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The Appealability of Orders under Supreme Court Rule 304, 3 J. Marshall J. of Prac. & Proc. 84 (1969)

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THE APPEALABILITY OF ORDERS UNDER SUPREME COURT RULE 304

In 1955, section 50(2)[1] of the Illinois Civil Practice Act was revised to provide a method for determining when certain orders were appealable and which orders must be appealed in order to preserve a party's right to judicial review.[2] In 1967, the Illinois Supreme Court adopted the substance of section 50 (2) in Rule 304 which reads as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.[3]

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[1] Law of July 19, 1955, ch. 110, §50(2) (1955) Ill. Laws 2259 (replaced by Supreme Court Rule 304) reads as follows:

> If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only on express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties.

Id. at 2259.

[2] *See* ILL. ANN. STAT. ch. 110, §50 (Smith-Hurd 1956), Committee Comments at 402.

[3] ILL. REV. STAT. ch. 110A, §304 (1967).

Supreme Court Rule 304 has recently been amended. The original rule is now designated as paragraph (a); a new paragraph, designated as paragraph (b), has been added. The amendment, which became effective Jan. 1, 1970, reads as follows:

> (b) Judgments and Orders Appealable Without Special Finding. The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:
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> (1) A judgment or order entered in the administration of an estate, guardianship, conservatorship, or similar proceeding which finally determines a right or status of a party.
>
> (2) A judgment or order entered in the administration of a receivership, rehabilitation, liquidation, or other similar proceeding which finally determines a right or status of a party and which is not appealable under rule 307(a).
>
> (3) A judgment or order granting or denying any of the relief prayed in a petition under section 72 of the Civil Practice Act (Ill. Rev. Stat. ch. 110, §72).
>
> (4) A final judgment or order entered in a proceeding under

The purpose of this comment is to examine the problems which led to the adoption of section 50(2) as well as the difficulties existent under the present rule.

HISTORICAL BACKGROUND

Appellate courts in the United States, including Illinois, have traditionally held that appeals will lie only from final orders or judgments.[4] The avowed purpose of the final judgment rule in both the federal and Illinois courts is to prevent appellate courts from being overwhelmed by piecemeal appeals.[5] At early common law, piecemeal appeals apparently did not pose serious problems to the courts due to the application of the "single unit judgment theory."[6] This theory regarded an action as a single judicial unit which had to be adjudicated in its entirety before a judgment could become an appealable order.[7] While the early federal courts applied this theory in both actions at law and suits in equity,[8] Illinois appellate courts have for many years recognized as final a decree which finally determines one aspect or branch of a case.[9]

With the advent of modern methods of civil procedure, such

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section 73 of the Civil Practice Act (Ill. Rev. Stat. ch. 110, §73). ILL. REV. STAT. ch. 110A, §304 (1969).

The committee comments state that paragraph (b) was not designed to change but to clarify existing law. Further, the committee offered the following explanation of the applicability of the paragraph.

> Subparagraph (1) applies to orders that are final in character although entered in comprehensive proceedings that include other matters. Examples are an order admitting or refusing to admit a will to probate, appointing or removing an executor, or allowing or disallowing a claim.
>
> Subparagraph (2) is comparable in scope to subparagraph (1) but excepts orders that are appealable as interlocutory orders under Rule 307. Examples or orders covered by subparagraph (2) are an order allowing or disallowing a claim and an order for the payment of fees.
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> Subparagraph (3) is derived from paragraph (6) of section 72 of the Civil Practice Act (Ill. Rev. Stat., 1967, ch. 110, §72(6), which deals with relief from judgments after 30 days.
>
> Subparagraph (4) is derived from paragraph (7) of section 73 of the Civil Practice Act (Ill. Rev. Stat., 1967, ch. 110, §73(7) which deals with supplementary proceedings.

In addition to the express exceptions to 304 the committee noted that judgments imposing sanctions for contempt of court are appealable without the finding. Quoting *People v. Bua*, 37 Ill. 2d 180, 191, 226 N.E.2d 6, 13 (1967), the committee explained that . . . "a contempt proceeding is 'an original special proceeding, collateral to and independent of the case in which the contempt arises', . . . [the judgment] is therefore final and appealable." ILL. ANN. STAT. ch. 110A, §304 (Smith-Hurd 1969), Committee Comments at 33.

