

THE NEW YORK STATE BAR ASSOCIATION'S PROPOSED  
AMENDMENT TO CPLR 5501: A NON-SOLUTION TO A NON-  
PROBLEM

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For the past several years, the Committee on Civil Practice Law and Rules (CCPLR) of the New York State Bar Association (“NYSBA”) has proposed an amendment to CPLR 5501.<sup>1</sup> The stated purpose of the amendment is to overturn the Appellate Division, First Department’s decision in *Pollak v. Moore*<sup>2</sup> and allow appeals from final judgments to bring up for review all prior orders, whether deemed “final” or “non-final.”<sup>3</sup> At first blush, the amendment may not seem like a bad idea. The CCPLR is concerned that unwitting litigants, whose attorneys did not fully understand the concept of finality and its impact on appealability and reviewability on appeal, might understandably await the last determinative paper in the case to file their appeal, and such appeals should allow for review of all earlier orders necessarily affecting that final paper, whether the prior order is deemed final or non-final.

The problem with the proposed amendment is two-fold. First, the amendment almost surely would not have solved the alleged “problem” presented by *Pollak v. Moore*, because it is unlikely that any appeal from the purported final judgment in that case would have been allowed under the circumstances presented therein.<sup>4</sup> Second, and more fundamentally, the amendment would conflict with decades of Court of Appeals precedent on the concept of finality – precedent which is grounded in the State Constitution.<sup>5</sup> This presents a number of problematic potentialities. First, to the extent

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<sup>1</sup> See Staff Memorandum, N.Y. State Bar Ass’n Exec. Comm., Agenda Item #5 (Jan. 17, 2012) (on file with N.Y. State Bar Ass’n) [hereinafter NYSBA].

<sup>2</sup> *Pollak v. Moore*, 926 N.Y.S.2d 434 (App. Div. 2011).

<sup>3</sup> See Staff Memorandum, *supra* note 1.

<sup>4</sup> See *Pollak*, 926 N.Y.S.2d at 435; Staff Memorandum, *supra* note 1.

<sup>5</sup> See *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995) (citing N.Y. C.P.L.R. 5501(a)(1) (McKinney 2018)).

that it attempts to provide for a definition of finality that is different from Article 6, it may, at least as applied in some cases, be deemed unconstitutional. Second, even if it is not deemed unconstitutional, it may lead to new pitfalls in appellate practice – including potentially creating orders reviewable by the Appellate Division, but not by the Court of Appeals. Third, even if harmonized with the State Constitutional finality requirement, it may negate current appellate doctrine grounded in sound public policy – namely – party finality.

For these reasons, this article will argue that the proposed amendment is both unnecessary and unwise.

## I. BACKGROUND

CPLR 5501 (a) (1) provides that “[a]n appeal from a final judgment brings up for review: . . . any non-final judgment or order which necessarily affects the final judgment.”<sup>6</sup>

The problem CPLR 5501 is meant to solve, derives from a somewhat unique aspect of New York appellate practice. Unlike the Federal system, which, as a general rule, allows intermediate appeals from final judgments only,<sup>7</sup> New York allows litigants an intermediate appeal from a broad array of non-final, or interlocutory, orders.<sup>8</sup> This liberal gateway to appellate review is limited, however, to the Appellate Division only; pursuant to Article 6 of the New York Constitution, appeals to the Court of Appeals are limited to judgments or orders “which finally determine[] an action or special proceeding.”<sup>9</sup>

What if a litigant does not wish to appeal an interlocutory order but instead, as he would be required to do in the Federal system, chooses to await the final judgment in the case? That is precisely what CPLR 5501 was designed to permit, allowing the litigant in such a case to raise not only those issues decided on the last go-round in Supreme Court, but also any issues decided upon earlier orders in the case.<sup>10</sup> Without CPLR 5501, appeals from interlocutory orders would effectively be mandatory, rather than simply permissible.<sup>11</sup>

Historically, from the time of its enactment, the definition of “final” judgment (and, by necessary corollary, “non-final” judgment or order)

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<sup>6</sup> N.Y. C.P.L.R. 5501(a).

<sup>7</sup> See 28 U.S.C. § 1291 (2018); 28 U.S.C. § 1292(a) (2018).

<sup>8</sup> See N.Y. C.P.L.R. 5701(a)(2) (McKinney 2018).

<sup>9</sup> N.Y. CONST. art. 6, § 3 (b)(1), (2), (4), (6).

<sup>10</sup> See N.Y. C.P.L.R. 5501(a)(1).

