declares that the plaintiff does owe money to the defendants, the court has not disposed of an entire "claim" within

the meaning of Rule 2-602(b). The "claim" in such a case includes a determination of how much money the plaintiff owes to the defendants.

a. Facts: The WSSC intended to condemn certain land subject to restrictive covenants that benefitted other lands (i.e., the dominant tenements). The WSSC sought a declaration that, in condemning those lands, it had no obligation to pay just compensation to the owners of the dominant tenements. The owners of the dominant tenements counterclaimed for a declaration that the WSSC did have an obligation to compensate them for the loss of the rights secured by the restrictive covenants. In addition, the owners of some of the dominant tenements counterclaimed for damages, representing the amount of compensation allegedly due. The circuit court declared that the WSSC had to pay compensation to the owners of the dominant tenements, certified its ruling as final under Rule 2-602(b), but failed to determine the amount of compensation due from the WSSC.

b. Ruling: The WSSC's request for declaratory relief and the defendants' counterclaims for money judgments constituted one and the same "claim" for purposes of Rule 2-602(b). Id. at 308. The case was identical to East v. Gilchrist, except that the positions of the parties were reversed. Whereas in East v. Gilchrist the defendants had filed a counterclaim for declaratory relief merely to negate their adversaries' claim for relief, here, the plaintiff had filed a request for declaratory relief seeking merely to negate its likely adversaries' claim for relief. Id. at 309. In both cases, the complaint and counterclaim constituted but one "claim" under Rule 2-602(b).

3. Carl Messenger Service, Inc. v. Jones, 72 Md. App. 1 (1987).

a. Facts: Just before the running of limitations, the plaintiff, Jones, filed suit to recover for injuries allegedly sustained in an automobile accident. After the running of limitations, the defendant counterclaimed for property damage to its vehicle. Citing limitations, the circuit court entered summary judgment on the counterclaim, but certified its ruling as final.

b. Ruling: Certification was improper because the circuit court had disposed of less than an entire "claim" within the meaning of Rule 2-602(b). Because the plaintiff's complaint and the defendant's counterclaim both arose from the same set of operative facts, they constituted a single "claim." The court could not certify as a final a ruling disposing only of the counterclaim. Id. at 4-5.

4. Rustic Ridge L.L.C. v. Washington Homes, Inc., 149 Md. App. 89 (2002).

a. Plaintiff brought action for declaratory judgment concerning ownership of property. Defendant counterclaimed for slander of title. The circuit court entered partial summary judgment for the plaintiff on the complaint, but did not decide the counterclaim. The defendant appealed.

b. Ruling: The circuit court could not have directed the entry of judgment under Rule 2-602(b), because in entering partial summary judgment on the complaint alone, it disposed of less than an entire "claim." Consequently, the Court of Special Appeals would not enter judgment on its own initiative under Rule 8-602(e).

5. See also Murphy v. Steele Software Sys. Corp., 144 Md. App. at 394. While the court dismissed the appeal because the circuit court had not adequately articulated the basis for concluding that there was no "just reason to delay" the entry of final judgment, the appeal would have been improper in any event because the circuit court's ruling disposed of the plaintiff's claims but not the defendant's counterclaims.

J. If the circuit court dismisses a claim against one of several defendants, but then denies a motion for certification under Rule 2-602(b), can the plaintiffs obtain appellate review by voluntarily dismissing the remaining claims against the remaining defendants without prejudice? According to Collins v. Li, 158 Md. App. 252 (2004), they cannot: the order consenting to the voluntary dismissal with prejudice is, according to the Court of Special Appeals, not a final appealable order.

1. For federal cases on the same general subject, see James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir. 2002); Great Rivers Co-op. v. Farmland Indus., Inc., 198 F.3d 685 (8th Cir. 1999); Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147 (10th Cir. 1992); Cheng v. Comm'r, 878 F.2d 306 (9th Cir. 1989); Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978).

K. Note the savings provisions of Rule 8-602(e): Where certification might be appropriate under Rule 2-602(b), appellate courts now have the power, upon noting absence of a final judgment, either to remand the case to circuit court to allow it to exercise its discretion under 2-602(b) to enter a final judgment or to direct a final judgment on its own initiative.

1. See, e.g., Bessette v. Weitz, 148 Md. App. 215 (2002): Where one defendant's bankruptcy had prevented circuit court from entering judgment against all defendants, the Court of Special Appeals directed the entry of a final judgment on its own initiative.

2. See, e.g., Tyrone W. v. Danielle R., 129 Md. App. 260, 270 (1999): Where the circuit court had attempted to certify its order as a final judgment but neglected to make the requisite finding that there was no just reason to delay, the Court of Special Appeals had discretion to entertain the appeal under Rule 8-602(e); see also Tall v. Board of School Comm'rs, 120 Md. App. 236, 243 (1998).