[4] *See generally* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539 (1932). In Illinois the state constitution now includes the requirement of finality for appeals. ILL. CONST. art. VI, §§5 & 7.

[5] *See, e.g.*, Petrol Corp. v. Petroleum Heat & Power Co., 162 F.2d 327 (2d Cir. 1947); La Vida, Inc. v. Robbins, 33 Ill. App. 2d 243, 178 N.E.2d 412 (1961).

[6] *See* 6 J. MOORE, FEDERAL PRACTICE ¶54.19, at 161 (2d ed. 1953).

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, Sebree v. Sebree, 293 Ill. 228, 127 N.E. 392 (1920).

as the Illinois Civil Practice Act and the Federal Rules of Civil Procedure, which contain liberal provisions for joinder of parties and causes of action,[10] the number of cases involving multiple parties and multiple issues substantially increased. Multiple party and multiple issue litigation led to increased demands for appeals at different stages in the trial. Prospective appellants in the federal courts found that a strict application of the single unit judgment theory often resulted in severe hardships when appeals could not be prosecuted immediately.[11] In 1937, Federal Rule 54(b) was drafted to add some degree of flexibility to the single unit judgment theory when an action contained multiple claims by providing that the trial court:

> [A]t any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim.[12]

With the adoption of 54(b), multiple appeals within a given case became more frequent in the federal courts.[13] Due to judicial recognition of the possibility of several appealable orders within a given case, appeals from partial decisions were not new to Illinois appellate courts.[14] However, in neither the Illinois nor the federal courts was it certain as to what type of orders were appealable and when such orders were appealable. In Illinois, attorneys found difficulty in ascertaining whether a judgment "finally disposed of one aspect or branch of a case."[15] Attorneys in the federal courts found that the federal judiciary had developed different interpretations of "claims." Some fed-

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[10] FED. R. CIV. P. 13 (counterclaims and cross claims), 14 (joinder of third parties), 18 (joinder of claims and remedies), 20 (permissive joinder of parties); ILL. REV. STAT. ch. 110, §§23, 24, 25 (joinder of parties), §38 (counterclaims), §44 (joinder of causes of action) (1967).

[11] See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). The United States Supreme Court in this case held that the dismissal of the claims of an intervenor was a final and appealable order. Since the intervenor's appeal came after the statutory period for appeals had run, the court held that it had forfeited its right to appeal.

Referring to the difficulties involved in determining whether an order was final and appealable, the Court said:

> The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had.

Id. at 511.

[12] FED. R. CIV. P. 54(b) (1939).

[13] Prior to the adoption of the rule, federal courts had recognized an exception to the single unit judgment rule where the case involved multiple parties. In multiple party litigation an order adjudicating a separate and distinct claim or terminating the action except as to a separate and distinct claim could be appealed without waiting until determination of the entire matter. Republic of China v. American Express Co., 190 F.2d 334 (2d Cir. 1951).

[14] See note 9 *supra*.

[15] *See* ILL. ANN. STAT. ch. 110A, §304 (Smith-Hurd 1968), Historical & Practice Notes at 586-90.

eral courts equated claims with causes of action[16] while others held that a separate set of facts constituted a claim and that the entire set of facts had to be appealed as a unit.[17] Federal courts employing the cause of action definition reasoned that a single set of facts might give rise to several claims.[18] Those courts using the "separate set of facts" definition reasoned that a given set of facts constituted only a single claim.[19]

Litigants in both the Illinois and federal courts often were faced with a dilemma. If they sought an appeal, they might be dismissed for lack of finality. However, appeals in both court systems had to be taken within a statutory period. Therefore, an incorrect decision by a litigant might result in the loss of a right to appeal. As a result the appellate courts became flooded with precautionary appeals.[20]

In 1946, Federal Rule 54(b) was amended to alleviate this problem in the federal courts by providing that for a judgment to be appealable under the rule, the trial court must make a finding that there is no just reason for delay. Unless this finding was specifically made, the statutory period for appeals did not commence to run.[21] In 1955, section 50(2) of the Civil Practice Act was amended to provide a similar procedure in Illinois.[22] Section 50(2) provided that the statutory period for appeals did not begin to run until the trial judge had made an express finding that "there . . . [was] no just reason for delaying enforcement or appeal."[23] Although the procedure described in 50(2) was intended to provide "an easy method of determining when certain types of orders are appealable . . . [application of the section] has proved to be anything but easy."[24]

LACK OF FINALITY

One source of difficulty concerns the effect of the finding

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[16] *See, e.g.*, Gold Seal Co. v. Weeks, 209 F.2d 802 (D.C. 1954).