<sup>11</sup> See N.Y. C.P.L.R. 5501(b); Staff Memorandum, *supra* note 1.

in CPLR 5501 has been interpreted in accordance with the Court of Appeals' long-standing finality jurisprudence,<sup>12</sup> which, again, is grounded in Article 6 of the State Constitution.<sup>13</sup> This makes sense, since a contrary interpretation could, as discussed below, render it unconstitutional under Article 6, at least as applied to certain cases; at the very least, it would lead to serious conflicts with current Court of Appeals jurisdictional jurisprudence. The Court of Appeals has taken a pragmatic view of what constitutes a "final" order or judgment, one which emphasizes substance over form.<sup>14</sup> While impossible to completely sum up in one sentence, a "fair working definition" of finality is that "a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters."<sup>15</sup>

## II. THE *POLLAK* CASE.

In *Pollak v. Moore*, the Court issued a quintessential final order, after which the Clerk of the Court issued a clearly ministerial final judgment.<sup>16</sup> *Pollak* was an action for breach of contract, and related causes of action, based upon a real estate deal gone wrong.<sup>17</sup> Defendants collectively moved to dismiss all of the causes of action, and, by Order entered November 20, 2009, the Court granted the motion, ordering the complaint dismissed in its entirety against all of the defendants.<sup>18</sup> The Cover Sheet to the Order specifically stated that it constituted a "FINAL DISPOSITION,"<sup>19</sup> though the order itself also specifically ordered "the Clerk to enter judgment in favor of Defendants."<sup>20</sup> The Plaintiff in *Pollak* filed a notice of appeal from the November 20, 2009 order, but for reasons not known, thereafter abandoned that appeal.<sup>21</sup> Almost a year later, Plaintiff made what was purported to be a motion<sup>22</sup> for a Judgment based upon the November 2009 order.<sup>23</sup> Notably, this motion was not made to the

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<sup>12</sup> See *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995).

<sup>13</sup> See Staff Memorandum, *supra* note 1.

<sup>14</sup> See *Burke*, 647 N.E.2d at 739.

<sup>15</sup> *Id.*

<sup>16</sup> See *Pollak v. Moore*, 926 N.Y.S.2d 434, 436 (App. Div. 2011).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 435.

<sup>19</sup> See Record on Appeal, *Pollak v. Moore*, 926 N.Y.S.2d 434 (App. Div. 2011).

<sup>20</sup> *Id.* at 5.

<sup>21</sup> See *Pollak*, 926 N.Y.S.2d at 436.

<sup>22</sup> See Record on Appeal, *supra* note 19, at 5.

<sup>23</sup> See *id.*

Court; rather, it was made to the Clerk of the Court, and it is not even clear from the record that it was made on notice.<sup>24</sup> The Clerk obliged, issuing a Judgment on September 14, 2010, which simply referenced the earlier order and “ADJUDGED that the complaint is dismissed.”<sup>25</sup> Plaintiff then attempted to take a second bite of the apple by appealing from the September 2010 Judgment.<sup>26</sup> Quite appropriately, the First Department held that this was improper; having “abandoned his appeal from the November 20, 2009 order,” plaintiff could not be allowed to “revive that appeal by the expedient of effecting a ministerial entry of judgment upon the final order after expiration of the time to perfect the initial appeal.”<sup>27</sup> Citing *Burke v. Crosson*, the Court also noted that the November 2009 Order “disposed of all of plaintiff’s claims,” and was therefore the final order in the case.<sup>28</sup> It could not be brought up for review under CPLR 5501 by the later entered judgment, because regardless whether the “order ‘affected’ the judgment,” the Order was a final one, rather than a non-final one that could be brought up under CPLR 5501.<sup>29</sup>

It is all but impossible to see what grave injustice the CCPLR believed was done in *Pollak* that would necessitate an overhaul of CPLR 5501, and, therewith, decades of Court of Appeals finality jurisprudence.<sup>30</sup> At the outset, while in some cases finality can be a difficult concept to grasp, that was certainly NOT the case in *Pollak*.<sup>31</sup> It would be hard to envision a more “final” order than the original November 20, 2009, order in *Pollak* dismissing the case in its entirety.<sup>32</sup> That Order disposed of the entire action, leaving nothing of a non-ministerial nature left to do; indeed, the subsequent “judgment” did not even require any judicial action - it was a purely ministerial action by the Court Clerk.<sup>33</sup> Moreover, Plaintiff knew enough to appeal the November Order to allow him to abandon that appeal, and bring a new appeal upon a purely ministerial judgment

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<sup>24</sup> See *id.* at 5. The Judgment recites that it was on the summons and complaint, the November 20, 2009, decision, and the “motion of attorney for the Plaintiff.” *Id.* No mention is made of any papers of any of the Defendants. See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *Pollak*, 926 N.Y.S.2d at 435–36.

