NEW YORK LAW SCHOOL

NYLS Law Review

Volume 40
Issue 3 *Volume XL, Number 3, 1996*

Article 5

January 1996

RULES 58 AND 79(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE: APPELLATE JURISDICTION AND THE SEPARATE JUDGMENT AND DOCKET ENTRY REQUIREMENTS

Michael Zachary

RULES 58 AND 79(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE: APPELLATE JURISDICTION AND THE SEPARATE JUDGMENT AND DOCKET ENTRY REQUIREMENTS

MICHAEL ZACHARY*

This article addresses two issues of federal appellate jurisdiction: whether a court of appeals has jurisdiction over an appeal (a) where the district court failed to file a separate judgment after rendering a final decision, pursuant to Federal Rule of Civil Procedure 58, and the appellant's notice of appeal from that decision is not filed within the time period set forth in Federal Rule of Appellate Procedure 4(a)(1); or (b) where the district court failed to enter the final judgment in the civil docket, pursuant to Federal Rule of Civil Procedure 79(a), although the appellant filed a notice of appeal from the final decision.

These issues are of some importance to both appellants and the federal courts as the described omissions may result in unnecessary confusion, inefficient marshalling of judicial resources, and, most important, delays in obtaining or, possibly, actual loss of the right to, appellate review. While it cannot be said that these omissions occur on a daily basis, their regularity, the mischief they may cause, and the inconsistent treatment they have received by the courts and commentators, suggest that a clear and cogent resolution is needed. It is hoped that the following discussion will be of some use to the courts in reaching that resolution.[1]

I. THE SEPARATE DOCUMENT REQUIREMENT AND THE WAIVER DOCTRINE

Although the district courts are generally required, under Civil Procedure Rule 58,[2] to file a judgment as a separate document at the

---

* Supervisory Staff Attorney, United States Court of Appeals for the Second Circuit. The views expressed herein are those of the author and do not necessarily represent the policies of the Second Circuit.

1. Throughout this article, once a Federal Rule of Civil Procedure or a Federal Rule of Appellate Procedure is introduced, it will thereafter be abbreviated as "Civil Procedure Rule ___" or "Appellate Procedure Rule ___."

2. FED. R. CIV. P. 58, entitled "Entry of Judgment," states as follows:
Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers

conclusion of an action, this requirement is not a jurisdictional prerequisite for an appeal and may be waived by the parties.[3] This waiver rule, announced in *Bankers Trust Co. v. Mallis*,[4] resolved an inter-circuit conflict[5] concerning appellate jurisdiction: those circuit courts which found a separate judgment to be a jurisdictional prerequisite dismissed appeals in which separate judgments were lacking;[6] those courts which found that the filing of a separate judgment after the rendering of a final decision could be, and in fact had been, waived by the parties found jurisdiction and reviewed the merits of the appeal.[7] In *Mallis*, the Supreme Court agreed with the latter courts of appeals, but emphasized that both the finality of the order under appeal and the waiver of the separate judgment requirement must be clear.[8]

> to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. *Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).* Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Id. (emphasis added). The requirement that every judgment be set forth on a separate document was added in 1963. *See* FED. R. CIV. P. 58 advisory committee note to 1963 amendment.

3. *See* Deborah F. Harris, Annotation, *Requirement of Rule 58, Federal Rules of Civil Procedure, That Every Judgment Shall Be Set Forth on a Separate Document*, 53 A.L.R. FED. 595 (1981 Supp. 1994).

4. 435 U.S. 381, 384-88 (1978).

5. *Id.* at 382-83 & n.2 (noting conflict and listing cases).

6. *See, e.g.*, Sassoon v. United States, 549 F.2d 983 (5th Cir. 1977); Baker v. South Pac. Transp., 542 F.2d 1123 (9th Cir. 1976); Baity v. Ciccone, 507 F.2d 717 (8th Cir. 1974); Richland Trust Co. v. Federal Ins. Co., 480 F.2d 1212 (6th Cir. 1973); Lyons v. Davoren, 402 F.2d 890 (1st Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

7. *See, e.g.*, Mallis v. Federal Deposit Ins. Corp., 568 F.2d 824, 827 n.4 (2d Cir. 1977) *aff'd in part, dismissed in part sub nom.* Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978); W.G. Cosby Transfer & Storage Corp. v. Froehlke, 480 F.2d 498, 501 n.4 (4th Cir. 1973).

8. *Mallis*, 435 U.S. at 387-88; *see* Turner v. Air Transp. Lodge 1894 of Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, 585 F.2d 1180, 1182 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (acknowledging waiver rule, but remanding because district court order under appeal was unclear as to (i) whether it was a final decision and (ii) the relief granted).

Waiver, or consent to the appeal without the filing of a separate judgment document, is generally established where one party appeals from an order and the opposing parties do not contest the appeal on the basis of the separate document rule.[9] It can be assumed that, where the absence of a separate judgment is the only defect, objections by appellees on the basis of the separate judgment rule will be rare since the appeal will go forward in any event after the separate judgment is filed and entered. Since the only likely advantage to an appellee who insists on the filing of a separate judgment will be that which is gained through delay of the appellate process, the courts may wish to examine the motives of any appellee so objecting. If it appears that an objection is not made in good faith, but only for the purpose of delay or harassment or for other improper purposes, the court may deem it appropriate to consider the separate judgment requirement waived, notwithstanding the appellee's vexatious objection.[10]

II. WHERE THE NOTICE OF APPEAL WAS NOT FILED AFTER THE DISTRICT COURT'S FINAL DECISION WITHIN THE TIME PERIOD SET FORTH IN APPELLATE PROCEDURE RULE 4(A)(1), AND NO SEPARATE JUDGMENT WAS ENTERED

The classic *Mallis* situation is one in which the district court failed to file a separate judgment document, but the appellant's notice of appeal from the district court's final decision was timely filed within the parameters of Appellate Procedure Rule 4(a)(1).[11] In that instance the only issue to be decided is whether waiver occurred. A more difficult situation arises where there is no separate judgment document *and* the notice of appeal is not filed after the final decision within the time period set forth in

---

9. *Mallis*, 435 U.S. at 387-88; *see, e.g.*, *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 263 n.1 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1397 (1994); Cooper v. Salomon Bros., 1 F.3d 82, 86 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 737 (1994); Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 430-31 (2d Cir. 1989).

10. Although the Supreme Court stated in *Mallis* that the separate judgment requirement "must be 'mechanically applied[,]'" absent waiver by the parties, it did not foreclose other exceptions to that requirement. *Mallis*, 435 U.S. at 386 (quoting United States v. Indrelunas, 411 U.S. 216, 221-22 (1973)). A litigant's improper motive for performing acts otherwise permitted by the federal rules of procedure has long provided a basis for forbidding the taking of such action or for punishing the litigant afterwards. *See, e.g.*, 28 U.S.C. § 1927; FED. R. CIV. P. 11(b) & (c), 16(f), 26(g)(2) & (3), 56(g); Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (stating that federal courts have inherent authority to assess attorneys' fees to sanction a party who "act[s] in bad faith, vexatiously, wantonly, or for oppressive reasons" (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975)).

11. FED. R. APP. P. 4(a)(1).

Appellate Procedure Rule 4(a)(1). As yet, neither the courts nor commentators have provided a satisfactory resolution or analysis as to (a) whether the timing of such a notice of appeal deprives the court of appeals of appellate jurisdiction, or (b) where it is recognized that such an "untimely" notice of appeal is not a bar to appellate jurisdiction, whether the court of appeals must stay or dismiss the appeal and require the parties to return to the district court for filing and entry of a separate judgment by that court.

Resolution of these two issues appears to lie in the interstices between (a) Appellate Procedure Rule (4)(a)(2),[12] which deems as timely a notice of appeal filed prior to entry of judgment, (b) the Supreme Court's decision in *United States v. Indrelunas*,[13] which requires the separate document requirement to be "mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered[,]"[14] and (c) the Supreme Court's *Mallis* decision.[15] However, these three authorities do not clearly dispose of the issues outlined above since they involve situations which are distinguishable: Appellate Procedure Rule 4(a)(2) assumes that a separate judgment was, in fact, filed and entered at some point; *Indrelunas* involved a separate judgment which was belatedly entered by the district court and a subsequently filed notice of appeal which was found effective through the Supreme Court's holding that the separate judgment requirement must be mechanically applied;[16] and,

---

12. FED. R. APP. P. 4(a)(2) provides that "[a] notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."

13. 411 U.S. 216 (1973).

14. *Id.* at 222.

15. *Mallis*, 435 U.S. 381.

16. In *Indrelunas*, a jury verdict regarding liability only was rendered on March 21, 1969. On the same day, the verdict was entered in the docket pursuant to the judge's instruction that "the verdicts be entered . . . and . . . there be judgment on the verdicts so entered." Foiles v. United States, 465 F.2d 163, 164-65 (7th Cir. 1972), *rev'd sub nom.* United States v. Indrelunas, 411 U.S. 216 (1973). A stipulation regarding the amounts to be paid to the prevailing parties was filed on May 14, 1970 and the appellant, the government, filed a timely notice of appeal. That appeal, however, was not pursued. On February 25, 1971, on the government's motion, the district court entered formal judgments from which the government appealed. The court of appeals, in holding that the government's appeal was untimely, decided that judgment had been entered on March 21, 1969 and that a separate judgment document was required only when a complex judgment, as described in clause (2) of Civil Procedure Rule 58, was rendered. *Foiles*, 465 F.2d at 166-69; *Indrelunas*, 411 U.S. at 219. The Supreme Court reversed, finding that a separate judgment document was required for both the "simple" and "complex" judgments described in Rule 58 and that a separate judgment was not filed until February 25, 1971. *Id.* at 220-22. The court also held that the intent or good faith of the

while it was held in *Mallis* that the filing of a separate judgment may be waived by the parties,[17] the timeliness of the notice of appeal was not at issue.[18] As a result of the uncertainty concerning how these authorities

---

government was not a relevant consideration:

> [W]hatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the 'separate document' provision of Rule 58 is one of them. That provision is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered.

Id. at 221-22; *accord* Domegan v. Ponte, 972 F.2d 401, 405 (1st Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1378 (1993). Thus, while *Indrelunas* strengthened the separate document requirement of Civil Procedure Rule 58, it did not concern the situation where a notice of appeal is filed long after entry of a dispositive order and a separate judgment is never filed.

17. *Mallis*, 435 U.S. at 384.

18. *But see* Parisie v. Greer, 705 F.2d 882, 891 n.3 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). In *Parisie*, the court found that the timeliness of the notice of appeal in *Mallis* was, in fact, an issue resolved by the Supreme Court *sub silentio*. *Id.* However, this conclusion is based on an incorrect reading of the various filing and entry dates in the *Mallis* case. The *Parisie* decision states that the notice of appeal in *Mallis* "was filed many months after the appealed from order . . . ." *Id.* However, this conclusion was apparently based on the Second Circuit's inaccurate description in its *Mallis* opinion of the procedural history of the case. After noting that the notice of appeal was filed March 24, 1976, the Second Circuit stated that the district court's opinion ordering dismissal of the complaint was filed September 30, 1975, and a Civil Procedure Rule 54(b) certificate directing the entry of final judgment with respect to all defendants but one was filed December 5, 1975. *Mallis*, 568 F.2d at 827 n.4. According to the Second Circuit, it was the Civil Procedure Rule 54(b) certificate which permitted the appeal. *Id.*

However, the *Mallis* district court docket sheet states otherwise. According to the docket sheet, the case was dismissed as to all defendants by order entered on September 30, 1975; by order entered October 2, 1975, the claim against one defendant was reinstated; the plaintiffs filed their first notice of appeal from the order of dismissal on October 31, 1975 and, on November 25, 1975, filed motions for Civil Procedure Rule 54(b) certification and an extension of time to file a notice of appeal; by order filed November 28, 1975, the district court denied certification under 28 U.S.C. § 1292(b) and, on December 15, 1975, *denied* certification under Civil Procedure Rule 54(b); a copy of the court of appeals order indicating the withdrawal of the plaintiff's first appeal was filed in district court on December 23, 1975; the claim against the one remaining defendant was dismissed by an order and stipulation filed March 2, 1976; the second, effective, notice of appeal was filed March 24, 1976.

Since the March 2, 1976 order dismissing the action as to the last defendant was the final decision of the district court, the March 24, 1976 notice of appeal was filed after the final decision within the period permitted by Appellate Procedure Rule 4(a)(1), notwithstanding the contrary suggestion in *Parisie*. *See* Beukema's Petroleum Co. v.

interact with each other, the various courts facing the two issues discussed here have resolved them in a variety of ways. Unfortunately, even those courts which appear to have reached a correct resolution of the issues fail to offer a satisfactory explanation for their decision.[19]

Admiral Petroleum Co., 613 F.2d 626, 628 n.2 (6th Cir. 1979) (noting that "no question as to the timeliness of the appeal was involved" in *Mallis*). It must be assumed that the Supreme Court had access to the district court's docket sheet and record when it decided the jurisdictional issue in *Mallis*. Thus, there was no reason for the Supreme Court to determine whether the *Mallis* waiver doctrine would also apply where the notice of appeal was not filed after the final order within the period allowed by Appellate Procedure Rule 4(a)(1). *But see Mallis*, 435 U.S. at 382 n.1 & 384 n.4 (notes judgment of dismissal was entered September 30, 1975; no mention of March 2, 1976 order). The conclusion that timeliness was not an issue in *Mallis* is further supported by the Supreme Court's explicit statement that "[t]he issue posed is whether a decision of a district court can be a 'final decision' for purposes of [28 U.S.C.] § 1291 if not set forth on a document separate from the opinion." *Id.* at 383.