> The claim for relief referred to in Rule 54(b) is of course the claim for relief referred to in Rule 8(a) of the Federal Rules of Civil Procedure . . . . That is to say, the claim for relief must indicate the existence of a cause of action.

Id. at 807.

[17] *See, e.g.*, Town of Clarksville v. United States, 198 F.2d 238 (4th Cir. 1952), where the court said: "A separate claim is said to be that which is entirely distinct from other claims involved in an action and which arises from a different occurrence or transaction." *Id.* at 240.

[18] Hanney v. Franklin Fire Ins. Co., 142 F.2d 864 (9th Cir. 1944).

[19] See note 17 *supra*.

[20] 6 J. MOORE, FEDERAL PRACTICE ¶54.01, at 10 (2d ed. 1966). *See also* ILL. ANN. STAT. ch. 110A, §304 (Smith-Hurd 1968), Historical & Practice Notes at 586.

[21] Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511-12 (1950).

[22] Ariola v. Nigro, 13 Ill. 2d 200, 203, 148 N.E.2d 787, 789 (1958).

[23] See note 1 *supra* for the entire text of former section 50(2).

[24] ILL. ANN. STAT. ch. 110A, §304 (Smith-Hurd 1968), Committee Comments at 585.

upon the question of finality. It is clear that the mere presence of the trial court's express finding will not, by itself, confer appealability upon an order. In addition to the trial court's finding, the judgment appealed from "must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with the execution of the judgment."[25] The order does not have to dispose of all of the issues presented, but "it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof."[26] The Committee Comments to Supreme Court Rule 304 state that although the rule is substantially the same as section 50(2),

> [t]he language has been revised slightly, however, to emphasize the fact that it is not the court's finding that makes the judgment final, but it is the court's finding that makes this kind of a final judgment appealable.[27]

ABUSE OF DISCRETION IN MAKING THE FINDING

Although the trial court's express finding is said to be discretionary,[28] the Illinois Supreme Court in *Martino v. Barra* held that an appeal can be dismissed for abuse of discretion in making the finding despite the presence of multiple parties and a final judgment as to one of the parties.[29] In the trial of this case, the defendants, who were also cross-defendants, had obtained the required finding and had sought an appeal from two orders entered by the trial court. One order resulted when the trial court entered a judgment *non obstante veredicto* after the jury had entered a verdict for all defendants and against all plaintiffs. The second order appealed was a judgment entered after the trial court sustained the cross-claimant's post trial motion for judgment against the cross-defendant.[30] The appellate court held that the judgment *non obstante veredicto* was not an appealable order but was a finding on the issue of liability only leaving damages to be ascertained in a future court.[31] However, the appellate court held that the judgment entered pursuant to the cross-claim was final because damages had been stipulated by the parties prior to the entry of judgment.[32] It then reversed the latter order and remanded the cause directing the trial court

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[25] Midstates Fin. Co. v. Waller, 67 Ill. App. 2d 437, 440, 214 N.E.2d 624, 626 (1966).

[26] *Id.*

[27] ILL. ANN. STAT. ch. 110A, §304 (Smith-Hurd 1968), Committee Comments at 585.

[28] Vogel v. Melish, 37 Ill. App. 2d 471, 474, 185 N.E.2d 724, 726 (1962).

[29] 37 Ill. 2d 588, 229 N.E.2d 545 (1967).

[30] Martino v. Barra, 67 Ill. App. 2d 328, 331-32, 215 N.E.2d 12, 15 (1965).

[31] *Id.* at 340, 215 N.E.2d at 19.