<sup>27</sup> *Id.* at 436.

<sup>28</sup> See *id.* at 435–36 (first citing N.Y. C.P.L.R. 5015(a)(1) (McKinney 2018); then citing *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995)).

<sup>29</sup> See *Pollack*, 926 N.Y.S.2d at 436 (citing N.Y. C.P.L.R. 5015(a)(1)).

<sup>30</sup> See Staff Memorandum, *supra* note 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See *Pollack*, 926 N.Y.S.2d at 435–36 (citing N.Y. C.P.L.R. 5015(a)(1); *Burke*, 647 N.E.2d at 739).

would have served no useful purpose, and would have unnecessarily, and unjustly, prolonged the litigation.

### III. THE CCPLR'S RESPONSE

The CCPLR believed that *Pollak* had somehow abrogated the rule that “[a]ppeals from non-final orders should be optional and not mandatory.”<sup>34</sup> In the CCPLR’s view, the final paper in the case must bear the label “judgment,” rather than “order,” period.<sup>35</sup> The CCPLR initially recommended that CPLR 5501 be amended to make clear that an appeal from a “final judgment” would bring up for review “any non-final judgment or any order which necessarily affects the final judgment.”<sup>36</sup> Adding “any,” in the CCPLR’s view, would vitiate the distinction between final and non-final orders.<sup>37</sup> The CCPLR was forced to acknowledge, however, that, under present practice, an “order” is often the final paper issued in a case.<sup>38</sup> In recognition that a “final judgment” is not always issued by a Court in every case (because, as set forth below, orders that completely decide a case are themselves final), the CCPLR also recommended that a new subsection be added to CPLR 2219 “requiring that when a court issues an order resolving all of the issues in the case, it make appropriate direction for a final judgment.”<sup>39</sup> Of course, the *Pollak* Court had actually made such a direction, and the First Department nevertheless appropriately held that such a ministerial action (i.e. the entry of such judgment by the clerk) was not an appropriate vehicle to bring up for review a prior final order.<sup>40</sup>

The Bar Association’s Committee on Courts of Appellate Jurisdiction (“CCAJ”) objected to the CCPLR’s initial proposal, fearing that it “may cause unintended and unwanted consequences.”<sup>41</sup> The CCAJ also pointed out that,

The problem in *Pollak* was not that the court made mandatory an appeal from a non-final order that should have been optional. Instead, an appeal from a final determination that was mandatory had been abandoned, and an improper appeal

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<sup>34</sup> See Staff Memorandum, *supra* note 1.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* (citing *In re Washington*, 628 N.Y.S.2d 837 (App. Div. 1989)).

<sup>39</sup> Staff Memorandum, *supra* note 1.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

from a later nominal final judgment was properly dismissed.<sup>42</sup>

Whether in response to the CCAJ's concerns or not, the CCP thereafter came up with a new proposed amendment to CPLR 5501, which would provide that an appeal from a final judgment would bring up for review:

"[A]ny ~~order or interlocutory non-final~~ judgment ~~or order~~ which necessarily affects the final judgment . . . provided that such order or interlocutory non-final judgment ~~or order~~ has not previously been reviewed by the court to which the appeal is taken."<sup>43</sup>

This proposal would appear to open up the same appellate pitfalls noted by the CCAJ as the earlier version.<sup>44</sup>

In either its original or amended form, the CCPLR's proposal is based mainly on the CCPLR's apparently deep-held belief that, at the nisi prius level, at least, there can be no final order in a case; rather, only a judgment can be deemed final.<sup>45</sup> The CCPLR "believes that good order requires that all actions and proceedings end in a [paper denominated] final judgment, and that parties aggrieved thereby have the right to appeal from that judgment."<sup>46</sup> The CCPLR insistence that the final paper in a case be called a judgment totally elevates form over substance, contrary to the appellate jurisprudence of this state, under which the formalistic labeling of a paper is disregarded in favor of a substantive determination of whether it constitutes a simple interlocutory order, or one which disposes of the case in its entirety, "apart from mere ministerial matters."<sup>47</sup> Thus the Court of Appeals, as well as the Appellate Divisions, routinely determine whether a Supreme Court order constitutes the final paper in the case by a substantive analysis of what the paper does, rather than the moniker it is given, and assess its appealability accordingly.<sup>48</sup> Indeed, a judgment entered after an order "that

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<sup>42</sup> *Id.*

<sup>43</sup> Memorandum from James E. Pelzer to N.Y. State Bar Ass'n Comm. on the Civil Practice Law and Rules (Jan. 27, 2016) (on file with author).