19. As a preliminary matter, it should be noted that the courts and the applicable federal rules and statutes have given the phrase "entry of judgment" a variety of meanings. In the strict Civil Procedure Rule 79(a) sense, it refers to the entering of judgment as an item on the docket sheet. A broader definition is derived from Appellate Procedure Rule 4(a)(7) which states that "[a] judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." The reference to Civil Procedure Rule 58 in Appellate Procedure Rule 4(a)(7) has been interpreted to mean that "entry" includes both the mechanical procedures described in Civil Procedure Rule 79(a) and the rendering of a separate judgment document. *See, e.g.*, Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989); Vernon v. Heckler, 811 F.2d 1274 (9th Cir. 1987); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 688 (4th Cir. 1978); *see also* Shalala v. Schaefer, 113 S. Ct. 2625, 2632 n.6 (1993) (distinguishing between entry of judgment and entry of a formal separate judgment). The genesis of Appellate Procedure Rule 4(a)(7), previously Appellate Procedure Rule 4(a)(6), supports this interpretation. Prior to the 1979 amendment which resulted in the current version of the rule, the rule stated that "[a] judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket." *See* FED. R. APP. P. 4(a)(6) (1968); Prelim. Draft of Proposed Amendments, Comm. on Rules of Prac. & Proc. of the Judicial Conf., Rule 4(a) (April 1977); *see also* Prelim. Draft of Proposed Uniform Rules of Fed. App. Proc., Comm. on Rules of Prac. & Proc. of the Judicial Conf., Rule 4(a) (March 1964) (sentence ends with "when it is noted in the civil docket"). The sentence was amended in 1979 to "call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document." Advisory Comm. Notes to 1979 Amendment, Rule 4(a)(6). *See generally* Walter W. Jones, Jr., Annotation, *What Constitutes "Entry of Judgment" Within Meaning of Rule 58 of Federal Rules of Civil Procedure, as Amended in 1963*, 10 A.L.R. FED. 709 (1972 Supp. 1994); Comment Note, Annotation, *Formal Requirements of Judgment or Order as Regards Appealability*, 73 A.L.R.2d 250 (1960). Some authorities also use the phrase in its broadest sense, as meaning to formally set down the court's disposition in writing. *See* BLACK'S LAW DICTIONARY 530-31 (6th ed. 1990). This interpretation blurs the distinction between "rendition of

A. *The Case Law*

1. Appellate Jurisdiction Found; No Remand Necessary

Of the nine circuits which have confronted the timeliness issues posed in this section, seven (the First, Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits) have determined that such an appeal is not untimely and may proceed without a remand.[20] The seven circuits which permit the appeal to proceed employed a two-step analysis. First, since *Indrelunas* (or its progeny) and Civil Procedure Rule 58 require the entry of a separate judgment document in all cases,[21] and Appellate Procedure Rule 4(a) measures the time within which to file a notice of appeal from that entry, a notice of appeal filed before entry of the separate judgment was found not untimely even if filed long after the final disposition in the action.[22] Such an appeal was found to be premature, not late.[23] Second, rather than require the parties to the appeal to return to the district court to arrange for entry of the missing separate judgment, these courts found, pursuant to *Mallis*, that the parties had waived such entry and that the appeal could proceed without further delay.[24]

---

judgment" and "entry of judgment" which is discussed in BLACK'S LAW DICTIONARY under "Entering Judgments." *Id.* at 531. For purposes of this article, the phrases "Civil Procedure Rule 79 entry" (or "docket entry") and "Appellate Procedure Rule 4(a) entry" will be used to indicate which of the first two definitions discussed above is intended. The third, broadest definition will not be used.

20. Domegan v. Ponte, 972 F.2d 401, 406 (1st Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1378 (1993); Gregson & Assocs. Architects v. Virgin Islands, 675 F.2d 589, 593 (3d Cir. 1982); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 691 (4th Cir. 1978); Reid v. White Motor Corp., 886 F.2d 1462, 1468-69 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); Parisie v. Greer, 705 F.2d 882, 883, 890-91 (7th Cir. 1981) (en banc), *cert. denied*, 464 U.S. 918, 950 (1983); Vernon v. Heckler, 811 F.2d 1274, 1276-77 (9th Cir. 1987); Clough v. Rush, 959 F.2d 182, 186 (10th Cir. 1992).

21. *Indrelunas*, 411 U.S. at 221-22.

22. *See supra* note 20.

23. *Id.*

24. *Domegan*, 972 F.2d at 405-06; *Caperton*, 585 F.2d at 689-91; *Reid*, 886 F.2d at 1468-69; *Parisie*, 705 F.2d at 890-91; *Vernon*, 811 F.2d at 1276-77. Although *Clough* does not mention *Indrelunas*, its discussion of Civil Procedure Rule 58 is clearly consistent with *Indrelunas*. *Clough*, 959 F.2d at 185-86. In *Gregson*, four paragraphs after discussing the *Mallis* waiver doctrine, the court stated, "As discussed *supra*, the lack of a separate document does not preclude us from recognizing the existence of an appealable final judgment[ ]" and cited to *Mallis* as an example. 675 F.2d at 591-92, 593 n.5. In so doing, it is assumed that the court was applying the waiver doctrine.

2. Appellate Jurisdiction Found; Remand Necessary

Although the Eighth Circuit has held that the absence of a separate judgment prevents a belated notice of appeal from being found untimely under Appellate Procedure Rule 4(a)(1), it still requires the parties to such an appeal to return to the district court for entry of a separate judgment.[25] In *In re Ozark Restaurant Equipment Co.*,[26] the court held that the lack of a separate judgment document prevented an appellant's appeal from being time-barred.[27] In so holding, the court adopted the analysis of Judge Eschbach of the Seventh Circuit in *Parisie v. Greer*,[28] which, in turn, was based on the holding in *Indrelunas* that the separate document requirement must be "mechanically applied."[29] Although the Eighth Circuit recognized that "'a court confronted with such a situation may consider the technically premature appeal on the merits without the necessity of a formalistic remand,'"[30] it decided that the "better practice"[31] was to remand for entry of judgment on a separate document without prejudice to the taking of a timely appeal upon entry of that judgment. [32]

The Second Circuit position remains unclear. In *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1397 (1994), after finding a proper waiver of the separate judgment requirement under *Mallis*, the Court noted that the notice of appeal was timely filed from the final decision in the case. *Id.* at 263 n.1. Since the court was not faced with an "untimely" notice of appeal, there was no need for it to decide whether the *Mallis* waiver doctrine resolved that issue as well.

25. *In re* Ozark Restaurant Equip., 761 F.2d 481, 484 (8th Cir. 1985).

26. *Id.* at 481.

27. *Id.* at 484.

28. 705 F. 2d 882, 883, 890-91 (7th Cir.) (en banc), *cert denied*, 464 U.S. 950 (1983).

29. *Id.* at 891 (stating that "*Mallis* reaffirmed the holding in *Indrelunas* that 'the separate document rule must be "mechanically applied" *in determining whether an appeal is timely*.' [*Mallis*, 435 U.S.] at 386.") (emphasis in *Parisie* opinion).

30. *Ozark Restaurant Equip.*, 761 F.2d at 484 (quoting *Parisie*, 705 F.2d at 890).

31. *Id.*

32. *Id.* The only authority cited in *Ozark Restaurant Equip.* in support of the use of the "better practice" was Beukema's Petroleum Co. v Admiral Petroleum Co., 613 F.2d 626, 629 (6th Cir. 1979). The court in *Beukema's Petroleum*, which involved an appeal from an injunction, found that while the *Mallis* waiver doctrine was "salutary when the issue involves filing requirements for a timely appeal, the potential problems which may stem from injunctive relief would seem to require greater efforts toward compliance [with the separate judgment rule]." *Id.* at 628. The court concluded that there was "no practical reason to ignore the lack of [Civil Procedure] Rule 58 formality at this juncture of the proceedings, and the better practice calls for compliance in this case even though the parties have treated the opinion as an appealable preliminary

3. No Appellate Jurisdiction; New Appeal Allowed Only After Appellant Moved for Entry of Separate Judgment

The Fifth Circuit also requires the parties to return to the district court in such situations, although for somewhat different reasons than the Eighth Circuit. In *Townsend v. Lucas*,[33] the Fifth Circuit found that although *Mallis* permitted the parties to waive entry of a separate judgment, waiver in that case would leave the appellant with an untimely appeal from the last order entered in the case, one which adopted a magistrate judge's recommendation of dismissal with prejudice.[34] In order to comply with the statement in *Mallis* that the separate document requirement "should be interpreted to prevent loss of the right of appeal, not to facilitate loss," the Fifth Circuit decided to "not view[] the [last order in the action] as a final order" and dismissed for lack of jurisdiction.[35] The holding was summarized as follows: "Since no final judgment has been entered as a separate document and thus there is no timely notice of appeal, the jurisdictional prerequisites for an appeal have not been met and the appeal should be dismissed."[36] The court advised that the "problem of the untimely notice of appeal . . . [could] be obviated if [the appellant] file[d] a motion for the entry of a judgment in the district court," from which he could then appeal.[37]

---

injunction." *Id.* at 629. The case was remanded for entry of an injunction on a separate document; the court of appeals retained jurisdiction of the appeal in all other respects upon return of the case to that court after entry of the separate judgment. *Id. Ozark Restaurant Equip.* involved an appeal from a bankruptcy judge's order awarding judgment to a bankruptcy trustee in three adversary proceedings. *Ozark Restaurant Equip.*, 761 F.2d at 482. The opinion does not state whether injunctive relief was involved.

33. 745 F.2d 933 (5th Cir. 1984).

34. *Id.* at 934.

35. *Id.*

36. *Id.* at 933-34.

37. *Id.* at 934. The Fifth Circuit also noted that it had previously held in United States v. Rodriquez, 744 F.2d 92 (5th Cir. 1984) (reported in table only), that "it may take jurisdiction over an appeal in which judgment has not been entered on a separate document even when the notice of appeal from the noncomplying order is untimely." *Id.* at 934 n.1. Since this prior holding is inconsistent with the holding in *Townsend*, it is assumed that its status as an unpublished table case renders it of limited precedential value under the local rules of the Fifth Circuit.

The holding in *Townsend* was later described by the Fifth Circuit as follows: "Under *Townsend v. Lucas*, this court may elect to dismiss an appeal in which no [Civil Procedure] Rule 58 judgment has been entered, but is not required to do so. Generally, this court declines under *Townsend* to hear the appeal if the status of a post-judgment motion is unclear due to the lack of a [Civil Procedure] Rule 58 judgment or if the notice

4. No Appellate Jurisdiction; Appeal Forfeited

There are two circuit court opinions which conclude that appellate jurisdiction is irreparably lost where an appellant files a notice of appeal beyond the time period permitted by Appellate Procedure Rule 4(a)(1), even where a separate judgment has not been entered. Although neither opinion represents the current law of their respective circuits, they appear to reflect a strong minority view on this issue. The first is the four-judge dissenting opinion in *Parisie v. Greer*,[38] an *en banc* decision in which five of the nine voting judges found, pursuant to *Indrelunas* and *Mallis*, appellate jurisdiction without the necessity of a remand. The dissenters, however, found that the *Mallis* waiver doctrine required a finding of no appellate jurisdiction.[39] They reasoned that since there was no doubt or confusion that the district court's dispositive decision was the final order in the case, and the judge and all parties treated it as such, and no party objected to the absence of a separate judgment, the separate judgment requirement was waived, leaving the appellant with an untimely appeal.[40] Similar reasoning was used in *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*,[41] an unpublished decision which, under the rules of the Sixth Circuit, may not be cited except under limited circumstances. The court in *Amoco Oil*, citing *Mallis*, found that the purpose of the separate judgment requirement "is merely to identify the district court order as a final decision and clarify when the appeals period began to run."[42] Since the appellant was not misled by the failure to enter a separate judgment and recognized the court's dispositive decision as the final order, "[t]he mere technicality that the district court failed to file a separate judgment should not be used to give jurisdiction to this Court of an untimely filed

---

of appeal would have been untimely if the order appealed had constituted a [Civil Procedure] Rule 58 judgment." Whitaker v. Houston, 963 F.2d 831, 834 (5th Cir. 1992). While this statement in *Whitaker* makes the *Townsend* determination sound discretionary, and thus nonjurisdictional, the *Townsend* decision clearly stated that dismissal was required since "jurisdictional prerequisites for an appeal ha[d] not been met . . . ." *Townsend*, 745 F.2d at 933-34.

38. 705 F.2d 882, 883, 890-91 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 950 (1983).

39. *Id.* at 889.

40. *Id.* The dissenters also rejected the analysis of three other judges who found jurisdiction on grounds other than the *Indrelunas* and *Mallis* decisions. *Id.* at 885-88.

41. 786 F.2d 1163 (6th Cir.), *cert. denied*, 479 U.S. 966 (1986).

42. Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., No. 85-1619, 1986 U.S. App. LEXIS (6th Cir. Feb. 7, 1986), *cert. denied*, 479 U.S. 966 (1986).

appeal in which the parties were not misled by the lack of a separate judgment."[43]

Although the Supreme Court denied certiorari in *Amoco Oil*,[44] Justice Blackmun, joined by Justice O'Connor, dissented from the denial and opined that the Sixth Circuit had misconstrued the Supreme Court's decisions in *Indrelunas* and *Mallis*.[45] Contrary to the Sixth Circuit's reasoning, Justice Blackmun argued that *Indrelunas* and *Mallis*, in all instances, should be construed to save appellate jurisdiction:

> These two decisions, I believe, are to be read to support the following proposition: the separate-document requirement must be applied mechanically in order to protect a party's right of appeal, although parties may waive this requirement in order to maintain appellate jurisdiction of their case. . . . Given that a finding of waiver in this case results in Amoco's loss of its right of appeal, then, under our earlier decisions in *Indrelunas* and *Bankers Trust* [v. Mallis], [Civil Procedure] Rule 58 should have been applied mechanically. The Court of Appeals should have dismissed the purported appeal and directed the District Court to enter a final judgment, from which a proper appeal could lie.[46]

The analysis of Justice Blackmun is similar to that of the Fifth Circuit in *Townsend v. Lucas*.[47] Both opinions recognize that waiver of the separate document requirement would leave the appellant with an untimely appeal;[48] both conclude that dismissal of the appeal is necessary;[49] and both state that an appeal can be salvaged by arranging for the entry of a separate judgment by the district court.[50] The only distinction is that Justices Blackmun and O'Connor would have the court of appeals order

---

43. *Id.*

44. Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 479 U.S. 966 (1986) (denying certiorari).