[32] *Id.* at 341, 215 N.E.2d at 19.

to enter judgment on the verdict against the cross-claimant.[33] A petition for leave to appeal was subsequently allowed by the supreme court. The supreme court affirmed the appellate court's finding that the judgment *non obstante veredicto* was not final[34] but reversed the appellate court in respect to its disposition of the appeal from the order granting the cross-claim. After holding that the trial court had abused its discretion in making the finding permitting appeal, the court explained:

> The judgment as to Cities Service [the cross-defendant] was final and, if it were the only judgment in the case, of course would have been appealable. But under the circumstances here, to permit its appeal would be to authorize a piecemeal appeal.[35]

The supreme court then cited its earlier decision of *Ariola v. Nigro*[36] which had stated that section 50(2) was aimed at discouraging piecemeal appeals in the absence of just reason. Explaining that just reasons were present here, the court said:

> Here, there is to be a trial for the purpose of determining damages with respect to Martino, Saunders and Hamel [the other defendants], after which there can be appeals which may come for appellate review. Appellate consideration of the Cities Service judgment alone is contrary to the purpose and policy underlying section 50(2). There are no circumstances present to require that this isolated judgment be considered as a matter of justice before the entering of appealable judgments in the related matters.[37]

Although *Martino* was the first case where an appeal was actually dismissed on the grounds that a just reason existed for delaying an appeal, the Illinois appellate court in *Hawthorn-Mellody Farms Dairy, Inc. v. Elgin, Joliet & Eastern Railway Co.*[38] had stated that an appeal should be dismissed despite the finding, if a just reason for delaying an appeal existed.[39] Few cases have discussed what constitutes a just reason for delaying an appeal. It has been stated that the finding should not be made routinely but rather should be made with a view toward avoiding piecemeal appeals.[40]

Failure To Obtain the Finding

A separate problem arises where the required finding has not

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[33] *Id.* at 343, 215 N.E.2d at 20.
[34] 37 Ill. 2d at 588, 229 N.E.2d at 545.
[35] *Id.*
[36] 13 Ill. 2d 200, 148 N.E.2d 787 (1958).
[37] 37 Ill. 2d at 595, 229 N.E.2d at 549.
[38] 18 Ill. App. 2d 154, 151 N.E.2d 393 (1958).
[39] [T]here . . . [would be] an abuse of discretion . . . in allowing the appeal because there is a just cause for delaying the appeal: namely we are not to anticipate the liability of the railroad [the appellant] by deciding its right to damages at the risk of a subsequent not guilty verdict in its favor; nor to determine the railroad's right to fees and expenses at the risk that later the third-party defendants would question on appeal the amount of the allowance of fees and expenses.
Id. at 159, 151 N.E.2d at 395.
[40] 13 Ill. 2d 200, 148 N.E.2d 787 (1958).

been obtained but an appeal has been prosecuted. The early cases interpreting section 50(2) indicated a lenient attitude where the appealed case fulfilled the requirements of the section but did not contain the necessary finding. In *Ariola v. Nigro*[41] the supreme court indicated that if the trial court would enter the requisite finding, a later appeal would be heard on the same briefs. The case of *Oppenheimer Brothers, Inc. v. Joyce & Co.*[42] even suggested that the finding was not necessary if the trial court would have made a finding had it been called to its attention. Later cases have indicated a more strict attitude. In *Weidler v. Westinghouse Electric Corp.*[43] the court said:

> Six and one-half years have elapsed since the effective date of the statute and we feel it is time to discontinue the procedure temporarily permitted in *Ariola* and *O'Hara* — a procedure which encourages appeals because the trial court invariably feels impelled to enter the order when invited to do so by the reviewing court.[44]

Subsequent cases have simply dismissed the appeal where the necessary finding is absent.[45] It has been suggested that Rule 304 might be interpreted to allow a finding after the appeal has been dismissed if lack of certification were the only reason precluding appeal.[46] Such an approach seems to be sound. Dismissal means that the case is still within the jurisdiction of the trial court; and there seems to be no reason why it could not then make the finding. Furthermore, this approach would not be subject to the objections posed by the *Weidler* court;[47] no "inviting" statements by the reviewing court need be involved.