<sup>44</sup> See Staff Memorandum, *supra* note 1.

<sup>45</sup> See N.Y. STATE BAR ASS'N, REPORT PREPARED BY THE COMM. ON CIVIL PRACTICE LAW AND RULES 6 (on file with author).

<sup>46</sup> NYSBA, *supra* note 1.

<sup>47</sup> *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995) (citing *Marna Constr. Corp. v. Town of Huntington*, 31 N.Y.2d 854, 855 (1972); ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* 328–42, 393–404 (2005)).

<sup>48</sup> See, e.g., *Roth v. City of Syracuse*, 995 N.E.2d 123, 126 (N.Y. 2013) (citing N.Y. C.P.L.R. 5602 (a)(1)(ii) (McKinney 2018)) ("This Court granted petitioner leave to appeal, pursuant to CPLR 5602 (a) (1) (ii), from a judgment (denominated order) of Supreme Court. . . ."); *Leeward Isles Resorts, Ltd. v. Hickox*, 901 N.E.2d 1282, 1282 (N.Y. 2009) (emphasis added) ("Motion for leave to appeal dismissed upon the ground that the March 2008 Appellate Division order sought to be appealed from does not finally determine the action within the meaning of the

disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action”<sup>49</sup> will generally be deemed ministerial, and therefore non-final – even though it may be the last paper issued in a case.<sup>50</sup> Only if the matter is remitted for “any action of a *judicial* or *quasi-judicial* nature” will the prior order be deemed non-final.<sup>51</sup> This is in keeping with the general principal that the final paper in a case is the order that substantively ends it.<sup>52</sup>

One recent example of particular note, where the Court both called an order final and applied CPLR 5501, is *Roth v. City of Syracuse*.<sup>53</sup>

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Constitution. The April 2008 Supreme Court *order* disposing of the remaining causes of action, *which is the final paper in this action. . . .*”); *see generally* *Gilroy v. American Broadcasting Co.*, 389 N.E.2d 117, 118 (N.Y. 1979) (emphasis added) (citing N.Y. C.P.L.R. 5501; *Farber v. U.S. Trucking Corp.*, 256 N.E.2d 521, 528 (N.Y. 1970); *Buffalo Elec. Co. v. New York*, 201 N.E.2d 869, 870 (N.Y. 1964)) (“[W]e hold that a *final judgment or order* which is appealable by virtue of CPLR 5601 (subd (d)) brings up for review only the prior nonfinal order of the Appellate Division which is the predicate for the appeal.”).

<sup>49</sup> *Burke*, 647 N.E.2d at 739 (citing *Marna Constr. Corp.*, 31 N.Y.2d at 855).

<sup>50</sup> *See, e.g.*, *Harvey v. Members Emps. Tr. for Retail Outlets*, 748 N.E.2d 1061, 1063 n.1 (N.Y. 2001) (citing KARGER, *supra* note 47, at 79–81) (“The Appellate Division order is final and subject to review by this court because the remittal to Supreme Court contemplates purely ministerial action.”); *Spodek v. Park Prop. Dev. Assocs.*, 759 N.E.2d 760, 761 (N.Y. 2001) (first citing N.Y. C.P.L.R. 5611 (McKinney 2018); then citing *Colonial Liquor Distrib. v. O’Connell*, 65 N.E.2d 745, 746–47 (N.Y. 1946)) (“Contrary to plaintiff’s contention that this appeal is from amended judgment of the Supreme Court, the appeal arises from the Appellate Division order which disposed of all issues in the case and remitted only for ministerial action.”); *see also* *Brusco v. Braun*, 645 N.E.2d 724, 727 (N.Y. 1994) (citing N.Y. REAL PROP. ACTS. § 732 (McKinney 2018); N.Y. REAL PROP. ACTS. § 749 (McKinney 2018)) (“Even after a default, the court may stay the issuance of the warrant of eviction up to 10 days (RPAPL 732 [3]), after issuance of the warrant, the tenant is entitled to at least 72 hours notice before execution (RPAPL 749 [2]), and prior to the execution of the warrant, the court retains jurisdiction to vacate the warrant for good cause shown (RPAPL 749 [3]).”); *Logan v. Guggenheim*, 128 N.E. 903, 904 (N.Y. 1920) (“The entry of the final judgment was a mere clerical or ministerial procedure and did not constitute ‘the proceeding to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any,’ within the intendment of that language of section 1350.”); *see generally* KARGER, *supra* note 47, at 79 (“If, on the other hand, ‘nothing is left for the [tribunal] to do except to perform those purely ministerial acts which may be necessary to give effect to the decision of the Appellate Division’ (emphasis added), the order is final.”).