45. *Id.* at 966-69 (Blackmun, J., dissenting).

46. *Id.* at 969 (Blackmun, J., dissenting) (emphasis omitted).

47. 745 F.2d 933 (5th Cir. 1984).

48. *Amoco Oil*, 479 U.S. at 969 (Blackmun, J., dissenting); *Townsend*, 745 F.2d at 933-34.

49. *Amoco Oil*, 479 U.S. at 969 (Blackmun, J., dissenting); *Townsend*, 745 F.2d at 934.

50. *Amoco Oil*, 479 U.S. at 969 (Blackmun, J., dissenting); *Townsend*, 745 F.2d at 933-34.

the district court to enter a separate judgment,[51] while the Fifth Circuit would require the appellant to move for entry of a separate judgment.[52]

In its first published opinion on the subject, the Sixth Circuit followed neither the procedure followed in its prior unpublished opinion in *Amoco Oil* nor that suggested by Justice Blackmun. Instead, in *Reid v. White Motor Corp.*,[53] it followed the majority of circuit courts by finding jurisdiction and considering the merits of the appeal without requiring the appellant to return to the lower court for entry of a separate judgment.[54] Entry of a separate judgment was deemed waived pursuant to *Mallis*.[55]

5. No Appellate Jurisdiction and Appeal Forfeited Where Appellant Failed to Appeal Within Three Months

Although the First Circuit, in *Domegan v. Ponte*,[56] interpreted *Indrelunas* and *Mallis* as allowing an appellate court, where the notice of appeal was not timely filed as measured from the final decision, to consider the merits of the appeal without requiring the appellant to return to the district court for entry of a separate judgment,[57] it created a notable exception in *Fiore v. Washington County Community Mental*

---

51. *Amoco Oil*, 479 U.S. 966 (Blackmun, J., dissenting).

52. *Townsend*, 745 F.2d at 934. The procedure suggested by the Fifth Circuit leaves open the possibility that the district court could decide not to enter a separate judgment. *See* 15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3915 at 262-63 (1992 Supp. 1994) (noting instances where district court refused to enter judgment). The district court may believe that a separate judgment is not required or that the party requesting it is not so entitled. For example, the court may hold that there is no final judgment from which an appeal may properly be taken. Alternatively, the laches doctrine might provide a rationale in instances where the case has been long dormant and other parties would be unduly prejudiced by the reactivation of the case. *See infra* note 118 and accompanying text.

53. 886 F.2d 1462 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990).

54. *Id.* at 1468-69.

55. *Id.* at 1469. *Reid* concerned the failure of the bankruptcy court to enter a separate judgment pursuant to Bankruptcy Rule 9021. According to the court, the separate document requirement of Bankruptcy Rule 9021 is identical to that of Civil Procedure Rule 58. *Id.* at 1468. The discussion in *Reid* of the *Mallis* waiver doctrine was later found specifically applicable to waiver of the Civil Procedure Rule 58 separate judgment requirement. Whittington v. Milby, 928 F.2d 188, 192 (6th Cir.), *cert. denied*, 502 U.S. 883 (1991).

56. 972 F.2d 401 (1st Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1378 (1993).

57. *Id.* at 406.

Health Center.[58] In *Fiore*, the court found it appropriate, "absent exceptional circumstances," to infer waiver of the separate judgment requirement, pursuant to *Mallis*, where a party failed to act within three months of the district court's last order in a case.[59] The court found that a party wishing to appeal and awaiting entry of judgment should move for entry within that period.[60] Failure to act in that period would foreclose appeal if the notice of appeal was untimely filed from the order of dismissal.[61] According to the court, "[t]his approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties."[62]

B. *Analysis of the Case Law*

1. The *Mallis* Waiver Doctrine is Inapplicable

As noted above, the majority of circuits addressing the issue endorse the use of the *Mallis* waiver doctrine to allow appeals to proceed without an intervening remand for entry of a separate judgment, even when the notice of appeal was not timely filed from the order under appeal.[63] One of those circuits, however, also used the *Mallis* waiver doctrine to find that appeals filed beyond three months after the last district court order were forfeited.[64] Two other opinions, although not binding precedent in any circuit, used the *Mallis* waiver doctrine to find a lack of appellate jurisdiction due to the untimely filing of the notice of appeal.[65] In each

---

58. 960 F.2d 229 (1st Cir. 1992) (en banc).

59. *Id.* at 236.

60. *Id.*

61. *Id.*

62. *Id.* The First Circuit saw no conflict between its conclusion in *Fiore* and Supreme Court precedent suggesting that [Civil Procedure] Rule 58's technical requirements should be relaxed only to assist an appeal, not to foreclose one. [citation omitted] Allowing a party to use the separate document requirement to delay indefinitely an appeal would not serve [Civil Procedure] Rule 58's purpose of protecting against mistakenly ill-timed appeals. The three-month period generally should ensure that a failure to appeal was a matter of choice, not confusion, and any further delay in finality would serve no one's interest.

Id. at 236 n.11. However, the court cited to no authority in support of its three-month rule.

63. *See supra* notes 20 & 24 and accompanying text.

64. *Fiore*, 960 F.2d at 236.

65. *See supra* notes 38-43 and accompanying text.

of these decisions, however, the use of the *Mallis* waiver doctrine appears to have been incorrect.

The majority position fails to recognize that use of the *Mallis* waiver doctrine in these situations creates rather than cures a jurisdictional quandary: upon waiver of the filing of a separate judgment, the timeliness of the appellant's notice of appeal can only be measured from the district court's final decision; if the notice of appeal was not filed after that decision within the time period required by Appellate Procedure Rule 4(a), the notice is untimely. Thus, in this regard, the minority view is correct—waiver of a separate judgment under these circumstances leaves the court of appeals without jurisdiction.

However, those circuit decisions which stopped at this point in their analysis, and found no appellate jurisdiction, were also in error. In so concluding, these decisions are in conflict with the policy statement in *Mallis* that the separate judgment "'rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.'"[66] Moreover, these decisions also failed to take note of the distinction drawn in *Mallis* between situations where the separate document requirement had to be "mechanically applied" to save appellate jurisdiction, as in *Indrelunas* (which involved a notice of appeal which was untimely if measured from the order deemed final by the court of appeals but timely if measured from the separate judgments entered by the district court),[67] and situations where it did not, as in *Mallis*:

> In *United States v. Indrelunas*, we recognized that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. Technical application of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought.[68]

While the jurisdictional scenario under discussion does not fall squarely within the parameters of *Indrelunas* (since, in that case, a separate judgment was, in fact, entered and the Supreme Court appeared to disagree with the conclusion of the court of appeals that the earlier

---

66. Bankers Trust Co. v. Mallis, 435 U.S. 318, 386 (1978) (quoting 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.08[2], at 119-120 (1970)). The current edition of Moore's states that the "overriding principle in applying the separate document requirement should be to preserve, not destroy, a party's opportunity to appeal." 6A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 58.02.1[2], at 58-20 (2d ed. 1994).

67. *Indrelunas*, 411 U.S. 216.

68. *Mallis*, 435 U.S. at 386 (citations omitted).

order was the final decision in the case),[69] it appears to be a closer fit than *Mallis* (where the notice of appeal was timely filed from the final decision).[70] The very fact that a district court renders a final decision in a case and fails to enter a separate judgment itself creates uncertainty as to the proper time to appeal. Under most circumstances, both sophisticated and unsophisticated appellants may assume that a district court is not abdicating its responsibilities and may thereby be lulled into inaction and fail to file a protective notice of appeal until it is too late.[71] While some judges have found that the filing of the notice of appeal evidences the appellant's waiver of a separate judgment,[72] it is just as likely that the appellant filed out of caution or fear, or in anticipation that a judgment would eventually be filed, validating the notice of appeal *nunc pro tunc* under Appellate Procedure Rule 4(a)(2).[73] Determining the mental state of a particular appellant at the time the appellant filed a notice of appeal would not only be unduly burdensome but would constitute the type of "case-by-case tailoring" of the separate judgment requirement rejected by the Supreme Court in *Indrelunas*.[74] Thus, when the analysis is focused on the uncertainty inherent in this situation, which, in fact, is the primary factor underlying the separate judgment requirement itself,[75] the issue presented is clearly closer to the *Indrelunas* scenario than that addressed by *Mallis*, where uncertainty as to finality, timeliness or the intentions of the judge and parties was not an issue.[76]

---

69. *Indrelunas*, 411 U.S. at 219 (noting entry of formal judgments from which appeal was taken), 221 (noting that earlier docket entry, which the court of appeals found started the appeal period, reflected only the jury's liability determination without specifying an amount due).

70. *See supra* note 18 and accompanying text for a discussion of the timeliness of the notice of appeal in *Mallis*.

71. *See, e.g.*, Fennell v. TLB Kent Co., 865 F.2d 498, 499 n.1 (2d Cir. 1989) (appeal permitted from final order without separate judgment entry; "We note in this regard that it was at least arguably the responsibility of the district court and its clerk to enter judgment without any action by the parties.").

72. Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., No. 85-1619, 1986 U.S. App. LEXIS (6th Cir. Feb. 7, 1986), *cert. denied*, 479 U.S. 966 (1986); Parisie v. Greer, 705 F.2d 882, 889 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983).

73. An appellant who filed a belated protective notice of appeal may have done so either without first contacting the district court concerning the missing separate judgment or after having an actual request for entry of a separate judgment denied.

74. United States v. Indrelunas, 411 U.S. 216, 221 (1973).

75. *See* FED. R. CIV. P. 58 advisory committee notes on 1963 Amendment, ¶¶ 3-4.

76. This conclusion also applies to the three-month rule announced in *Fiore* which was also based on the *Mallis* waiver doctrine. Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992). The three-month rule is suspect

Finally, the decisions which used the *Mallis* waiver doctrine to find an absence of appellate jurisdiction run counter to clear indications from the Supreme Court that delay in filing a notice of appeal where there is no separate judgment is not determinative of the jurisdictional issue. In *Jung v. K. & D. Mining Co.*,[77] the petitioners' first amended complaint was dismissed and the petitioners were granted twenty days to file an amended complaint.[78] In lieu of filing another amended complaint, the petitioners nearly two years later filed a motion electing to stand on their first amended complaint.[79] The district court dismissed the case and the petitioners filed a notice of appeal from that order.[80] The court of appeals dismissed the appeal as untimely, holding that the earlier order dismissing the first amended complaint became the final judgment when an amended complaint was not thereafter filed within twenty days.[81] The Supreme Court disagreed, finding that the later order dismissing the action was the final judgment.[82] In so ruling, the Supreme Court found that the earlier ruling left the case open for further proceedings and that the petitioners' two year delay was not determinative:

> Although to be sure nearly two years elapsed between the time petitioners were given leave to file an amended complaint and their motion of March 25, 1957 [electing to stand on their first amended complaint], the defendants also did not, as they so easily could have done, nor did the District Court exercising power *sua sponte* over its own calendar, take any step to put a definitive end to the case and thereby fix an unequivocal terminal date for appealability. *The undesirability of useless delays in litigation is*

---

for an additional reason: there does not appear to be any statutory or judicial basis for it. In fact, while the deadline may help in controlling the court's caseload, it appears to conflict with the language, purposes and actual use of *Indrelunas*, *Mallis* and Appellate Procedure Rule 4(a)(2). For example, if an appellant files a notice of appeal five months after entry of the final decision in an action, and the district court thereafter enters a separate judgment document, the *Fiore* rule would require dismissal of the appeal for lack of jurisdiction while Appellate Procedure Rule 4(a)(2) would require a finding of jurisdiction based on the later separate judgment.

77. 356 U.S. 335 (1958).

78. *Id.* at 336.

79. *Id.*

80. *Id.* at 337.

81. *Id.*

82. *Id.* at 337-38.

more than offset by the hazards of confusion or misunderstanding as to the time for appeal.[83]

In *Shalala v. Schaefer*,[84] the Supreme Court found a fifteen month delay after the final decision in that case irrelevant due to the absence of a separate judgment document.[85] The plaintiff in *Schaefer*, a social security case, prevailed by obtaining an order, on April 4, 1989, reversing an administrative decision and remanding the case to the agency for further proceedings.[86] After obtaining an award of benefits on remand, the plaintiff returned to the district court and, on July 18, 1990, applied for attorneys' fees under the Equal Access to Justice Act[87] (EAJA).[88] In opposing the motion, the government noted that the EAJA required the plaintiff to file his fee motion within thirty days after a judgment becomes "not appealable" (i.e., after the sixty-day appeal period of Rule 4(a)(1)), and argued that this period ended ninety days after entry of the April 4, 1989 order.[89] The government also argued that a separate judgment was not necessary "for an order of the district court to *become* appealable[,]" citing to *Mallis* and other authorities.[90] The Supreme Court rejected the government's argument since the EAJA's thirty-day limit ran from the end of the appeal period, not the beginning.[91] Thus, absent a separate judgment, the April 4, 1989 order remained appealable at the time the EAJA motion was filed, rendering that motion timely.[92] Moreover, the Court stated that the failure of the district court to enter a separate judgment under Civil Procedure Rule 58 was a burden that "the relevant rules and statutes impose . . . on the party seeking to assert an untimeliness defense. . . ."[93] To the extent that this comment imposes the burden of the separate judgment requirement on the party alleging

---

83. *Id.* at 337 (emphasis added). Although *Jung* preceded promulgation of the separate judgment requirement, the Court's conclusion that delay will be tolerated when there may be confusion or misunderstanding regarding the time to appeal is still clearly relevant and is consistent with *Indrelunas*.

84. 113 S. Ct. 2625 (1993).

85. *Id.* at 2632.

86. *Id.* at 2628.

87. 28 U.S.C. § 2412 (1994).