3. But see Rustic Ridge L.L.C. v. Washington Homes, Inc., 149 Md. App. 89 (2002): Where circuit court could not properly have entered a final judgment under Rule 2-602(b), the appellate court could not enter judgment on its own initiative under Rule 8-602(b).

4. Note that, just as a circuit court has limited discretion to enter a final judgment under Rule 2-602(b), so too does an appellate court have only a limited amount of discretion to enter a final judgment under Rule 8-602(e).

a. See, e.g., Brown & Williamson Tobacco Corp v. Gress, 378 Md. 667 (2003) (where Court of Special Appeals had invited the circuit court to enter a final judgment under Rule 2-602(b), but the circuit court had exercised its discretion not to do so, the appellate court did not have the authority to enter a final judgment on its own initiative).

b. See also Smith v. Lead Indus. Ass'n, Inc., 386 Md. 12 (2005) (cautioning that, an appellate court "should be reluctant" to enter judgment on its own initiative when no one ever asked the trial court to enter final judgment under Rule 2-602(b) and that, "[e]xcept in the most extraordinary circumstances, predominantly where the problem of an open claim is a more or less technical one that was overlooked by the appellant when the appeal was noted and which, if spotted then, would likely have been corrected, the [circuit] court should not be by-passed").

c. With their emphasis on the appellate court's obligation to defer to the circuit court's decision not to certify a case and the litigants' obligation to present the certification issue to the circuit court in the first instance, Gress and Smith suggest that the remedy under Rule 8-602(e) is a very limited one.

L. Is there any time deadline for requesting certification under 2-602(b)?

1. While no Maryland cases have addressed this point, some federal cases state that "as a general rule it is an abuse of discretion for a district judge to grant a motion for a Rule 54(b) order when the motion is filed more than thirty days after the entry of the adjudication to which it relates." Schaefer v. First Nat'l Bank of Lincolnwood, 465 F.2d 234, 236 (7th Cir. 1972); accord Cherokee Nation of Oklahoma v. United States, 23 Cl. Ct. 735 (1991).

2. Other courts disagree. Bank of New York v. Hoyt, 108 F.R.D. 184, 185 (D.R.I. 1985): "Rule 54(b), unlike a myriad of other provisions in the Civil Rules, e.g., Fed. R. Civ. P. 59(b), 59(e), 72(a), 74(a), contains no express temporal restrictions."

3. But regardless of whether any time deadline applies to a request for certification, it becomes difficult to argue that there is "no just reason to delay" the entry of final judgment if the putative appellant itself has delayed in pursuing appellate review: "To be sure, the longer an aggrieved party waits after receiving notice of the court's ruling, the less likely it will be — in the typical case — that he can persuade the nisi prius court that there is, in the language of the rule, 'no just reason for delay.' (After all, such thumb-twiddling is itself some evidence that the disappointed suitor considered delay in seeking appellate review to be a tolerable circumstance.)" Id. at 185-86.

4. Furthermore, once a court has certified a ruling as final under Rule 2-602(b), the aggrieved party may obtain appellate review only by noting an appeal within 30 days of the docketing of the order. Keene Corp. v. Levin, 330 Md. 287, 294 n. 6 (1993).

VIII. Statutory Grounds for Appeal from Interlocutory Orders

A. Section 12-303 of the Courts and Judicial Proceedings Article provides that, in a few, limited instances, a party may appeal from interlocutory orders.

1. An order granting or dissolving an injunction — but an appeal will lie from an order granting an injunction only if the appellant has filed an answer. (Section 12-303(3)(I).)

2. An order refusing to dissolve an injunction — but, again, only if the appellant has filed an answer. (Section 12-303(3)(ii).)

3. An order refusing to grant an injunction. (Section 12-303(3)(iii).)

4. An order appointing a receiver — but only if the appellant has filed an answer. (Section 12-303(3)(iv).)

5. An order granting a petition to stay arbitration. (Section 12-303(3)(ix).)

IX. In Banc Review

A. Article IV, § 22, of the Maryland Constitution affords litigants an obscure right to "in banc review" of a circuit judge's rulings. Review occurs before a three-judge panel of the circuit court. The procedure is known as the "poor man's appeal" because, when it was created in 1867, it was thought to be cheaper than traveling to Annapolis from the far-flung corners of the State.

B. If a party seeks in banc review and fails to prevail, § 12-302(d) of the Courts and Judicial Proceedings Article states that the party loses the right to an appeal of right; the party may obtain further appellate review only by making "application for leave to appeal." On the other hand, the party who did not request in banc review may attempt to pursue appellate review of the in banc court's decision.

C. In Bienkowski v. Brooks, 2005 WL 819737 (Md. April 11, 2005), the Court of Appeals held under Article IV, § 22, the Court of Special Appeals cannot exercise jurisdiction over an appeal from a court in banc. The Court reasoned that, under the plain language of § 22, which refers only to the Court of Appeals and has never been amended since the establishment of the intermediate court, any further appellate review of a decision by a court in banc must occur in the Court of Appeals. An unsuccessful litigant in the court in banc is usually entitled to seek further appellate review by filing a petition for a writ of certiorari, which the Court of Appeals will consider like any other petition.