<sup>51</sup> KARGER, *supra* note 47, at 79.

<sup>52</sup> *See, e.g.*, *Sun Plaza Enter., Corp. v. Tax Comm’n*, 818 N.E.2d 652, 652 (N.Y. 2004) (citing KARGER, *supra* note 47, at 79–80) (“Motion for leave to appeal dismissed upon the ground that the Appellate Division order, from which no appeal was properly taken or motion for leave to appeal was properly made, was the final appealable paper as its remittal was for purely ministerial action.”); *Spodek*, 759 N.E.2d at 761 (citing N.Y. C.P.L.R. 5611; *Colonial Liquor Distrib.*, 65 N.E.2d at 746–47); *Harvey*, 748 N.E.2d at 1063 n.1 (citing KARGER, *supra* note 47 at 79–81); *Logan*, 128 N.E. 903 at 904; *see also* *Gettner v. Getty Oil Co.*, 765 N.E.2d 297, 297 (N.Y. 2002) (“The Court of Appeals thus treated plaintiffs’ August 2001 motion for leave to appeal, which plaintiffs noticed as being from the November 1999 order, as being from the July 2001 final Appellate Division order to bring up for review, if appropriate, the prior nonfinal November 1999 Appellate Division order.”).

<sup>53</sup> *See Roth*, 995 N.E.2d. at 126. *See also Burke*, 647 N.E.2d at 739 (“Defendants then

There, the “Court granted petitioner leave to appeal, pursuant to CPLR 5602(a)(1)(ii), from a judgment (*denominated order*) of Supreme Court that granted petitioner’s motion to voluntarily discontinue its remaining claims . . . bringing up for our review the prior nonfinal Appellate Division order.”<sup>54</sup> It is noteworthy that if the CCPLR’s definition of an appropriate “final” paper—i.e. one necessarily denominated a “judgment”—had been given effect, the Court could not have reviewed the prior non-final order—because the appeal would have been dismissed outright for non-finality.<sup>55</sup>

The CCPLR is of the belief that, contrary to the Court of Appeals holding in *Burke v. Crosson*,<sup>56</sup> the definition of finality for CPLR 5501 purposes should not be identical to the definition of finality for purposes of Court of Appeals review under the State Constitution, because “the two concepts are logically distinct and serve very different roles.”<sup>57</sup> In addition to raising form over substance, the CCPLR’s argument for divorcing the two definitions of finality is based on a fundamental misunderstanding of the Court’s finality jurisprudence. The CCPLR argues that:

The Court of Appeals, as a general rule reviews decisions of the Appellate Division, which are normally reflected in an order either affirming, modifying or reversing a result at the trial court level. Because the Court of Appeals normally reviews only matters that are final, it is necessary in the context of CPLR 5601 to have a “final” order. CPLR 5601 and 5602 explicitly use the phrase “an order of the appellate division which finally determines an action.” Actions at the trial court level end not with an order but a final judgment.<sup>58</sup>

There are at least two major problems with this analysis. First,

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successfully moved this Court for leave to appeal from this judgment (denominated an ‘order’), seeking review of ‘so much of the prior nonfinal [Appellate Division] order. . . .’); *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 603 N.E.2d 246, 247 (N.Y. 1992) (emphasis added) (citing N.Y. C.P.L.R. 5206(a)(1)(ii) (McKinney 2018)) (“We granted defendants’ motion for leave to appeal from the final order of Supreme Court, bringing up for review the Appellate Division’s prior nonfinal order. . . .”); *Gilroy*, 389 N.E.2d at 118 (emphasis added) (first citing N.Y. C.P.L.R. 5501 (McKinney 2018); then citing *Farber*, 256 N.E.2d at 52; and then citing *Buffalo Elec. Co.*, 201 N.E.2d at 870) (“[W]e hold that a *final judgment or order* which is appealable by virtue of CPLR 5601 (subd (d)) brings up for review only the prior nonfinal order of the Appellate Division which is the predicate for the appeal.”).

<sup>54</sup> *Roth*, 995 N.E.2d. at 127 (emphasis added) (citing N.Y. C.P.L.R. 5602 (McKinney 2018); N.Y. REAL PROP. TAX § 700 (McKinney 2018)).

<sup>55</sup> See N.Y. C.P.L.R. 5602(a)(1)(ii) (McKinney 2018).

<sup>56</sup> See *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995) (citing N.Y. CONST. art. VI, §3 (b) (1), (2), (6); N.Y. C.P.L.R. 5501 (a)(1), 5601, 5602).