88. *Schaefer*, 113 S. Ct. at 2628.

89. *Id.*

90. *Id.* at 2632.

91. *Id.* at 2628.

92. *Id.*

93. *Id.* at 2632 n.6.

untimeliness, it is clearly consistent with the above-quoted language from *Jung*.[94]

Thus, absent a separate judgment, notices of appeal filed beyond the Appellate Procedure Rule 4(a)(1) time period after the final decision are premature, not late.

For the foregoing reasons, of all the courts which have considered the issue, only the Fifth Circuit in *Townsend* and Justices Blackmun and O'Connor dissenting in *Amoco Oil* correctly found that the *Mallis* waiver doctrine does not apply where its use would render the notice of appeal untimely.[95] However, in the following discussion, it is suggested that the remedial procedures outlined in *Townsend* and *Amoco Oil*—dismissal of the appeal and return to the district court for entry of a separate judgment, are neither appropriate nor required.[96]

2. Dismissal of Appeal and Return to District Court for Entry of Separate Judgment Should Not Be Required

The remedial procedures outlined in both *Townsend* and *Amoco Oil* are primarily based on the statement in *Indrelunas* that the separate document requirement must be mechanically applied in instances where timeliness of an appeal is uncertain.[97] However, there is no statement in *Indrelunas* which requires or even suggests that (a) such an appeal, which would be deemed premature under *Indrelunas*, should be dismissed, or (b) the parties should bear the burden of returning to district court to arrange for the entry of judgment and the filing of a new notice of appeal. *Indrelunas* does not discuss such matters because a judgment had, in fact, been entered in that case and the notice of appeal was filed thereafter within the appropriate time period.[98] Thus, while *Indrelunas* requires the

---

94. The Court's reference to "the relevant rules and statutes" apparently encompasses the EAJA, Appellate Procedure Rule 4(a)(1), and the separate judgment requirement of Civil Procedure Rule 58.

95. Townsend v. Lucas, 745 F.2d 933, 933-34 (5th Cir. 1984); Amoco Oil v. Jim Heilig Oil & Gas, Inc., 479 U.S. 966, 969 (1986) (Blackmun, J., dissenting).

96. The Eighth Circuit, while requiring a remand for entry of a separate judgment where untimeliness is alleged, did not reject the *Mallis* waiver doctrine in such situations. In fact, the court stated, based on *Parisie* and *Mallis*, that it could consider the appeal without a remand but believed that the better practice was to remand. *In re* Ozark Restaurant Equip. Co., 761 F.2d 481, 484 (8th Cir. 1985). In any event, for the reasons discussed with regard to *Townsend* and *Amoco Oil*, this discretionary remand policy is also not appropriate or required.

97. *Amoco Oil*, 479 U.S. at 967-69; *Townsend*, 745 F.2d at 934 (citing to Sassoon v. United States, 549 F.2d 983, 985 (5th Cir. 1977), which, in turn, applies *Indrelunas*).

98. United States v. Indrelunas, 411 U.S. 216, 219 (1973).

entry of a separate judgment when the validity of the appeal is otherwise rendered uncertain, it does not suggest a procedure for such entry.

The first step suggested by *Townsend* and *Amoco Oil*—dismissal of the appeal—should be rejected since it conflicts with Appellate Procedure Rule 4(a)(2), which specifically governs the validity of notices of appeal filed after the announcement of a decision or order but before entry of the judgment.[99] Notices of appeal which fall within the scope of Appellate Procedure Rule 4(a)(2) are not dismissed as premature; they are effective and the appeal may proceed once the judgment is entered.[100] According to the Supreme Court, in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*,[101] Appellate Procedure Rule 4(a)(2) recognizes that the filing of a premature notice of appeal encompassed by that rule is a "technical defect" which "should not be allowed to extinguish an otherwise proper appeal."[102] While Appellate Procedure Rule 4(a)(2)

---

99. Rule 4(a)(2) was added to the Federal Rules of Appellate Procedure in 1979, well before the 1984 *Townsend* decision or the 1986 *Amoco Oil* dissent. According to the Advisory Committee, it generally reflected the state of the law as of the time of its adoption. The Advisory Committee Notes to the 1979 Amendment to Appellate Procedure Rule 4(a)(2) state that "[d]espite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective."

100. *See, e.g.*, Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428 (2d Cir. 1989). In *Long Island Lighting*, "no judgment was entered on the order [under appeal] until well after the oral argument of th[e] appeal when the district court, at [the appellate] court's suggestion, directed the clerk of the court to enter an appropriate judgment." *Id.* at 430. The court stated that although the notice of appeal was "technically premature because filed over six months prior to entry of judgment," it was to be treated as filed the day judgment was entered, rendering the appeal proper pursuant to Appellate Procedure Rule 4(a)(2). *Id.*; *see also* American Inter-Fidelity Exch. v. American Re-Ins. Co., 17 F.3d 1018, 1020 (7th Cir. 1994) (after being alerted to absence of separate judgment at oral argument, parties arranged for entry of judgment and the court held that appellate jurisdiction existed under Appellate Procedure Rule 4(a)(2)).

101. 498 U.S. 269 (1991).

102. *Id.* at 273. The Supreme Court's complete statement regarding the origins of Appellate Procedure Rule 4(a)(2) is as follows:

> Added to the Federal Rules in 1979, Rule 4(a)(2) was intended to codify a general practice in the courts of appeals of deeming certain premature notices of appeal effective. *See* Advisory Committee's Note on FED. R. APP. PROC. 4(a)(2), 28 U.S.C. App., p. 516. The Rule recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.

Id. While the general lack of prejudice stemming from premature notices of appeal contributed to passage of the rule, the rule itself does not provide any exception for instances where prejudice did, in fact, result. Even if such an exception is warranted,

does not explicitly address the issue presented where a separate judgment was never entered and the notice of appeal is untimely as measured from the final decision, its language clearly encompasses the situation.[103]

The second step in the *Townsend-Amoco Oil* procedure, requiring the parties to return to the district court for entry of judgment and the filing of a new notice of appeal, conflicts with the policy of pragmatism and efficiency underlying *Mallis*. Where the order under appeal is clearly the final decision of the district court, it appears that requiring the parties to return to the district court would entail the unnecessary "spinning of wheels."[104] Such a procedure will not only result in the unnecessary expenditure of time, money and judicial resources, but it may also frustrate the very purpose of the appellate process, that is, the timely review of the decision of the district court.[105] Moreover, if the original,

---

it does not affect the conclusions reached here as such exceptions would need to be made on a case-by-case basis.

103. *See* FED. R. APP. P. 4(a)(2). Permitting appeals which are premature under Appellate Procedure Rule 4(a)(2) to proceed once judgment is entered is consistent with the treatment of appeals which are premature under Appellate Procedure Rule 4(a)(4). When a notice of appeal is prematurely filed under Appellate Procedure Rule 4(a)(4), there being a tolling motion pending in district court, the notice is, "in effect, suspended until the motion is disposed of, whereupon the previously filed notice effectively places jurisdiction in the court of appeals." FED. R. APP. P. 4(a)(4) advisory committee note to 1993 Amendment. In other words, the notice of appeal "will ripen into an effective appeal upon disposition of [the tolling] posttrial motion." *Id.*; *see, e.g.*, Schroeder v. McDonald, 41 F.3d 1272, 1276 (9th Cir. 1994); *see also* IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054-55 (2d Cir. 1993) (in appeal where Appellate Procedure Rules 4(a)(2) and (a)(4) did not apply, court held that "'a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice'") (citation omitted). *Cf.* Strasburg v. State Bar of Wisconsin, 1 F.3d 468, 470 (7th Cir. 1993) (except where Appellate Procedure Rule 4(a)(2) applies, "the consequence of filing a premature notice of appeal is appellate dismissal"), *cert. denied*, 114 S. Ct. 698 (1994), *overruled in part on other grounds sub nom.* Otis v. City of Chicago, 29 F.3d 1159, 1168 (7th Cir. 1994) (en banc). *See generally* Daniel A. Klein, Annotation, *When Will Premature Notice of Appeal Be Retroactively Validated in Federal Civil Cases*, 76 A.L.R. FED. 199 (1986 Supp. 1994).

104. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978).

105. In *Otis v. City of Chicago*, the Seventh Circuit described the problems inherent in requiring an unsophisticated appellant to return to the district court for entry of a separate judgment:

> Waiting for a formal [Civil Procedure] Rule 58 judgment would not serve any purpose, but could well frustrate appellate review. . . . Requiring [the appellant] to ask the district court for a [Civil Procedure] Rule 58 judgment—and to seek a writ of mandamus if the judge does not supply the necessary document—would be the practical equivalent of denying her the right

premature appeal is effective once a separate judgment is entered, the filing of a new notice of appeal is unnecessary.

However, the policy considerations underlying *Mallis* were clearly limited to instances where "the *only* obstacle to appellate review" is the absence of a separate judgment.[106] Thus, where other obstacles, such as a timeliness issue, are present, those policy considerations, while still relevant, are not controlling and the dictates of *Indrelunas* must be met. It is suggested that the following recommended procedures would reconcile and effectuate the *Indrelunas* "mechanical application" requirement, Appellate Procedure Rule 4(a)(2) and the *Mallis* policy considerations and avoid the unwieldy procedures suggested in *Townsend* and *Amoco Oil*.

3. Recommended Procedures

To effectuate *Indrelunas*, Appellate Procedure Rule 4(a)(2) and the policy considerations underlying *Mallis*—in the context of a notice of appeal filed beyond the Appellate Procedure Rule 4(a)(1) time period following entry of a final decision where a separate judgment was never entered—the following four alternative approaches are possible:

1. The court of appeals may stay the appeal, order the district court to enter a separate judgment, and proceed with the appeal only after the separate judgment is entered;[107]

> of appellate review. If [the appellant] herself overcame the obstacle, others in her position would not, and all would suffer unnecessary delay.

Otis, 29 F.3d 1159, 1165-66. Moreover, requiring the parties to return to the district court would primarily burden the appellant, while the Supreme Court suggested in *Schaefer* that the burden resulting from the district court's failure to enter a separate judgment should rest "on the party seeking to assert an untimeliness defense." Shalala v. Schaefer, 113 S. Ct. 2625, 2632 n.6 (1993).

106. *Mallis*, 435 U.S. at 386 (emphasis added). The full quotation from *Mallis* is as follows: "[I]f the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, 'there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment.'" *Id.* (quoting 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.08[2], at 120 n.7 (1970)).

107. This procedure is similar to that used when an Appellate Procedure Rule 4(a)(4) post-judgment tolling motion is pending when a notice of appeal is filed. In that instance, the appeal is stayed, or held in abeyance, until the tolling motion is decided, at which time the appeal may proceed. *See supra* note 103.

2. The court of appeals may order the district court to enter a separate judgment without staying the appeal, and allow the appeal to proceed while the district court arranges for that entry;[108]

3. The court of appeals may proceed with the appeal and order entry of a separate judgment only at the end of the appeal in its dispositional order or opinion; or

4. The court of appeals may, as a fiction of law,[109] deem the judgment filed on or after the date the notice of appeal was filed, and proceed to the merits of the appeal with no further action as to the separate judgment.[110]

As a preliminary matter, it should be noted that a court of appeals is not without authority to issue binding orders in an appeal which is premature. Even if it is assumed that a court of appeals has minimal jurisdictional leeway in such situations, it may, under the All Writs Act, "issue all writs necessary or appropriate in aid of [its] respective jurisdiction[]."[111] In construing the All Writs Act, the Supreme Court has held that "the authority of the appellate court 'is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but

---

108. This approach is similar to the informal procedure used by various circuits to obtain entry of a separate judgment by the district court, in lieu of a formal stay, dismissal or remand. *See, e.g.*, American Inter-Fidelity Exch. v. American Re-Ins. Co., 17 F.3d 1018, 1020 (7th Cir. 1994) (after being alerted to absence of separate judgment at oral argument, parties arranged for entry of judgment; appellate jurisdiction found under Appellate Procedure Rule 4(a)(2)); Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 430 (2d Cir. 1989) (judgment entered by district court, at suggestion of court of appeals, after oral argument of the appeal; appeal was found proper under Appellate Procedure Rule 4(a)(2)).

109. Black's Law Dictionary defines "fiction of law" as follows:

> An assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place. An assumption, for purposes of justice, of a fact that does not or may not exist. A rule of law which assumes as true, and will not allow to be disproved, something which is false, but not impossible.
>
> These assumptions are of an innocent or even beneficial character, and are made for the advancement of the ends of justice. They secure this end chiefly by the extension of procedure from cases to which it is applicable to other cases to which it is not strictly applicable, the ground of inapplicability being some difference of an immaterial character.

BLACK'S LAW DICTIONARY 623 (6th ed. 1990) (citation omitted).

110. This alternative involves a bit of circular logic: the separate judgment would be deemed filed on or after the date the notice of appeal was filed; however, under Appellate Procedure Rule 4(a)(2), the premature notice of appeal is deemed filed as of the date of entry of the judgment. However, since there is a date-certain for the filing of the notice of appeal, the circularity issue is minor.

111. 28 U.S.C. § 1651(a) (1988).

extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'"[112] Thus, in appropriate circumstances, a court of appeals may act to preserve its "potential jurisdiction."[113] Furthermore, the court of appeals is empowered by Federal Rule of Appellate Procedure 10(e), which allows for the correction of omissions in the record, to order that a separate judgment be entered when its absence is due to error or accident.[114] Aside from Appellate Procedure Rule 10(e), various courts of appeals also claim the inherent authority to supplement or correct the record.[115]

The four alternative approaches are listed in order of (a) increasing efficiency, the first being least efficient, the fourth being the most efficient; and (b) decreasing conformity with the dictates of *Indrelunas* and Appellate Procedure Rule 4(a)(2), the first alternative conforming most closely, the fourth being furthest from conforming. Although it can reasonably be argued that all four alternatives are consistent with *Indrelunas*, Appellate Procedure Rule 4(a)(2) and the policy considerations

---

112. FTC v. Dean Foods, 384 U.S. 597, 603-04 (1966) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943)).

113. *Dean Foods*, 384 U.S. at 603-04; Michael v. INS, 48 F.3d 657, 663-64 (2d Cir. 1995).