Since the penalty for failing to obtain the trial court's finding has become potentially more severe, it should be requested before attempting an appeal. If the trial court refuses to make the finding, the prospective appellant may find that he cannot compel the court to do so. Although there have been no cases where mandamus has actually been sought, there is dictum in one case to the effect that mandamus will not lie to compel a judge to make the finding.[48]

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[41] *Id.* *See also* O'Hara v. Carrillo, 18 Ill. App. 2d 106, 151 N.E.2d 449 (1958).

[42] 17 Ill. App. 2d 408, 150 N.E.2d 381 (1958). In 1963, the First District of the Illinois Appellate Court, the same district that had decided *Oppenheimer*, held that henceforth *Oppenheimer* would not be followed in the first district. See American Sav. & Acctg. Supply, Inc. v. Steinhauer, 41 Ill. App. 2d 37, 190 N.E.2d 167 (1963).

[43] 37 Ill. App. 2d 95, 185 N.E.2d 100 (1962).

[44] *Id.* at 99, 185 N.E.2d at 102.

[45] Cannon v. Thompson, 28 Ill. App. 2d 69, 170 N.E.2d 174 (1960).

[46] Tone & Euvaldi, *Separation of Trials and Appeals in Multiparty Actions*, 1967 ILL. L. FORUM 234 (1967).

[47] See text at note 44 *supra*.

[48] E.M.S. Co. v. Brandt, 103 Ill. App. 2d 445, 242 N.E.2d 695 (1968). The plaintiff had appealed an order vacating a default judgment against one of several defendants. A finding was requested but refused. On appeal

MULTIPLE CLAIMS

One of the most vexing analytical problems posed by section 50(2) and Supreme Court Rule 304 concerns the meaning of the phrase "multiple claims."[49] In *Ariola v. Nigro*,[50] the first Illinois decision interpreting section 50(2), the Illinois Supreme Court considered at length the meaning of "multiple claims." In this case the parties were adjoining landowners contesting an alleged easement in which the plaintiff filed a complaint seeking injunctive relief and damages while the defendant cross-claimed seeking identical relief.[51] At the conclusion of a hearing before a master in chancery, it was determined that the plaintiff was only entitled to the damages he had sustained from a deprivation of the easement. The plaintiff appealed, claiming that he was entitled to relief by way of a mandatory injunction.[52] On appeal, the defendant-appellee contended that the appeal must be dismissed since the action involved multiple claims and plaintiff had not obtained the trial court certification required by section 50 (2).[53] The appellant argued that multiple claims were synonymous with multiple causes of action and that since both legal and equitable relief could be sought in a single cause of action, his complaint contained only one claim.[54]

The court acknowledged that section 50(2) was patterned after rule 54(b) of the Federal Rules of Civil Procedure[55] and that several federal courts had interpreted claims to be synonymous with causes of action.[56] However, the supreme court concluded that the federal courts' interpretations of claims were in a state of confusion. Quoting the committee which had drafted section 50(2), the court declared that the section was

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the plaintiff claimed that the judge had assured him that the order was appealable without the finding. The plaintiff claimed that under these circumstances, refusal to grant the finding was an abuse of discretion rendering the order appealable without the finding. The court rejected this argument saying that:

> The making of such a finding is discretionary with the trial court, but there is no provision for review of an abuse of that discretion when a finding is refused. The absence of the finding in such a judgment — for whatever reason — leaves the judgment final but unenforceable and unappealable.

Id. at 447-48, 243 N.E.2d at 696.

[49] Although section 50(2) and rule 304 read disjunctively, multiple parties or multiple claims, the term multiple parties has not caused serious problems. Multiple parties have been found by virtue of intervention, Brodsky v. Brodsky, 20 Ill. App. 2d 587, 156 N.E.2d 608 (1959), or through a third party complaint, Hawthorn-Mellody Farms Dairy, Inc. v. Elgin, J. & E. Ry., 18 Ill. App. 2d 154, 151 N.E.2d 393 (1958).

[50] 13 Ill. 2d 200, 148 N.E.2d 787 (1958).

[51] *Id.* at 201, 148 N.E.2d at 788.

[52] *Id.* at 202, 148 N.E.2d at 789.