<sup>57</sup> N.Y. STATE BAR ASS’N, *supra* note 45, at 4.

<sup>58</sup> *Id.*



the final paper in many cases before the Court of Appeals is not rendered in the Appellate Division, but in the Supreme Court.<sup>59</sup> Pursuant to CPLR 5602(a)(1)(ii), the Court can hear appeals from “a final judgment of [the Supreme Court, other lower courts and administrative agencies] . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award.”<sup>60</sup> And in determining what constitutes such a lower court final “judgment, determination or award,” the Court, as one would expect, applies its longstanding substantive finality jurisprudence.<sup>61</sup> No matter what a lower court paper is denominated, it will be deemed a final paper, appropriately appealable, where it “disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters.”<sup>62</sup>

Second, whatever the CCPLR believes should be the final paper in the Supreme Court—i.e. a judgment—the truth is that the Court of Appeals has been treating Supreme Court orders as final long before *Burke v. Crosson*.<sup>63</sup> Not only is this reflected in the cases set forth above, it is reflected in the majority of the Court’s finality determinations—though not always explicitly.<sup>64</sup> The CCPLR is correct in asserting that the majority of appeals to the Court of Appeals come from the Appellate Division, and that most of those Appellate Division cases by definition are determined by an order.<sup>65</sup> The finality of an Appellate Division order, however, often, if not the majority of the time, turns on the finality of the underlying paper in the Supreme Court<sup>66</sup>—and the finality of that underlying paper is determined by the Court of Appeals’ substantive test, not by whether it is labeled an order as opposed to a judgment.<sup>67</sup> Comparing two simple and hypothetical situations demonstrates this fact. Take two separate cases from Supreme Court: in Case A, plaintiff moves for summary judgment, and Supreme Court denies the motion in an order; in Case B, plaintiff moves for summary judgment, and

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<sup>59</sup> See, e.g., N.Y. C.P.L.R. 5602(a)(1) (McKinney 2018).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; *Burke*, 647 N.E.2d at 739.

<sup>62</sup> See *Burke*, 647 N.E.2d at 739 (citing KARGER, *supra* note 47 at 328–42, 393–404).

<sup>63</sup> See Alan D. Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality*, 54 ST. JOHNS L. REV. 443, 460 (1980) (discussing case law pertaining to finality judgments pre-1980).

<sup>64</sup> See, e.g., *id.* at 444.

<sup>65</sup> See *id.* at 454, 455–56.

<sup>66</sup> See *id.* at 446–47.

<sup>67</sup> See *id.* at 453.

Supreme Court grants the motion in an order which dismisses the case in its entirety. Assume on appeal that the Appellate Division agrees with each disposition; in both cases, the Appellate Division order will simply state “Order affirmed.” How can one possibly determine, from the Appellate Division orders alone, whether either case has been finally determined for purposes of Court of Appeals review? The answer – and what the Court of Appeals routinely looks to – is to look to the finality of each Supreme Court order. The order denying summary judgment is clearly a non-final order, while the order granting summary judgment is clearly a final order, appealable to the State high court. And in undertaking this analysis, the Court cares not whether the underlying Supreme Court paper is labeled an order or a judgment; the determinative factor is whether that underlying paper finally determines the action.<sup>68</sup>

Thus, it should be clear that the CCPLR’s assertion that the Court of Appeals analysis of the finality of orders applies only to orders of the Appellate Division<sup>69</sup> is simply wrong. The CCPLR’s misimpression that Judgments are always the final paper in a civil case has, in reality, never been the case, at least under the Court of Appeals interpretation of Article 6 of the Constitution.<sup>70</sup> The one mistake that the First Department in *Pollak* may have made was, arguably, to contribute to this confusion. In saying that the Judgment could not bring up for review the final (as opposed to non-final) order that necessarily affected the judgment, the Court arguably indicated that there were two final papers in the case – both the order and the judgment.<sup>71</sup> To that extent, the First Department may have gotten its finality discussion a bit backwards. In reality, the problem was not that the final order could not be brought up for review by the final judgment – but, rather, the judgment was not a final paper that would bring up for review any prior papers.<sup>72</sup> The

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<sup>68</sup> The Court’s decisions do not generally discuss this principle, which, given that “most of such decisions do not contain any discussion of the issue of finality,” is to be expected. See KARGER, *supra* note 47, at 36. However, there is at least a general discussion and explicit application of this principle in *Cadichon v. Facelle*, 939 N.E.2d 138, 139 (N.Y. 2010) (citing *Paglia v. Agrawal*, 508 N.Y.S.2d 514 (App. Div. 1986)).