114. Fed. R. App. P. 10(e) provides as follows:

> *(e) Correction or Modification of the Record.*
> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. *If anything material to either party is omitted from the record by error or accident* or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or *the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected,* and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Id. (emphasis supplied). *See, e.g.*, GHR Energy v. Crispin Co., 791 F.2d 1200, 1201-02 (5th Cir. 1986) (notice of appeal from bankruptcy court to district court that appellant had not properly made part of record was ordered added to the record under Appellate Procedure Rule 10(e)); United States v. Becker, 536 F.2d 471, 474 (1st Cir. 1976) (ordered correction of district court docket entry concerning sentence, pursuant to Appellate Procedure Rule 10(e)); United States v. Jarratt, 471 F.2d 226, 230-31 (9th Cir. 1972) (remanded case to permit district court to correct, pursuant to Appellate Procedure Rule 10(e), discrepancy between sentence noted in sentencing hearing transcript and sentence appearing in written judgment of conviction), *cert. denied*, 411 U.S. 969 (1973).

115. *See* Dakota Indus. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993); Barilla v. Ervin, 886 F.2d 1514, 1521 (9th Cir. 1989); Ross v. Kemp, 785 F.2d 1467, 1477 (11th Cir. 1986).

underlying *Mallis*, the use of alternative two is recommended as the closest fit.

Alternative one unnecessarily assumes that no further appellate activity should take place until the separate judgment is entered. However, there is nothing in *Indrelunas* or Appellate Procedure Rule 4(a)(2) which requires such a conservative approach and, since the overwhelming majority of these appeals will go forward, there is no clear jurisdictional impediment to proceeding while the mechanical entry of the separate judgment is accomplished. The appellate activities that would take place in the short period between the issuance of an appellate order requiring entry of a separate judgment and the district court's response to that order (as outlined in alternative two) are unlikely to be anything other than nondispositive and ministerial in nature. Thus, while the absence of a separate judgment might bring into question the authority of an appellate court to issue dispositive rulings pending entry of the judgment, it should not prevent the court from performing mere preparatory tasks.[116] Additionally, the delay engendered by alternative one would run counter to the policy considerations of *Mallis*—both the parties and the courts would be put to needless expense and effort, and appeal processing time would lengthen.

Alternatives three and four, on the other hand, would present two possible jurisdictional problems. First, as suggested above, it is unlikely that a court of appeals has the authority to issue a dispositive ruling in a premature appeal. Alternative three, by including the order for entry of a separate judgment in the dispositive appellate ruling, does not satisfactorily resolve the issue as it does not provide for the separate judgment entry to precede the appellate disposition. Although alternative four avoids this problem by permitting the court to deem the separate judgment entered prior to the dispositive appellate ruling, it runs counter to the clear requirement of *Indrelunas* that the separate judgment rule be "mechanically applied" where there is any uncertainty as to the entry date of a judgment.[117] "Mechanical application" of this rule could only mean that an actual separate judgment must be prepared and a docket clerk must actually make the appropriate entry on the docket before the rule can be deemed satisfied.

---

116. Thus, in both American Inter-Fidelity Exch. v. American Re-Ins. Co., 17 F.3d 1018 (7th Cir. 1994), and Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428 (2d Cir. 1989), the appeal was scheduled, the parties' briefs were filed, and oral argument was held before entry of the separate judgment was arranged. In both instances, jurisdiction was found under Appellate Procedure Rule 4(a)(2). *American Inter-Fidelity Exch.*, 17 F.3d at 1020; *Long Island Lighting Co.*, 889 F.2d at 430.

117. U.S. v. Indrelunas, 411 U.S. 216, 221-22 (1973).

Second, alternatives three and four ignore the possibility that the district court may have had good reason for not entering a separate judgment. Although it may appear certain to the court of appeals that the district court has issued its final decision in an action and all that is lacking is a separate judgment, such appearances are often deceiving. Both district court docket sheets and the records on appeal are, not infrequently, incomplete or otherwise misleading regarding the procedural status of an action. It is possible that, contrary to all appearances, the action in question is still proceeding in district court as to some claims or parties. It is also possible that the decision in question is not perceived by the district court as one which requires a separate judgment.[118]

Alternative two avoids the foregoing problems by (a) allowing the appeal to proceed pending either entry of the separate judgment by the district court or submission by that court of an explanation of why entry is deemed inappropriate, and (b) providing for that entry or explanation prior to final disposition of the appeal by the appellate court. If entry is made, the appellate court may reach a final disposition in full compliance with *Indrelunas*, Appellate Procedure Rule 4(a)(2) and the policies underlying *Mallis*. If the district court informs the court of appeals that a separate judgment is inappropriate, the court of appeals can then address that issue, and, if the district court is correct, avoid reaching a final disposition in the absence of jurisdiction.[119]

---

118. *See, e.g.*, Williams v. United States, 984 F.2d 28, 31 (2d Cir. 1993) (holding no separate judgment necessary when § 2255 motion is denied; noting that district courts within circuit disagreed as to need for separate judgment); *see also* 15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 262-63 & n.15 (1992) (noting instances where district courts refused to enter judgment). As noted *supra* note 52, there may be cases where the district court believes the laches doctrine should prevent reactivation of long dormant appeals, notwithstanding language in *Indrelunas*, *Jung*, and *Schaefer* suggesting that delay is not the governing factor where uncertainty as to the time to appeal is concerned. *See infra* note 204 and accompanying text for a discussion of the laches doctrine.

119. The author offers the following example of language that may be used in a court of appeals order where it appears that a separate judgment which would permit a notice of appeal to be found timely was erroneously omitted by the district court:

> It appears from the district court docket sheet and other materials available to this court that the final decision in this action was entered on [date] and that no separate judgment document meeting the requirements of Fed. R. Civ. P. 58 was entered. The district court is hereby directed to either enter a separate judgment document or submit an explanation of why such document is not required, within ten days of the date of this order.

III. ENTRY OF JUDGMENT ON THE DOCKET AND THE WAIVER DOCTRINE

In *Mallis*, the Supreme Court limited its ruling on the waiver doctrine to situations where a separate judgment was lacking;[120] it did not rule that the parties could waive the related Civil Procedure Rule 58 requirement that judgment be entered on the docket in accordance with Federal Rule of Civil Procedure 79(a). The relevant portion of Civil Procedure Rule 58 states that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in [Civil Procedure] Rule 79(a)."[121]

While stating that the "sole purpose of the separate-document requirement . . . was to clarify when the time for appeal . . . begins to run,"[122] the Supreme Court found an additional rationale for the docket entry requirement: it fulfilled a "public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it."[123] Although this discussion in *Mallis* is dicta, the court was clearly suggesting that the two requirements may not be equally waivable since the docket entry requirement served an additional, perhaps greater, purpose than the separate document requirement.[124] Thus, *Mallis* leaves open the question of whether the docket entry requirement is waivable at all; or is waivable upon a greater showing than for waiver of the separate document requirement; or, in spite of the Supreme Court's dicta in *Mallis*, is waivable on terms comparable to the separate document waiver doctrine.[125]

The three possibilities left open by *Mallis* are reflected in the few circuit opinions which discuss the docket entry requirement. At one extreme is the Ninth Circuit's decision in *Carter v. Beverly Hills Savings*

---

120. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385-86 (1978).

121. FED. R. CIV. P. 58.

122. *Mallis*, 435 U.S. at 384.

123. *Id.* at 384 n.4.

124. However, at least one circuit has interpreted the Supreme Court's discussion of the entry requirement in *Mallis* as concluding that the docket entry requirement fulfills a lesser function than the separate judgment requirement. After noting that the separate document requirement clarifies when the time to appeal begins to run, the Seventh Circuit in C.I.T. Fin. Serv. v. Yeomans, 710 F.2d 416, 417 n.5 (7th Cir. 1983), contrasted the docket entry requirement by stating that it "merely fulfills a public recordkeeping function." *Id.* (citing *Mallis*, 435 U.S. at 384 & n.4).

125. As with the separate judgment requirement, a discussion of the docket entry requirement is complicated by the several meanings that have been given to the phrase "entry of judgment." As discussed later in the text, it is often difficult to determine what usage was intended in particular decisions. *See supra* note 19.

& Loan Association,[126] which suggests that the docket entry requirement may not be waivable since the *Mallis* decision "indicated" that a judgment which has not been entered pursuant to Civil Procedure Rule 79(a) "may not be final."[127] Linking the docket entry requirement to the finality requirement of 28 U.S.C. § 1291[128] would appear to make the failure to enter judgment on the docket a non-waivable defect. However, the *Carter* decision appears to be the only one which picked up on the Supreme Court's dicta in *Mallis* that "it is arguable that a decision must be entered on the civil docket before it may constitute a 'final decision' for purposes of § 1291."[129]

At the other extreme is another Ninth Circuit decision, *Neill v. City of Concord*,[130] which failed to discuss the finality issue raised in *Carter* and simply found the docket entry requirement waivable.[131] *Neill* is in

---

126. 884 F.2d 1186 (9th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990).

127. *Id.* at 1190. The language in *Carter* concerning the docket entry requirement's relation to the finality doctrine may be dicta since the court found that the decision at issue was, in fact, properly entered on the docket. *Id.* However, the entry was not of a judgment that complied with the separate document requirement of Civil Procedure Rule 58. *Id.*

The district court's docket entry involved in *Carter* was as follows: "3-25-85 sb 18. crt dism actn reason of settlmnt & retn jurdctn 60 reopen if settlmnt not completed (ENT 3-26-85) MD JS 6 Mld cpys." Rather than showing that a separate order had been filed and entered as required by Civil Procedure Rule 58, the court found this to reflect only the entry of the minutes of the action taken by the district judge at a pretrial conference. In a previous case, the Ninth Circuit had found that the filing of similar minutes did not comply with the separate document requirement of Civil Procedure Rule 58. *Id.* at 1189-90.

Although both the majority and dissenting judges in *Carter* agreed that the docket entry was sufficient for Civil Procedure Rule 79(a) purposes, they appeared to disagree on whether the docket entry needed to explicitly state that a separate document was filed and entered. *Id.* at 1190, 1193-94.

128. 28 U.S.C. 1291 (1988).

129. Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 n.4 (1978).

130. No. 90-15556, 1992 U.S. App. LEXIS 15442 (9th Cir. June 26, 1992). Pursuant to the rules of the Ninth Circuit, the *Neill* opinion was not deemed appropriate for publication and the courts of the Ninth Circuit are forbidden from citing it except under limited circumstances. U.S.C.S. CT. APP. 9TH CIR., CIRCUIT R. 36-3 (LAW. CO-OP. 1995). Notwithstanding this limitation, the opinion is still likely to be of some persuasive value in subsequent cases since its reasoning is a logical extension of the *Mallis* decision.

131. *Neill*, 1992 U.S. App. LEXIS 15442, at *4. As support for its waiver ruling, the court cited to *Mallis* and two Ninth Circuit cases which concerned waiver of the Civil Procedure Rule 58 separate document requirement, Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989), and Vernon v. Heckler, 811 F.2d 1274 (9th Cir. 1987). In both

accord with the Third and Seventh Circuits which have also held that requirement waivable.[132] While the Third Circuit focused on the fact that there clearly was a final disposition in that case, making remand for the ministerial act of entering judgment on the docket unnecessary,[133] the Seventh Circuit focused on the possible prejudice to the litigants, stating that "the absence of an entry does not preclude appellate jurisdiction in the absence of demonstrated prejudice to the litigants."[134]

Allah and *Vernon*, the court found there was no "entry" of judgment because, although the district court's orders were actually entered on the civil docket, there was no separate document setting forth the district court's judgment. *Allah*, 871 F.2d at 889-90; *Vernon*, 811 F.2d at 1276. Thus, while the court used the phrase "entry" to describe the deficiency in each of these cases, it was actually concerned with the lack of a separate document. In both instances, this broader definition of "entry" was drawn from FED. R. APP. P. 4(a)(6) (now FED. R. APP. P. 4(a)(7)). *See supra* note 19 for a discussion of the varying definitions of "entry."

132. Local P-171, Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Thompson Farms, 642 F.2d 1065, 1072 (7th Cir. 1981) (court failed to direct entry of judgment as required by Federal Rule of Civil Procedure 54(b), judgment was not entered on docket by clerk and no separate document was filed pursuant to Civil Procedure Rule 58; court found all three requirements were validly waived, thus giving the appellate court jurisdiction over the appeal); Hamilton v. Stillwell Van and Storage, 343 F.2d 453, 455 (3d Cir. 1965) (court declined to remand for formal entry of judgment "in the clerk's record" as there clearly was a final disposition of the case and only the ministerial entry of judgment by the clerk was lacking).

133. *Hamilton*, 343 F.2d at 455.