1. Bienkowski abrogates the following Court of Appeals' opinions to the extent that they had stated or assumed that the Court of Special Appeals could exercise jurisdiction over an appeal from a court in banc: Langston v. Langston, 366 Md. 490 (2001); Dabrowski v. Dondalski, 320 Md. 392 (1990); Montgomery County v. McNeece, 311 Md. 194 (1987); O'Connor v. Moten, 307 Md. 644 (1986); Dean v. State, 302 Md. 493 (1985); Merritts v. Merritts, 299 Md. 521 (1984); and Estep v. Estep, 285 Md. 416 (1979). In addition, Bienkowski effectively holds that Rule 2-551(h) is unconstitutional insofar as it contemplates that the Court of Special Appeals can entertain an appeal from a court in banc.

D. For purposes of assessing the finality of judgments after review by an in banc court of a circuit court, the Court of Appeals views the circuit court as an appellate court. Therefore, even when an in banc panel's reversal of a circuit court's ruling has the effect of requiring a remand for further proceedings, the in banc panel's ruling is final and appealable to a higher appellate court. "[T]he court in banc acts only as an appellate tribunal so that its decisions are not those of a reconsidering circuit court but are reviewable as final appellate judgments." Estep v. Estep, 285 Md. at 421; accord Dabrowski v. Dondalski, 320 Md. at 395-96; Bienkowski, 2005 WL 819737, at *17.

X. Mandamus and Prohibition

A. The Court of Appeals has held that, in aid of its appellate jurisdiction, it has the power to issue the "extraordinary" or "prerogative" common-law writs of mandamus or prohibition to review a lower court's action or failure to act. In re Petition for Writ of Prohibition, 312 Md. 280, 304 (1988). The Court can exercise that power even though no appellate proceeding is yet pending before it, as long as there is some potentiality of eventual appellate review by appeal or certiorari. Id. at 302.

1. Mandamus serves to command an official — here, a lower court judge — to take some action that he or she is under a positive duty to take. Prohibition serves to command the official not to take some action that he or she has a positive duty not to take. Ordinarily, neither writ will issue to command the performance of a discretionary function. Id. at 305-06.

B. The Court has considered issuing the writ in only a few cases — the first, In re Petition for Writ of Prohibition, being one where a trial judge vacated a criminal conviction and granted a motion for a new trial based on his assessment of the credibility of the witnesses. The State — the party aggrieved by the ruling — had no right to appeal from it, because the grant of a new trial, unlike the grant of a motion for a judgment of acquittal, is interlocutory; the final judgment will not occur until after the completion of the second trial. In that case the Court of Appeals did not find the "extraordinary circumstances" necessary to justify the issuance of a writ of mandamus or prohibition.

1. In State v. Manck, 385 Md. 581 (2005), the Court of Appeals held that in a criminal case it cannot grant the State's request for a writ of mandamus or prohibition to review a decision that the State has no right to appeal. Because the Court's power to issue the writ "in aid of" its "appellate jurisdiction," the Court reasoned that it cannot issue the writ to consider a ruling that the State cannot appeal — in this case, a ruling striking the State's notice of its intention to impose the death penalty. In so holding, the Court expressly disapproved of what it called "dicta" to the contrary in In re Petition for Writ of Prohibition, 312 Md. 280 (1988).

C. The Court of Appeals has refused to issue a writ of mandamus to consider discovery rulings — even rulings that reject a claim of privilege and compel the production of allegedly privileged materials. Goodwich v. Nolan, 343 Md. 130 (1996).

D. In addition, the Court of Appeals has made it clear that it will not issue writs of mandamus or prohibition, in its words, to "micromanage" complex litigation in circuit courts. See, e.g., Keene Corp. v. Levin, 330 Md. 287, 291 (1993) (refusing to

issue writ in asbestos litigation, where circuit court had severed plaintiffs' claims from defendants' cross-claims against settling defendants).

1. On the other hand, in Phillip Morris Inc. v. Angeletti, 358 Md. 689 (2000), the Court of Appeals issued a writ of mandamus, for the first and only time in history, to review and reverse a circuit court's decision to certify a state-wide class action in litigation against the tobacco industry. The circuit court had divided the litigation into three phases – Phase I, which would entail a class action jury trial conducted principally to determine whether the defendants were liable to the class members; Phase II, which would enable the named representatives of each class or subclass to try the issues of causation and damages; and Phase III, which would involve trials of individual class membership, causation, smoking history, and damages for each and every absent class member. The Court reasoned that, absent mandamus, the defendants probably could not obtain judicial review of the crucial question of class certification until after the resolution of each case in each of the three phases. The Court issued the writ to avoid the "tremendous waste of judicial resources" that would otherwise ensue.