<sup>69</sup> See N.Y. STATE BAR ASS’N, *supra* note 45, at 4.

<sup>70</sup> See N.Y. CONST. art. VI, § 3 (b)(1), (2), (6); *Gilroy v. Am. Broad. Co.*, 389 N.E.2d 117, 119 (N.Y. 1979) (first citing N.Y. C.P.L.R. 5501, 5601 (McKinney 2018); then citing *Farber v. U.S. Trucking Corp.*, 256 N.E.2d 521, 528 (N.Y. 1970); and then citing *Hempstead v. Little*, 239 N.E.2d 722, 723 (N.Y. 1968)); KARGER, *supra* note 47, at 33–34.

<sup>71</sup> See *Pollak v. Moore*, 926 N.Y.S.2d 434, 436 (App. Div. 2011) (citing N.Y. C.P.L.R. 5501 (McKinney 2018)).

<sup>72</sup> See *Pollak*, 926 N.Y.S.2d at 435–36 (first citing N.Y. C.P.L.R. 5015 (McKinney 2018); then citing *Burke v. Crosson*, 647 N.E.2d 736, 739 (N.Y. 1995)).

judgment was a purely ministerial paper which, though entered after the final order, did not constitute a final order or judgment in the case.<sup>73</sup>

There is more at stake here than the CCPLR appears to understand. Divorcing the definition of finality for purposes of CPLR 5501 from the Court of Appeals definition of finality under the State Constitution would have serious, and negative, consequences for appellate practice. Suppose, for example, that, in case A above, the Plaintiff chose not to appeal the order, but, instead, waited for some considerable period of time (say a year), and then entered a clerk's judgment (with no further judicial action), and timely appealed from that judgment. That is exactly what occurred in *Pollak*,<sup>74</sup> and, given that the CCPLR's proposed amendment is explicitly meant to overrule *Pollak*,<sup>75</sup> seemingly the Appellate Division would be compelled, in reviewing the judgment, to review the prior final order as well. What, though, would happen were the Appellate Division to affirm the judgment? The legislature cannot expand the Constitutional jurisdiction of the Court of Appeals, and it is entirely possible that the Court would determine that no appeal would lie from the Appellate Division order, because, having been made as a result of a ministerial judgment rather than the previous final order, it is non-final for purposes of Court of Appeals review. The situation is entirely hypothetical at this point, because, by defining finality for CPLR 5501 purposes identically with the Constitutional requirement, it cannot arise. But divorcing the two definitions of "finality" raises this, and no doubt other similar, potential issues. There would certainly be ample reason for the Court to reach the determination I envision. Why should the final paper in a case be one – as it was in *Pollak* and this hypothetical – be one that is entered not on the authority of a Judge, but upon the ministerial action of a County Clerk? As set forth above, the Court routinely holds that ministerial judgments are not final.<sup>76</sup> In addition, allowing an appeal

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<sup>73</sup> See *Pollak*, 926 N.Y.S.2d at 436.

<sup>74</sup> *Pollak* did involve the additional issue that a first appeal had been abandoned, but, if anything, that makes the hypothesized situation more appealable to the Appellate Division. See Staff Memorandum, *supra* note 1.

<sup>75</sup> See *id.*

<sup>76</sup> See, e.g., *Harvey v. Members Emps. Tr. for Retail Outlets*, 748 N.E.2d 1061, 103 n.1 (N.Y. 2001) (citing *KARGER*, *supra* note 47, at 79–81); *Spodek v. Park Prop. Dev. Assocs.*, 759 N.E.2d 760, 761 n.\* (N.Y. 2001) (first citing N.Y. C.P.L.R. 5611 (McKinney 2018); then citing *Colonial Liq. Distribs. v. O'Connell*, 65 N.E.2d 745, 746 (N.Y. 1946); and then citing *KARGER*, *supra* note 47, at 80); *Brusco v. Braun*, 645 N.E.2d 724, 726, 727 (N.Y. 1994); *Logan v. Guggenheim*, 128 N.E. 903, 904 (N.Y. 1920); *KARGER*, *supra* note 47, at 73–75.

to be taken long after what, under established precedent, would have been the final paper in the case has been filed undermines one of the very purposes of the finality requirement – to ensure that litigation timely ends, and is not thereafter revived.