134. *Local P-171*, 642 F.2d at 1072. The holding in *Local P-171* appears to be consistent with the Seventh Circuit's later statement that, in comparison to the separate document requirement of Civil Procedure Rule 58, Civil Procedure Rule 79(a) "merely" fulfills a public recordkeeping function. C.I.T. Fin. Serv. v. Yeomans, 710 F.2d 416, 417 n.5 (7th Cir. 1983). However, the holding in *Local P-171* that both the entry requirement of Civil Procedure Rule 79(a) and the separate document requirement of Civil Procedure Rule 58 may simultaneously be waived, *Local P-171*, 642 F.2d at 1072, is inconsistent with the statement in *C.I.T. Fin. Serv.* that one of the prerequisites for finding a proper Civil Procedure Rule 58 waiver was "a judgment recorded in the clerk's docket," *C.I.T. Fin. Serv.*, 710 F.2d at 417 n.6 (although docket entry requirement was met, court found no appellate jurisdiction due to absence of any document indicating final judgment was rendered; *Mallis* waiver rule not implicated because document that was missing was not the judgment, but the order, opinion or transcript evidencing the court's final decision). In a later unpublished case, the Seventh Circuit apparently overlooked the *Local P-171* decision when it posed the following issue: "May the parties waive entry of judgment [on the docket] when a separate document sufficient under [Civil Procedure] Rule 58 exists announcing the judgment? Surprisingly, we have found no case that answers this question." Crotty v. City of Chicago Heights, No. 90-2572, 1991 U.S. App. LEXIS 19093, at *9 (7th Cir. Aug. 14, 1991) ("unpublished order not to be cited per Seventh Circuit Rule 53;" reported at table 940 F.2d 665). *See* U.S.C.S. CT. APP. 7TH CIR., CIRCUIT R. 53 (LAW. CO-OP. 1995). The court in *Crotty* goes on to suggest

The Eighth Circuit has also allowed waiver of the Civil Procedure Rule 79(a) entry requirement, although it is unclear if the court recognized that the issue was distinguishable from the Civil Procedure Rule 58 separate document issue. In *Sanders v. Clemco Industries*,[135] the court noted that

> [t]he district court never entered a final judgment on a separate document as required by Rule 58 of the Federal Rules of Civil Procedure, and the clerk of the district court did not make an entry of a final judgment on the docket sheet as required by Rule 79(a), but noted the filing of the Memorandum and Order [granting summary judgment for the defendants] on November 6, 1987.[136]

However, this description of the facts was followed by an analysis which addressed only the question of whether the separate document requirement was waived by the parties.[137] Thus, it is unclear whether the court deemed the Civil Procedure Rule 79(a) entry requirement to be encompassed by the separate judgment waiver doctrine or if it considered the docket entry requirement satisfied by the entry concerning the memorandum and order on the summary judgment motion. The former alternative appears more likely given the court's specific language regarding the absence of a final judgment docket entry, its failure to state that the memorandum and order docket entry satisfied the Civil Procedure Rule 79(a) requirement, and its failure to quote that entry.[138]

The Second Circuit's position on waiver of the docket entry requirement is similarly unclear. In *Long Island Lighting Co. v. Town of Brookhaven*,[139] after noting that a separate judgment was not entered

---

that the *Mallis* waiver rule may apply since, "assuming that it is clear the district court has rendered a final decision, dismissing the appeal would cause nothing but pointless delay since the district court would simply tell the clerk to enter a proper judgment on the docket." *Crotty*, 1991 U.S. App. LEXIS 19093, at *9 (appeal resolved on other grounds).

135. 862 F.2d 161 (8th Cir. 1988).

136. *Id.* at 166 (footnote omitted).

137. *Id.* at 166-68.

138. *See id.* The failure to quote the memorandum and order entry also makes it impossible to opine whether it would meet the rather minimal requirement suggested by the *Mallis* decision where the court suggested that the following constituted a proper entry of a judgment of dismissal: "Complaint dismissed in its entirety. So Ordered. Pollack, J. (mn)." Bankers Trust Co. v. Mallis, 435 U.S. 381, 382 n.1, 384 n.4 (1978).

139. 889 F.2d 428 (2d Cir. 1989).

after the district court dismissed the action, the court stated that "if the parties consent to the appeal of an order, even without entry of a judgment, the court of appeals has jurisdiction to hear the appeal."[140] *Mallis* was cited in support of this proposition with a parenthetical stating that the "parties to appeal may waive separate judgment requirement."[141] Based on the difference in language between the parenthetical and the proposition preceding the *Mallis* citation (and language earlier in the decision concerning the requirements of Civil Procedure Rules 58 and 79(a)), it could be argued that the court was fully aware of the difference between the docket entry requirement and the separate document requirement and intended to hold that the entry requirement was waivable.[142] However, the fact that the court never discussed the possibility that the entry of the dismissal order itself constituted the Civil Procedure Rule 79(a) entry of judgment, as in *Mallis*,[143] suggests that either the court was blurring the distinction between the docket entry and separate document requirements or was focusing exclusively on the fact that a separate document labeled "judgment" was not entered, and overlooked the possibility that the dismissal order entry could constitute the "entry of judgment" under Civil Procedure Rule 79(a).[144]

Finally, the Tenth Circuit has also rendered an ambiguous decision which may or may not hold the docket entry requirement waivable. In *Carey, Baxter & Kennedy, Inc. v. Wilshire Oil Co.*,[145] the appellee moved for dismissal of the appeal on the ground that "the judgment of the trial court [was] not in the record."[146] Although the findings and conclusions of the district court were before the court of appeals, the appellee contended, according to the court, that "the clerk's entry of judgment [was] not in the record and hence there [was] no assurance that

---

140. *Id.* at 430. After argument of the appeal in *Long Island Lighting*, the district court entered judgment. This entry was found to validate the appeal *nunc pro tunc* under Appellate Procedure Rule 4(a)(2). *Id.* The analysis discussed in the text was an alternative holding of the court.

141. *Id.*

142. The court may have used the word "entry" to refer to either Civil Procedure Rule 79(a) docket entry alone or, pursuant to Appellate Procedure Rule 4(a)(7), to both the docket entry and the separate judgment requirements. In either event, its language suggested that the docket entry was waivable.

143. Bankers Trust Co. v. Mallis, 435 U.S. 381, 382 n.1 & 384 n.4 (1978).

144. *See Long Island Lighting*, 889 F.2d 428.

145. 346 F.2d 110 (10th Cir. 1965).

146. *Id.* at 112.

it was ever entered; that there [was] not a judgment to review."[147] In finding the motion without merit, the court stated the following:

> It is the duty of the clerk to enter the judgment on the civil docket. *See* Rules 58 and 79(a), Federal Rules of Civil Procedure. It must be presumed that the clerk performed this duty and [appellee] does not seriously question this. Nor is the finality of the court's order . . . questioned. The contention thus reduces to a most technical one which does not merit attention. It would be indeed impractical to dismiss or even stay this appeal so as to obtain the showing demanded. We conclude that the findings and conclusions [before the court] furnish the requisite evidence of the judgment appealed from so as to render unnecessary the final entry.[148]

At least one treatise has considered this case as holding that entry on the docket may be waived.[149] Due to the imprecise language used by the court, however, it appears equally likely that the court was concerned with the absence of a separate judgment document, not the absence of the judgment entry on the docket sheet. This alternative interpretation is based on the court's statement that the clerk is presumed to have "enter[ed] judgment on the civil docket and [appellee] does not seriously question this."[150] The court may have been stating that since the judgment was reflected on the civil docket, there was no need to remand to allow the district court to file a separate judgment document in the record. However, the ambiguous use of the words "record" and "entry" makes it impossible to firmly conclude which alternative the Tenth Circuit intended.[151]

---

147. *Id.*

148. *Id.*

149. CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE & PROCEDURE § 2781 n.11 (1995) ("Court heard appeal by presuming that the judgment was entered in the docket even though it was not shown to have been entered.").

150. *Carey, Baxter & Kennedy*, 346 F.2d at 112.

151. As previously noted, "entry of judgment" is frequently used to mean either (a) entry in the docket (pursuant to Civil Procedure Rule 79(a)) or (b) entry in the docket and filing of a separate judgment document (pursuant to Appellate Procedure Rule 4(a)(7)) or, in its broadest sense, (c) the court's actual rendering of the judgment. *See supra* note 19. Additionally, "record" can either refer to the documents filed in a case or the docket itself. Black's Law Dictionary defines "record," under the "court record of proceedings" subheading, as both "[t]he official collection of all the trial pleadings, exhibits, orders and word-for-word testimony that took place during the trial[,]" and as consisting primarily of the "civil docket" in civil cases and the "criminal docket" in

As suggested by the preceding discussion, none of the cases which concern the Civil Procedure Rule 79(a) entry requirement analyze the waiver issue in any detail.[152] While one might conclude that the courts generally deem the docket entry requirement waivable on terms similar to the separate document waiver doctrine, the absence of any clear and cogent analysis renders this conclusion of minimal value. However, as discussed below, the relevant authorities, and common sense, permit the following conclusions: the docket entry requirement should be broadly construed; it should not be deemed jurisdictional; and only in narrow circumstances should it be deemed waivable.

1. The Docket Entry Requirement Should Be Broadly Construed

First, and perhaps most important, the issue can be avoided in most instances if the courts follow the lead of the Supreme Court in *Mallis* by broadly defining what qualifies as entry of judgment on the docket. In *Mallis*, the court stated that "[a] judgment of dismissal was entered [on the docket][153] in this case below" when the following entry was made: "Complaint dismissed in its entirety. So ordered. Pollack, J. (mn)."[154] Thus, although the word "judgment" was not used,[155] the clear meaning

---

criminal cases. BLACK'S LAW DICTIONARY 1273 (6th ed. 1990); *see* FED. R. APP. P. 10(a) (record on appeal is composed of "[t]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. . . ."). Thus, the claim that there was no "judgment in the record" or no "entry of judgment in the record" may either mean that a separate judgment document was not filed or that no entry was made on the docket.

152. *See supra* notes 126, 130, 132, 135, 139, 145 and accompanying text.

153. The bracketed words were added to make clear that the court used the word "entry" to refer only to FED. R. CIV. P. 79(a) entry. The FED. R. APP. P. 4(a)(7) meaning was clearly not intended since that meaning would encompass the filing of a separate judgment document, which did not occur.

154. Bankers Trust Co. v. Mallis, 435 U.S. 381, 382 n.1, 384 n.4 (1978).

155. Thus, the Court in *Mallis* disapproved, *sub silentio*, of cases requiring use of the word "judgment" to indicate that a docket notation constituted entry of a judgment. *See* Associated Press v. Taft-Ingalls Corp., 323 F.2d 114 (6th Cir. 1963), where the court stated the following:

> [W]e deem it significant that the memorandum opinion and entry prepared by the clerk did not include the word "judgment." While it is settled that there are no required forms or words to constitute a judgment, it has been said that: "It is difficult to conceive of a Clerk purporting to engage in an act of 'notation of a judgment' or 'entry of the judgment' under the Rules, without some use of the term 'judgment' itself in relation to the act, in view of the fixed identity and characterizing significance which the word has in the field

of the entry was that (a) the case was at an end by means of a final disposition (b) which was rendered by an authorized judicial officer. Such a construction of the docket entry requirement will eliminate most potential Civil Procedure Rule 79(a) issues. If, on the other hand, an entry fails to indicate the disposition of the case or simply states, "case closed," without any indication of who prevailed or the authority by which it was closed,[156] it cannot properly be said to be a judgment, which is a judicial act of a judicial officer.[157]

---

of the law."

Id. at 117 (quoting Brown v. United States, 225 F.2d 861, 863 (8th Cir. 1955), which stated that although the "actual use of the term may perhaps not always be . . . necessary, it would seem that there reasonably would be . . . at least some . . . expression . . . which represents 'the end of the law.'").

156. *See, e.g.*, Reynolds v. Wade, 241 F.2d 208, 210 (9th Cir. 1957), where entries stating, "Mar. 26 Opinion filed" and "April 23 Judgment filed and entered[,]" were found to not qualify as proper entries of judgment. The court stated:

> We do not reach here the question of how poor an entry can be and still be a judgment. A docket entry that doesn't even say who won, surely cannot qualify. The substance of a judgment just is not in this docket. *United States v. Cooke* is apposite, but the facts here are really more like the situation where the clerk has written nothing.

Id. (citation omitted).

In *Cooke*, an entry stating, "Filing decision (McLaughlin - Favor Plaintiff)," was found insufficient since "the bare statements of the names of the successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments." United States v. Cooke, 215 F.2d 528, 530 (9th Cir. 1954). The facts in *Cooke* were distinguished from cases holding valid (a) an entry that the judgment was in favor of the defendant where it is apparent from the entry that the plaintiffs were denied any relief and the substance of the judgment is shown; (b) entries showing the amounts of the plaintiffs' recoveries; and (c) an entry noting the grant of a summary judgment which was in the amount claimed by the plaintiffs. *Id.*

157. The Supreme Court discussed the meaning of the term "judgment" as follows:

> A "judgment" for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a "final decision" as that term is used in 28 U.S.C. § 1291. Federal Rule Civ. Proc. 54(a), for example, provides that "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies."

Mallis, 435 U.S. at 384 n.4 (citations omitted).

The "judicial officers" who are authorized to render judgment include not only judges but also magistrate judges and clerks of court when authorized by federal or local rules. *See, e.g.*, 28 U.S.C. § 636(c)(1) (1994) (upon consent of parties, magistrate judge may, *inter alia*, enter judgment); FED. R. CIV. P. 55(b)(1) (authorizing entry of default judgment by clerk); FED. R. CIV. P. 77(c) (same).

2. The Entry Requirement Should Not Be Deemed Jurisdictional

Second, the pertinent case law, federal rules and historical sources strongly suggest that the docket entry requirement should not be deemed a jurisdictional prerequisite to appellate review.[158] While entry of judgment on the docket, like the separate judgment document, evidences the existence of a final decision, it is not an element of finality. Finality is determined by the nature of the court's ruling—if there is nothing more to be done in a case and the court has rendered a disposition formally ending it, the disposition is final. This is consistent with the Supreme Court's description of a final decision in *Coopers & Lybrand v. Livesay*,[159] as a decision by the district court that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[160]

The Supreme Court's suggestion in *Mallis* that entry on the civil docket might be required before a decision is deemed final under 28 U.S.C. § 1291[161] is based on the portion of Civil Procedure Rule 58 that states that a "'judgment is effective only . . . when entered as provided in Federal Rule of Civil Procedure 79(a).'"[162] However, the full quotation from Civil Procedure Rule 58 states that a "judgment is effective only when so set forth [on a separate document] and when entered as provided in [Civil Procedure] Rule 79(a)."[163] Thus, the same logic would also make the separate judgment requirement a jurisdictional prerequisite, a result the court easily rejected in the text of its decision.[164] As with the separate document requirement, even if entry

158. *See infra* notes 159-193 and accompanying text.

159. 437 U.S. 463 (1978).