[53] *Id.*

[54] *Id.* at 204-05, 148 N.E.2d at 790.

[55] *Id.* at 203, 148 N.E.2d at 789.

[56] *Id.* at 205-06, 148 N.E.2d at 790-91.

drafted with the federal problems in mind and that the drafters sought to avoid this confusion.

> The language of section 50(2), as well as the comments of the committee which drafted it, indicate that a flexible and reasonable meaning was intended for the *claims* to which the section refers. The section itself speaks in terms of a final judgment or decree that adjudicates less than *all the claims or rights and liabilities* and upon two occasions the advisory committee comments that its provisions are to take effect when there is a final judgment adjudicating fewer than *all the matters involved.*[57]

The court continued its interpretation of section 50(2) saying:

> That the problems are the same whether one, or more than one, cause of action is involved, is demonstrated by this case . . . . [W]e are of the opinion that section 50(2) was intended to apply wherever a final judgment or decree determines fewer than all the rights and liabilities at issue . . . .[58]

Concluding that section 50(2) was applicable, the court held that the order appealed from was not final because the required certification was lacking. By way of dictum, the court went on to say that if the trial judge would make the finding, a later appeal would be entertained.[59]

While the *Ariola* court expressed a desire to avoid the confusion attached to the federal definitions of multiple claims, the Illinois Appellate Court of the Fourth District in *Veach v. Great Atlantic & Pacific Tea Co.*[60] relied on a federal decision to support its conclusion. In *Veach* the plaintiff-appellant had filed a two count complaint based upon the same factual occurrence alleging the defendant's negligence in each count. When the trial court dismissed one of the counts, plaintiff appealed on the theory that section 50(2) was applicable. The appellate court dismissed the appeal on the ground that the case involved only a single claim. Relying upon the federal decision of *Town of Clarksville v. United States,*[61] the court stated that multiple claims must be based on separate factual occurrences.

> The policy under the federal rule has been against allowing piecemeal appeals where there is only one actual claim involved. Rule 54(b) permits separate judgments where there are separate and distinct claims based on differing occurrences or transactions. If there is only a single claim or "factual occurrence" involved, the rule cannot be invoked to confer jurisdiction upon an appellate court, and an attempted piecemeal appeal will be dismissed.[62]

On the other hand, multiple counts were also involved in *Cunningham v. Brown*[63] where the Illinois Supreme Court held

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[57] *Id.* at 206, 148 N.E.2d at 791 (emphasis added).
[58] *Id.* at 207, 148 N.E.2d at 791.
[59] *Id.* at 208-09, 148 N.E.2d at 792.
[60] 22 Ill. App. 2d 179, 159 N.E.2d 833 (1959).
[61] 198 F.2d 238 (1952).
[62] 22 Ill. App. 2d at 181, 159 N.E.2d at 833-34.
[63] 22 Ill. 2d 23, 174 N.E.2d 153 (1961).

that alternative counts based on the same factual occurrence constituted multiple claims. As in *Ariola*, the court indicated a willingness to deviate from federal treatment of multiple claims which require separate factual occurrences to establish multiple claims. However, the *Cunningham* court stated that multiple counts based on the same facts could constitute multiple claims if the counts expressed different theories of liability. In denying a motion to dismiss on the grounds that only a single claim was involved, the court said:

> Although arising from the same occurrence or transaction, the bases of recovery are different. Section 50(2) was intended to apply wherever a final judgment determines fewer than all the rights and liabilities in issue. We think that such is the case here, and that it does not matter, in determining whether multiple counts allege multiple claims for relief, that recovery under one would bar recovery of additional damages under the others.[64]

Although most of the cases discussing multiple claims have involved complaints containing multiple counts, the court in *Central Wisconsin Motor Transportation Co. v. Levin*[65] held that a single count complaint involved multiple claims. Plaintiff's complaint sought specific performance and damages resulting from an alleged breach of contract.[66] Defendant appealed under section 50(2) after the demand for specific performance was stricken by the court, but the count seeking damages remained. Relying on *Veach* and federal decisions the plaintiff argued that only a single claim was involved since his complaint was based on a single factual occurrence. Citing both *Ariola* and *Cunningham* the court rejected plaintiff's contention while accepting the defendant's argument involved in the following interpretation of *Ariola:*