Perhaps even worse than the hypothetical above, the CCPLR's proposal would seem to have disastrous implications for an important, and commonly occurring, aspect of established finality jurisprudence – party finality. For those unfamiliar with the concept, another simple hypothetical should elucidate the doctrine. Imagine that plaintiff Yuckl sues defendants Grutz and Spano for personal injuries. Imagine further that both defendants move for summary judgment, and the Court issues an order granting Grutz's motion, dismissing the action against him in its entirety, but denying Spano's motion, allowing Yuckl's action to proceed against him. Under the doctrine of party finality, this order is final as to defendant Grutz and, unless Plaintiff appeals from it, Grutz is removed from the litigation forever. Party finality is based on the rationale that "there is no sound basis for postponing the appealability of such an essentially final determination until after the conclusion of often protracted proceedings with which the particular party is in no way concerned."<sup>77</sup> Parties who are removed from an action should be able, absent a prompt appeal, to rest easy, without worrying that claims against them may be revived by an appeal years down the line. Repose is an important policy.

The CCPLR proposal would seriously undermine the doctrine of party finality. In the case above, the order granting Grutz's motion for summary judgment would certainly be appealable to the Appellate Division. However, assuming that the Appellate Division then affirmed, would that Order be a final one that could be appealed to the Court of Appeals? If the Court of Appeals were to accept the CCPLR's position that only "judgments" are final, and not orders, the answer would seem to be no – meaning that Yuckl would have to await the final judgment in the case against Spano before being able to seek review of the dismissal of his claims against Grutz in the Court of Appeals. This would be troublesome for both parties. Years could elapse between the trial court dismissal of Yuckl's claims against Grutz, and the end of the case against Spano. Imagine that the case against Spano goes against Yuckl at the trial level, but, upon appeal, the Court of Appeals ultimately re-instates the claim against Grutz. Yuckl then would be faced with the prospect of having to try

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<sup>77</sup> KARGER, *supra* note 47, at 129.

the case all over again, when, had the initial dismissal been appealable to the Court of Appeals, all of the claims could have been tried at once. As for Grutz, imagine if Yuckl chose not to appeal the initial dismissal of his claims against Grutz. Under traditional Court of Appeals party finality doctrine, that order would be deemed final as to Grutz, and presumably he could breathe easy thereafter. Under the CCPLR's proposal, however, he would face the prospect of being pulled back into the action years later. This goes completely against the repose policy of the party finality rule.

These are only a few of the potential problems that will be created by the CCPLR's proposed amendment to CPLR 5501. One other that comes to mind is with respect to Appellate Division orders modifying money judgments on the ground that the damages are excessive or inadequate. As it currently stands, under *Whitfield v. City of New York*<sup>78</sup> and in many other cases, the final appealable paper in such a case is neither an order nor a judgment; it is a stipulation consenting to the reduction or increase in damages.<sup>79</sup> Presumably, a new judgment will be entered after that stipulation; would the amended CPLR 5501 overrule *Whitfield* and make this judgment the final paper? Who knows.

There will, no doubt, be many other such problems that this author's imagination cannot yet dream up. And for what purpose? The CCPLR's apparent aversion to the concept of a "final order" seems superficial, a purely aesthetic distaste which places form entirely over substance. While the concept of finality occasionally proves problematic, it is generally fairly easy to apply – instances of true injustices being created by application of the finality doctrine are rare at best. Certainly, *Pollak* presented no such injustice – indeed, to permit the plaintiff to revive his claim a year after he had abandoned it would have been the unjust. And basing the finality concept on the substance of what a court actually does – rather than on a ministerial action that can be carried out by a non-judicial employee – seems the right policy. What is the purpose of allowing the ministerial act of a clerk to set the time for taking an appeal, rather than the substantive decision of a court?<sup>80</sup> Whatever minefield

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<sup>78</sup> *Whitfield v. City of New York*, 689 N.E.2d 515 (N.Y. 1997).

<sup>79</sup> *See id.* at 547 (citing N.Y. C.P.L.R. 5601, 5602 (McKinney 2018)).

<sup>80</sup> It could be argued, perhaps, that the Appellate Division would have been better served to have treated this as a timeliness issue – i.e. an appeal must be taken from the final substantive order within 30 days of notice of entry, regardless when a later ministerial judgment is entered – rather than creating the dichotomy of a final judgment not bringing up for review the prior final order. Indeed, under CPLR 5501 (c), an appeal from a final order of dismissal or summary judgment is automatically deemed to include any later entered judgment. There do not appear

the finality issue may pose, the minefield that would be created by uncoupling the 5501 definitions of finality from the Constitutional definition could be far worse. The CCPLR should re-consider its proposal, and the legislature, if it is ever presented with the proposed amendment, would be wise to vote it down.

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to be any cases dealing with the timeliness of an appeal from a final “judgment” where a prior final “order” has been entered; *Pollak* essentially mooted the question. *Pollak v. Moore*, 926 N.Y.2d 434, 436 (App. Div. 2011).