160. *Id.* at 467 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

161. 28 U.S.C. § 1291 (1988).

162. Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 n.4 (1978).

163. FED. R. CIV. P. 58.

164. Prior to the 1963 amendment to Civil Procedure Rule 58 which added the reference to the separate document requirement to the sentence quoted in the text, that sentence read as follows: "The notation of a judgment in the civil docket as provided by 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." FED. R. CIV. P. 58 (1962); *see also* Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938, at 370 (A.B.A. 1938), comments of William D. Mitchell, chair of Advisory Committee:

> We wanted to be absolutely sure that there was no ambiguity in these rules as to when a judgment was entered (that is, when it became effective as a judgment) and we expressly said there [in Rule 58] that the entry in the civil docket and the notification entry in the docket by the clerk constitutes the entry. Your time for appeal runs from that date, and the judgment isn't

appears to be "mandatory" under the rules, that by itself does not make it jurisdictional or nonwaivable.[165]

The additional factor suggested by the Supreme Court, that the Civil Procedure Rule 79(a) requirement "fulfills a public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it[,]"[166] also fails to adequately distinguish the docket entry requirement from the separate document requirement. Both the docket sheet and the separate judgment document in the case file are accessible to, and are frequently used by, the parties to the action, the general public and court officials. Thus, *both* requirements fulfill similar public recordkeeping functions and *both* give notice to the losing parties that a final decision has been entered. However, even if the two requirements can be distinguished along the lines drawn by the Supreme Court, it appears that the court reversed the importance of the functions served by the two requirements. In regard to public recordkeeping, the separate document requirement is probably the more important of the two since, in the event of a discrepancy between the docket entry and the separate judgment document, which occurs with some frequency, the language of the judgment document controls.[167] The judgment document is also of greater importance than its parallel docket entry when the res

---

effective as a judgment until that is done.

Id. However, as with the current rule, there is no indication in the history of Rule 58 that the entry requirement was deemed jurisdictional.

165. In *Mallis*, although the Court held that the separate document requirement must be "mechanically applied," *Mallis*, 435 U.S. at 386 (quoting *Indrelunas*, 411 U.S. at 221-22), and "assume[d], without deciding, that the requirements for an effective judgment set forth in the Federal Rules of Civil Procedure must generally be satisfied before § 1291 jurisdiction may be invoked," the Court "nonetheless conclude[d] that it could not have been intended that the separate-document requirement of Rule 58 be such a categorical imperative that the parties are not free to waive it." *Mallis*, 435 U.S. at 384.

166. *Id.* at 384 n.4.

167. "Where . . . a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry[.]" United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 235 (1958); (quoting United States v. Hark, 320 U.S. 531, 534-35 (1944)). It is noted, however, that certain formal judgments may now be prepared, signed and entered by the clerk "without awaiting any direction by the court," pursuant to Civil Procedure Rule 58. Even if a judgment signed by the clerk does not have *prima facie* effect, it still should take precedence over a docket entry as it is typically prepared directly from the court's opinion or verdict form while the information in the docket entry may simply come from the previously prepared judgment.

judicata effect or, more generally, the precedential value of a decision and judgment must be determined.[168]

However, in regard to the giving of notice to the parties, the entry requirement in some respects ranks over the separate judgment requirement. The process by which parties are given notice is set forth in Federal Rule of Civil Procedure 77(d) which states that

> [i]mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. . . . [A]ny party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.[169]

Thus, this rule appears to give the docket entry requirement primacy in that it is the event that sets the clerk in motion. On the other hand, the last sentence of the rule makes clear that the parties may not rely on the clerk's obligation to give notice of the entry of an order or judgment—the parties are still required to check the public records kept by the court, that is, the docket sheet and the case record where the separate judgment should be filed. Additionally, although Civil Procedure Rule 77(d) only mentions the entry requirement, it implicitly involves the separate document requirement since the clerks typically send a copy of the document in question when giving notice of its entry. Thus, in many ways the two requirements have a "belt and suspenders" relationship; they are complementary parts of an integrated system of notice and recordkeeping rather than totally independent elements.

However, there is one important function served by the docket entry requirement, setting it apart from the separate document requirement, which the Supreme Court failed to mention: it establishes a control date

---

168. Unfortunately, discrepancies between docket entries and the judgment documents to which they refer are only part of the recordkeeping problem. It is often the case that both the docket entry and the judgment document fail to clearly and accurately state the court's disposition of the case. In this event, reference must be made to the order or orders underlying the judgment document. This is yet another reason why it is difficult to establish the relative importance of the docket entry and the judgment document.

169. FED. R. CIV. P. 77(d).

by which the timeliness of a great many pleadings is measured.[170] In the absence of a docket entry, it may be difficult either to determine the timeliness of those pleadings or to limit the amount of time an action spends on the district court's active calendar.[171] Even though the Supreme Court stated in *Mallis* that "[t]he sole purpose of the separate-document requirement . . . was to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run,"[172] it is clear that the primary tool for determining the time to appeal is the docket entry, since both § 2107 and Appellate Procedure Rule 4 specify entry as the starting point for the timeliness calculation;[173] the separate judgment document, which precedes and leads to the entry on the docket, only clarifies which docket entry starts the appellate clock. However, the importance of the entry requirement as a mechanical docket control device also does not make it a jurisdictional prerequisite.[174]

One authority which appears to tie entry of judgment with the jurisdictional finality requirement of 28 U.S.C. § 1291 is Federal Rule of Civil Procedure 54(b) which provides, in pertinent part,

---

170. *See, e.g.*, FED. R. CIV. P. 50(b) & (c)(2) (motion for judgment as a matter of law or for new trial to be made within ten days after entry of judgment); 52(b) (motion to amend findings within ten days of entry of judgment); 54(d)(2)(B) (motion for attorneys' fees within fourteen days after entry of judgment); 59(b) & (e) (motion for new trial or to alter or amend judgment within ten days after entry of judgment); 60(b) (certain motions for relief from judgment within one year after judgment, order or proceeding was entered or taken); 62(a) (stay of judgment enforcement until expiration of ten days after its entry); 74(a) (appeal from magistrate judge after entry of judgment); FED. R. APP. P. 4(a) & (b) (filing of notice of appeal after entry of judgment). The district courts and courts of appeals may also have local rules which calculate deadlines from the date of entry of an order or pleading. Since the date of mailing of an order or judgment is also noted in the docket, FED. R. CIV. P. 77(d), the entry also provides the control date for determining the timeliness of pleadings which must be filed within a certain time period after service of the order or judgment. *See, e.g.*, FED. R. CIV. P. 72(a) & (b) (objections to magistrate judge's order or report due within ten days of service of order or report).

171. *See, e.g.*, United States v. Hernandez, 5 F.3d 628, 631 n.2 (2d Cir. 1993) (although request for reinstatement appeared to be untimely, court gave appellant "the benefit of the doubt because the docket sheet d[id] not indicate the date the district court entered the judgment denying § 2255 relief.").

172. Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 (1978).

173. *See* 28 U.S.C. § 2107 (1994); FED. R. APP. P. 4(a).

174. The use of the docket entry requirement to determine the timeliness of a notice of appeal, pursuant to 28 U.S.C. § 2107 and Appellate Procedure Rule 4, is not to be equated to its use in determining the timeliness of other pleadings, since the timeliness of a notice of appeal is a jurisdictional prerequisite to appellate review. Appellate Procedure Rule 4 is discussed separately in the text. *See infra* notes 182-190 and accompanying text.

> [i]n the absence of such determination and direction [the district court's Civil Procedure Rule 54(b) certification], any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.[175]

It can be inferred from the last clause of the quoted paragraph that a decision is not final until final judgment is *entered.* If entry was not a requirement of finality, the drafters of Civil Procedure Rule 54(b) could have simply stated that an interlocutory decision was rendered final only upon *adjudication* of "all claims and the rights and liabilities of all the parties."[176] But they did not do so.

In the end, however, even this reference in Civil Procedure Rule 54(b) is not clear enough to justify making entry on the docket sheet an element of finality. First, the advisory committee notes accompanying Civil Procedure Rule 54 nowhere mention the entry requirement—they simply reflect the drafters' wish to allow appeals from certain orders prior to the time the entire case is adjudicated.[177] Essentially, the notes indicate that the advisory committee was concerned with actual finality rather than the procedural device which simply signaled finality.

Moreover, although the reference in Civil Procedure Rule 54(b) to the entry requirement suggests that entry may be an element of finality, it

---

175. FED. R. CIV. P. 54(b).

176. *Id.*

177. FED. R. CIV. P. 54(b) advisory committee's note to 1946 amendment. The advisory committee noted that "Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case." Furthermore, to resolve the confusion caused when judgment was entered on fewer than all claims, "the Advisory Committee . . . attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence." *Id.*; *see also* Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, Advisory Committee on Rules for Civil Procedure, note to proposed amendment of Rule 54(b) at 65 (May 1944) (rebound in 2 Legislative History of Rules of Civil Procedure, Amendments 1945/46) ("The amended rule is designed to make clear that interim adjudications disposing of some, but not all, of the claims, counterclaims, cross-claims and third-party claims arising out of a single transaction or occurrence are provisional. Judgment is not to be entered until all of such claims, counterclaims, cross-claims and third-party claims are determined.").

does not directly mandate the entry of every judgment.[178] On the other hand, the provision in Civil Procedure Rule 58, which does specifically mandate entry of a judgment pursuant to Civil Procedure Rule 79(a), does not suggest that this requirement affects the finality of the judgment in question.[179] The fact that the Civil Procedure Rule 58 docket entry requirement parallels the separate document requirement, and does not bear any resemblance or reference to Civil Procedure Rule 54(b) or the finality requirement, further suggests that it too should be treated as a non-jurisdictional requirement.[180]

An argument also can be made that Federal Rule of Appellate Procedure 4, and its statutory analog, 28 U.S.C. § 2107,[181] reflect the jurisdictional nature of the entry requirement. Appellate Procedure Rule 4 provides that the timeliness of notices of appeal, a jurisdictional prerequisite to appellate review,[182] is measured from the date of entry of the order or judgment from which an appeal is taken.[183] The rule clearly assumes entry will be made of all orders or judgments. The strongest language relating to the entry requirement is in Appellate Procedure Rule 4(a)(2), which states that "[a] notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."[184] This subsection appears to directly address the issue at hand: what happens when a party files a notice of appeal from a judgment or order but no entry of that judgment or order has yet been made? However, rather than mandating entry in all cases, the subsection only assumes that entry eventually will be made as a matter of course and concentrates on saving the premature notice of appeal.

Thus, there is nothing in either Appellate Procedure Rule 4 or its advisory committee notes directly connecting entry to the finality doctrine

---

178. *See* FED. R. CIV. P. 54(b).

179. *See* FED. R. CIV. P. 58.

180. The definition of "entry" in Appellate Procedure Rule 4(a)(7) is limited by its own terms to the use of that word in Appellate Procedure Rule (4)(a). However, to the extent that the Appellate Procedure Rule 4(a)(7) definition was intended in Civil Procedure Rule 54(b), the separate judgment component of Appellate Procedure Rule 4(a) "entry" renders it non-jurisdictional.

181. 28 U.S.C. § 2107 (1988).

182. The timely filing of notices of appeal in both civil and criminal cases is mandatory and jurisdictional. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (civil); United States v. Robinson, 361 U.S. 220, 229 (1960) (criminal).

183. FED. R. APP. P. 4(a)(1)-(6), and (b).

184. FED. R. APP. P. 4(a)(2).

or any other jurisdictional concept.[185] In fact, Rule 4(a)(7) requires an opposite conclusion, at least insofar as the word "entry" is used in Appellate Procedure Rule 4(a). As made clear by the text of Appellate Procedure Rule 4(a)(7), the advisory committee notes and other authorities, Appellate Procedure Rule 4 "entry" (as distinguished from Civil Procedure Rule 79(a) "entry") refers to both Civil Procedure Rule 79(a) docketing and preparation of a separate judgment document.[186] Since the separate document requirement is clearly nonjurisdictional under *Mallis*, Appellate Procedure Rule 4(a) entry also must be nonjurisdictional at least to the extent that it incorporates that requirement.[187]

---

185. The one appellate rule other than Appellate Procedure Rule 4 which does discuss jurisdictional prerequisites does not appear to answer the issue at hand. Federal Rule of Appellate Procedure 3(a) states that "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." FED. R. APP. P. 3(a). Since the entry of judgment is not a step the appellant is charged with taking, it is unlikely that this provision can be construed, by negative inference or otherwise, as providing that entry is nonjurisdictional. However, in discussing the original version of this provision, adopted as part of FED. R. CIV. P. 73 in 1938, the chair of the Advisory Committee may have suggested that nothing other than the timely filing of the notice of appeal should be deemed a jurisdictional prerequisite to an appeal: "the appeal is taken by merely filing with the clerk of the district court a notice of appeal. That is the only jurisdictional act, and nothing else that has to be done is jurisdictional, and the failure to perform it properly may result in a dismissal, or something of that kind, but cannot defeat the appeal absolutely for want of jurisdiction." Proceedings of the [A.B.A.] Institute at Washington, D.C. October 6, 7, 8, 1938, and of the Symposium at New York City October 17, 18, 19, 1938 at 317 (A.B.A. 1938) (comments of William D. Mitchell, chair of Advisory Committee); *accord* Proceedings of the [A.B.A.] Institute on Federal Rules, Cleveland, Ohio, July 21-23 1938 at 359 (A.B.A. 1938) (similar comments of William D. Mitchell, chair of Advisory Committee); *see also* Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, Advisory Committee on Rules for Civil Procedure, note to proposed amendment of Rule 73(a) at 84 (May 1944) (rebound in 2 Legislative History of Rules of Civil Procedure, Amendments 1945/46) (With regard to reducing the period of time in which to file a notice of appeal, the advisory committee noted: "All that is necessary to take an appeal under the rules is the filing of a notice of appeal. Ample time is allowed thereafter for perfecting the appeal.").

186. *See supra* note 19 and accompanying text.