> Distinct sets of rights and liabilities are involved inasmuch as the plaintiff asserts that it has the right to either damages or specific performance and that defendant is liable either to pay money or perform. One set of rights and liabilities was disposed of by the order of dismissal.[67]

An analysis of the cases where multiple claims either have or have not been found present does not result in the formulation of any easily applied test. For example, multiple claims were expressly or impliedly found in the following cases: *McGee v. McGee*,[68] a marriage dissolution, an issuance of temporary injunction, and an award of separate property and a property settlement were sought; *Simon v. Simon*,[69] a dissolution of a part-

[64] *Id.* at 25, 174 N.E.2d at 154.
[65] 66 Ill. App. 2d 383, 214 N.E.2d 776 (1966).
[66] *Id.* at 385, 214 N.E.2d at 778.
[67] *Id.* at 396, 214 N.E.2d at 783.
[68] 36 Ill. App. 2d 105, 183 N.E.2d 317 (1962).
[69] 37 Ill. App. 2d 100, 185 N.E.2d 111 (1962).

nership and an accounting were sought; *Cook County v. Hoytt*,[70] one count claiming a violation of a zoning ordinance and a separate count for nuisance; *American Saving & Accounting Supply, Inc. v. Steinhauer*,[71] injunctive relief and damages were sought; and *Brenner v. Neu*, [72] a mortgage foreclosure, damages on a note and for fraud were sought.

Some general conclusions are possible, however. The number of counts in one's complaint does not seem to be determinative. In *Levin* a single count complaint was held to contain multiple claims, while in *Veach* a two count complaint was said to contain only a single claim. Separate factual occurrences are apparently not needed to give rise to multiple claims. Finally, multiple claims can exist where relief is sought on more than one theory of liability regardless of whether relief under one theory would preclude relief under the other theory.

CONCLUSION

Uncertainty as to the right to appeal in multiple party and multiple claim litigation has continued in Illinois despite the existence of Supreme Court Rule 304. Since the statutory period for appeals now begins to run only after the express finding has been made, the rule has made certain when an order must be appealed to preserve the right to appeal. However, once the finding has been made the appealability of a given order remains uncertain. Despite the presence of a 304 finding, an appeal can be dismissed if the appellate court finds that the order appealed from is not final or that multiple claims or multiple parties are not present or that a just reason for delaying appeal exists. The difficulty of determining whether a trial court order is final exists, of course, in all areas of appellate practice. However, the appealability of orders under 304 is further conditioned by the requirements that either multiple parties or multiple claims must be present and that no just reason for delaying or enforceing appeal exists. Although "multiple claims" and "no just reason" are phrases central to the understanding of Rule 304, neither has been judicially defined with sufficient exactness to permit trial judges or practitioners to effectively utilize the rule.

In *Ariola* the supreme court attempted to avoid the confusion surrounding multiple claims that had troubled the federal courts by refusing to define multiple claims, stating instead that 50(2) (now Rule 304) was intended to apply whenever a final judgment determines fewer than all of the rights or liabilities at

[70] 41 Ill. App. 2d 122, 190 N.E.2d 150 (1963).
[71] 41 Ill. App. 2d 37, 190 N.E.2d 167 (1963).
[72] 26 Ill. App. 2d 319, 168 N.E.2d 449 (1960).

issue. The "flexible" approach to multiple claims suggested by the *Ariola* court has made it extremely difficult to tell when the rule is applicable. Similarly, few guidelines have been suggested by the supreme court as to what constitutes just reasons for delaying appeal. In *Martino* the court implied that an appeal should be dismissed when, as a matter of justice, there are no circumstances present to require an immediate hearing of the appeal. The decision, however, gave little indication as to when the supreme court would conclude that such circumstances were present. Much of the present uncertainty as to the right to appeal under 304 could be alleviated by a revision of the rule to clarify the phrases "no just reasons for delay" and "multiple claims." Despite the frequent statements by the courts that the rule is designed to discourage rather than encourage piecemeal appeals, fairness to litigants requires that the scope of permissible appeals be more clearly defined.

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