187. The clumsiness of parsing the entry requirement of Appellate Procedure Rule 4 into jurisdictional and nonjurisdictional components also suggests that no such distinction was intended.

Additionally, the advisory committee note to the 1979 amendment of Appellate Procedure Rule 4(a)(6),[188] which added the reference to Civil Procedure Rule 58, also suggests that Civil Procedure Rule 79(a) entry is not a jurisdictional prerequisite:

> The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document. *See United States v. Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 48 [sic] is not jurisdictional, (*see Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977)[sic]), compliance is important since the time for the filing of a notice of appeal by other [sic] parties is measured by the time at which the judgment is properly entered.[189]

The second sentence of the note states that the failure to enter judgment requires merely that the parties and district judge be advised of the omission. It does not require dismissal of the appeal or any other interruption of the appellate process. While it can be assumed that the court or parties usually will arrange for proper entry after being so advised (which would then allow the notice of appeal to be treated as filed on the entry date pursuant to Appellate Procedure Rule 4(a)(2)), the note does not require any particular result if a docket entry is never made, either through oversight or refusal of the clerk to do so.[190]

As a final matter, it is clear that the policy considerations discussed in *Mallis* apply equally to the docket entry requirement. As with the

---

188. FED. R. APP. P. 4(a)(6) (recodified in Supplement V to the 1988 version of 28 U.S.C. as FED. R. APP. P. 4(a)(7)).

189. FED. R. APP. P. 4(a)(6) advisory committee note to 1979 Amendment. The context makes clear that the reference in the last sentence to "Rule 48" should be to "Rule 58." Additionally, the *Mallis* citation should be 435 U.S. 381 (1978); the citation used in the Advisory Committee Note is to the grant of certiorari. Finally, the meaning of the phrase "by other parties" in the last sentence is unclear since the time for filing the first notice of appeal in an action is measured from the entry of judgment, Appellate Procedure Rule 4(a)(1), and, if that notice is timely, "any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this [Appellate Procedure] Rule 4(a), whichever period last expires," FED. R. APP. P. 4(a)(3).

190. As noted earlier, district courts occasionally will refuse to enter a judgment pursuant to Civil Procedure Rules 58 and 79(a). *See supra* notes 52 & 118 and text accompanying note 118. As a consequence, it may be unfair to make a jurisdictional prerequisite of a ministerial act over which the appellant has little or no control.

separate document requirement, certainty as to timeliness or the other functions of the docket entry are

> not advanced by holding that appellate jurisdiction does not exist absent a [docket entry corresponding to the order or judgment under appeal]. If, by error, [the relevant docket entry is not made] before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply [make the requisite docket entry], from which a timely appeal would then be taken. Wheels would spin for no practical purpose.[191]

Moreover, strict compliance with the docket entry requirement would still not be determinative of whether the decision of the district court was "final" for purposes of 28 U.S.C. § 1291:[192] "[e]ven if a separate judgment is filed [or the judgment is entered on the docket], the courts of appeals must still determine whether the district court intended the judgment to represent the final decision in the case."[193]

3. The Docket Entry Requirement Should Be Deemed Waivable, But Only in Narrow Circumstances

Third, although it is concluded that the Civil Procedure Rule 79(a) entry requirement should not be deemed jurisdictional, waiver of this requirement should not be freely permitted. As previously noted, the docket sheet is frequently used by the parties to the action, the general public, and court officials to determine, *inter alia*, the status of individual motions and the case itself, and deadlines for service or filing of various pleadings.[194] It thus helps to keep all interested persons informed and keeps the litigation moving forward to a timely disposition.

---

191. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978).

192. 28 U.S.C. § 1291 (1988).

193. *Mallis*, 435 U.S. at 385-86 n.6. It appears that the Supreme Court overstated the proposition when it noted that "strict compliance with the separate-judgment requirement [would not] aid in the court of appeals' determination of whether the decision of the District Court was 'final' for purposes of § 1291." *Id.* Both the separate judgment document and the docket entry are often of some aid to the courts of appeals when making the finality determination. While that determination will be based primarily on the actual decision of the district court being appealed, the judgment document and docket entry often offer additional clues as to whether the district court intended an order to be the final decision.

194. *See supra* note 170 (listing rules which use docket entries to establish deadlines for filing of pleadings) and accompanying text.

Even where the parties agree to waive the docket entry requirement, both the public and the court system have an interest in a docket which accurately reflects the proceedings in an action. First, and perhaps most important, accurate docket entries enable an appellate court to expeditiously determine whether it has jurisdiction to hear an appeal. Review of the docket sheet allows appellate court personnel to quickly determine (a) whether the notice of appeal was filed within the time constraints of Appellate Procedure Rule 4 and § 2107[195] and (b) whether the appeal is from an appealable order or judgment. Just as the parties to an appeal cannot confer subject matter jurisdiction on a federal court through consent or waiver,[196] they should not be allowed to obstruct the court's ability to make a jurisdictional determination by waiving the docket entry requirement.

Moreover, an accurate docket prevents persons who were not involved in the proceedings from drawing incorrect conclusions relating to either the procedural history or the substantive disposition. For example, as previously discussed,[197] the Seventh Circuit reached a decision on the jurisdictional issue involved in *Parisie v. Greer*,[198] based partly on a description of the *Mallis* pleadings made by the Second Circuit and an assumption that the Supreme Court likewise took that information into account when it ruled in *Mallis*.[199] A review of the district court docket sheet from the *Mallis* action, however, clearly shows that the Second Circuit's description of the pleadings was inaccurate, thus undermining the Seventh Circuit's conclusion since the Supreme Court was more likely to have relied on the information appearing in the docket rather than the inaccurate information in the Second Circuit opinion.[200]

---

195. 29 U.S.C. § 2107 (1988).

196. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); United States v. Griffin, 303 U.S. 226, 229 (1938); Stratton v. St. Louis S.W. Ry., 282 U.S. 10, 18 (1930); International Business Machs. Corp. v. United States, 493 F.2d 112, 119 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *see also* United States v. Horn, 29 F.3d 754, 768 (1st Cir. 1994) (cannot confer subject matter jurisdiction on trial or appellate court by indolence, oversight, acquiescence or consent).

197. *See supra* note 18.

198. 705 F.2d 882, 883, 890-91 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 950 (1983).

199. *Id.* at 891 n.3; *see supra* note 18.

200. Contrary to the Seventh Circuit's assumption in *Parisie*, the Supreme Court's silence in *Mallis* on the timeliness issue more likely stemmed from the fact that there was no such issue, as reflected in the district court docket sheet from the *Mallis* action, than from a decision to deal with that unsettled issue *sub silentio*. *See supra* note 18.

However, where the appellate court's jurisdiction is clear both in terms of timeliness and finality, notwithstanding the absence of a proper docket entry, and there does not appear to be any prejudice to any party, the public or the court, waiver may be appropriate to avoid the purposeless spinning of wheels.[201]

a. Timeliness of the Appeal Should Be Clear

Since timeliness of the notice of appeal is measured from the date of entry of the order or judgment being appealed,[202] the absence of an entry prevents a notice of appeal from being untimely, no matter how long the appellant takes to file the notice of appeal after the order or judgment is rendered. This is clear from both the language of Appellate Procedure Rule 4(a)(1) concerning the timely filing of notices of appeal and Appellate Procedure Rule 4(a)(2) which provides that a notice of appeal filed prior to the entry of the decision or order appealed from will be treated as filed "on the date of and after the entry."[203]

However, in the case where an appellant waits an unreasonable amount of time after the decision or order is either announced or rendered in a document, it is conceivable that a court of appeals may deem the absence of an entry insufficient excuse for the delay and dismiss the appeal. While dismissal on grounds of delay may be appropriate under the laches or other estoppel doctrine, it is assumed that only the rare appeal will qualify for such treatment in light of the clear timing language of Appellate Procedure Rule 4 and the need to demonstrate that prejudice resulted from the delay before estoppel will be found warranted.[204]

---

201. The factors noted in the text which would justify a finding of waiver of the docket entry requirement parallel those which were found to warrant a finding of waiver of the separate document requirement in *Mallis*:

> Here the District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment.

Mallis, 435 U.S. at 387-88.

202. FED. R. APP. P. 4(a)(1).

203. FED. R. APP. P. 4(a)(1)(2).

204. *See* Costello v. United States, 365 U.S. 265, 282 (1961) (laches requires (a) lack of diligence by party against whom it is asserted and (b) prejudice to party asserting defense); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 323 (1936) ("Estoppel in equity must rest on substantial grounds of prejudice or change of position, not technicalities."); Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1091 (7th Cir. 1992) (laches is a species of estoppel and requires (a) unreasonable delay and (b) harm or prejudice). *Cf.* Fiore v. Washington County Community Mental Health Ctr., 960

b. Finality of the Judgment or Order Should Be Clear

The finality of the judgment or order under appeal must be determined independently of, and prior to, the determination of whether there has been a waiver of the docket entry requirement. As noted in *Mallis*, the district court must "clearly evidence[] its intent that the opinion and order from which an appeal was taken . . . represent[s] the final decision in the case."[205] Moreover, regardless of the district court's intentions, the order or judgment under appeal must, in fact, be final. Where waiver of the separate document requirement might require entry of the judgment in the docket to evidence the finality of the decision appealed from,[206] waiver of the docket entry requirement might require, conversely, a separate judgment document or other clear indication that the order appealed from is the final decision in the case. Other indications might include language in the order or decision itself (or in the transcript evidencing the rendering of an oral order or decision), notations in the docket indicating that the case is closed or otherwise suggesting finality,

---

F.2d 229, 236 (1st Cir. 1992) (en banc) (appeals filed more than three months after last district court decision should be dismissed, notwithstanding absence of separate judgment; discussed at *supra* notes 59-62 and accompanying text). It is unclear whether the *Fiore* court was relying on estoppel principles in establishing its three-month rule. The strongest indication that estoppel was not the underlying rationale was the determination that the three-month limitation would apply in all cases absent exceptional circumstances, thus implying that prejudice was not a prerequisite. *Fiore*, 960 F.2d at 236. Although the prejudice determination has traditionally focused on possible prejudice to a litigant, it is possible that the *Fiore* court deemed controlling the prejudice to the court in having its interest in the timely disposition of cases circumvented. However, the courts' interest in avoiding delay, by itself, is unlikely to satisfy the prejudice element of the laches or estoppel doctrines. *See* Advanced Cardiovascular Sys. v. Scimed Life Sys., 988 F.2d 1157, 1163 (Fed. Cir. 1993) ("Although the principles of equity ignore no form of prejudice, the prejudice element of laches is not established solely because the raising of the claim would delay other litigation. Justice requires that an issue in legitimate dispute not be held forfeited . . . merely because it would complicate other pending litigation."); *see also* National Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698, 710 (5th Cir. 1994) ("To support a determination of laches, there must be more than simply an inexcusable delay; the party asserting laches must also establish that it has been prejudiced by the delay . . ."). Moreover, the courts' interest in avoiding delay will often, if not always, be counterbalanced by its interest in disposing of claims on their merits. *See* Jung v. K. & D. Mining Co., 356 U.S. 335, 337 (1958) (discussed at *supra* notes 77-83 and accompanying text).

205. *Mallis*, 435 U.S. at 387.

206. *See id.* at 387-88 (noting the recording of the judgment of dismissal in the clerk's docket as one of the circumstances permitting the finding that the separate judgment requirement was waived).

or oral or written notification from the district court confirming that the order or decision is final.

c. Prejudice and Waiver

The possible prejudice that might result from the absence of a docket entry has already been discussed.[207] In regard to waiver by the parties of the entry requirement, it may be established, as with waiver of the separate document requirement, either by affirmative waiver or by the taking of an appeal by one party without any other party objecting on that ground.[208] However, waiver by the parties should not end the court's inquiry. The court should also consider the possibility of prejudice to the public or the court itself as a result of the absence of a docket entry before accepting the parties' waiver.

It should further be noted that the presence of prejudice should not automatically result in a stay or dismissal of the appeal. In fact, a stay or dismissal of the appeal, for the sole purpose of allowing the district court to make the requisite entry, is likely to be unnecessary in most circumstances. When the absence of an entry is brought to the attention of either the district court or the court of appeals, and it is clear that the omission does not bring the appellate court's jurisdiction into question, either court may order the docket sheet corrected under Federal Rule of Appellate Procedure 10(e) without interrupting the processing or scheduling of the appeal itself.[209] In effect, the omission of a docket entry where prejudice may result from that omission should be treated in the same manner as the absence of a separate judgment document where such absence renders the timeliness of the appeal uncertain.[210] When

---

207. *See supra notes* 171, 194-200 and accompanying text.

208. *See Mallis*, 435 U.S. at 387-88; *see, e.g., In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 263 n.1 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1397 (1994); Cooper v. Salomon Bros., 1 F.3d 82, 86 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 737 (1994); Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 430-31 (2d Cir. 1989).

209. *See supra* note 114, for text of Appellate Procedure Rule 10(e).

210. Thus, as was concluded with regard to the separate judgment requirement, when it comes to the attention of the appellate court that a district court docket entry is necessary, the appellate process is better served by the appellate court itself ordering the district court to either make the entry or explain its absence rather than require the appellant to make the request on her own. *See supra* note 105 (requiring appellant to return to district court would cause unnecessary delay and may frustrate appellate review; burden of failure to enter separate judgment should fall on party seeking to assert untimeliness defense) and accompanying text.

calling such a docket entry omission to the attention of a district court, the court of appeals should require the district court to correct the omission or explain why correction is unnecessary or inappropriate.[211]

211. The author offers the following example of language that may be used in a court of appeals order where it appears that a necessary docket entry was erroneously omitted by the district court:

> It appears from the district court docket sheet and other materials available to this court that the judgment [or order] under appeal [describe document] was executed on [date] but that no corresponding docket entry meeting the requirements of Fed. R. Civ. P. 79(a) was made. The district court is hereby directed to either make the appropriate docket entry or submit an explanation of why such docket entry is not required, within ten days of the date of this order.