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Achille Lauro Missed the Boat: The Second Circuit's Refusal in Chasser v. Achille Lauro Lines to Hear Defendant's Interlocutory Appeal Under Collateral Order Exception

ACHILLE LAURO MISSED THE BOAT: THE SECOND CIRCUIT'S REFUSAL IN *CHASSER v. ACHILLE LAURO LINES* TO HEAR DEFENDANT'S INTERLOCUTORY APPEAL UNDER COLLATERAL ORDER EXCEPTION

Section 1291 of Title 28 of the United States Code confers to the United States courts of appeal jurisdiction to hear appeals from final decisions of the United States district courts.[1] Under section 1291, an appellant may not

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1. 28 U.S.C. § 1291 (1982 & Supp. IV 1986). Section 1291 of the Federal Judicial Code grants to the United States courts of appeals jurisdiction to hear all appeals from final decisions of the United States district courts. *Id.*; *see* 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.02[1] (1988) (stating that § 1291 authorizes appeal from final decisions); 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 (1976 & Supp. 1988) (describing § 1291 as basic source of jurisdiction for courts of appeals). A district court issues a final decision when the district court has heard an action to its logical conclusion and will take no further action in the case except for the execution of judgment. *See* Catlin v. United States, 324 U.S. 229, 233 (1945) (defining final decision); 9 J. MOORE, B. WARD & J. LUCAS, *supra*, ¶ 110.08[1] (discussing general definition of final decision). By comparison, an interlocutory decision is a decision of a district court that does not end the litigation on the merits, but rather resolves an incidental issue arising from the underlying merits. *See Catlin*, 324 U.S. at 233 (discussing interlocutory decision); J. MOORE, B. WARD & J. LUCAS, *supra*, ¶ 110.08[1] (describing orders that courts have found interlocutory); C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 3915 (defining nonfinal interlocutory orders). When a district court issues an interlocutory order, the action continues in the district court. *See Catlin*, 324 U.S. at 233-234 (describing final and nonfinal orders); J. MOORE, B. WARD & J. LUCAS, *supra*, ¶ 110.08[1] (stating that action continues in district court when district court issues interlocutory decision).

Section 1291 gives litigants an appeal as of right. *See* 28 U.S.C. § 1291 (1982 & Supp. IV 1986) (providing appeals from all final decision of district courts); C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 3901 (stating that § 1291 provides appeal as of right); Comment, *Qualified Immunity Defense that Fails to Meet the Collateral Order Requirements is Not Subject to Interlocutory Appeal*, 42 WASH. & LEE L. REV. 502, 502 n.1 (1985) (discussing statutory right of appeal under § 1291); *also* FED. R. APP. P. 3-4 (governing appellate procedure in appeals of right).

While § 1291 gives litigants an appeal from final decisions, § 1292 of Title 28 of the United States Code governs appeals from interlocutory decisions of the district courts to the circuit courts. *See* 28 U.S.C. § 1292 (1982 and Supp. IV 1986) (governing interlocutory appeals to federal circuit courts). Section 1292 tempers the final judgment rule in § 1291 by allowing litigants to appeal some nonfinal decisions. *Id.* Section 1292(a) lists the type of decisions that litigants may appeal as of right at the interlocutory stage, while § 1292(b) authorizes a litigant to appeal a nonfinal decision, subject to the discretion of both the district court and the court of appeals. *See id.* (providing methods of interlocutory appeal); Comment, *supra*, at 502 n.1 (stating that § 1292(a) gives litigants statutory right of appeal and § 1292(b) provides appeal at discretion of both district court and circuit court).

Section 1292(b) gives the district judge discretion to certify interlocutory orders for immediate appeal at the request of the appealing party if the district judge believes that the order determines a question of law which controls the case, on which views may differ, and that an immediate appeal would substantially promote a decisive conclusion to the litigation.

appeal a decision of a district court to a circuit court until the district court has rendered a final decision (final judgment rule).[2] A district court renders

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28 U.S.C. § 1292(b) (1982 & Supp. IV 1986); *see Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS. 13, 75-81 (spring 1984) [hereinafter INTERLOCUTORY RESTATEMENT] (reviewing appeals under § 1292(b)). Even if the district judge certifies the action for immediate appeal, the court of appeals has discretion not to hear the case. 28 U.S.C. § 1292(b) (1982 & Supp. IV 1986).

2. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) (describing rule of § 1291 that requires parties to wait until trial is over to appeal all claims of error in trial court as final judgment rule); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (referring to finality requirement of § 1291 as the final judgment rule).

In the United States the final judgment rule of § 1291 originated in § 22 of the Judiciary Act of 1789. 1 Stat. 73, 84 (1789) (codified as amended at 28 U.S.C. § 1291 (Supp. IV 1986)). Congress derived the concept of the final judgment rule from English laws. *See*, Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541-548 (1932) (reciting history of final judgment rule in England before American Revolution). In England, the finality rule was applicable to the courts of law, but not to the courts of equity. *Id.* at 547. After the American Revolution, Congress included a version of England's finality rule in the Judiciary Act of 1789. *Id.* at 549. Unlike the English version of the finality rule, in the United States the final judgment rule applied to both courts of law and courts of equity. *Id.* at 548. Strict application of the final judgment rule resulted in unfairness to litigants in some decisions in equity courts. *Id.* As a result, American courts developed intricate exceptions to avoid the strict application of the final judgment rule, such as the collateral order exception. *Id. See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3906 (discussing history of final judgment rule). The Supreme Court has noted that Congress enacted the finality rule to promote the efficiency of the federal court system; to limit disruptions, delays and expense to litigants that cause pretrial appeals; to decrease the burden on appellate court dockets; and to allow district judges unhampered supervision of pretrial and trial procedures. *See, e.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, — (1987) (holding that finality rule protects variety of interests related to judicial efficiency); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) (holding that the final judgment rule gives deference to trial judge's decisions at interlocutory stage); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (stating that final judgment rule gives deference to trial judge's decisions, prevents piecemeal litigation, and limits harassment of just claims by procedural delays); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) (stating that § 1291 promotes efficient judicial administration by avoiding piecemeal litigation); Cobbledick v. United States, 309 U.S. 323, 325 (1940) (holding that piecemeal appeals retard judicial administration). *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3907 (discussing various purposes of final judgment rule).

In allowing appellate courts to hear all appealable issues at one time under the final judgment rule, Congress recognized that more than one order during the litigation may be erroneous and grounds for reversal on appeal. *See* Richardson-Merrell, Inc.v. Koller, 472 U.S. 424, 430 (1985) (noting that district court rules on many decisions of law and fact before final decision). Thus, Congress enacted § 1291, the final judgment rule, which requires litigants to bring all errors resulting from a single trial at one time. *Id.*; 28 U.S.C. § 1291 (1982 & Supp. 1986). As a result, courts and litigants save time and expense because the litigants take one appeal to one appellate court. *Richardson-Merrell*, 472 U.S. at 430. Thus, the appellate court can correct all errors at one time. *Id.*

Although courts state that the final judgment rule has many purposes, in formulating the rule, Congress did not explain why it limited appeals to final decisions. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3906 (discussing lack of congressional records to aid in learning Congress's purpose in enacting final judgment rule). The legislative history of the congressional debates over the Judiciary Act of 1789 is not helpful in determining Congress' purpose in enacting the final judgment rule. *Id*; *see* 1 ANNALS OF CONG. 48-50 (J. Gales ed. 1789) (providing little evidence of Congress' intent in enacting final judgment rule).

a final decision when the court decides a case on the merits and the only remaining task is to execute the judgment.[3] Once a district court has rendered a final decision, section 1291 gives litigants an appeal as of right.[4] Accordingly, the final judgment rule avoids piecemeal litigation and promotes judicial efficiency by preventing appellate courts from ruling on interlocutory issues that may become moot by the end of the litigation and by allowing the appellate court to hear all the appealable issues from a case at one time.[5]

Although the language of section 1291 only appears to permit appeals to courts of appeal from final decisions, the United States Supreme Court has created an exception to the final judgment rule, which is commonly known as the collateral order exception.[6] The collateral order exception

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3. *See* Catlin v. United States, 324 U.S. 229, 233 (1945) (defining "final decision" as decision that disposes of entire case and adjudicates all rights in cause of action leaving nothing for district court to do except execute judgment); *also* INTERLOCUTORY RESTATEMENT, *supra* note 1, 26-28 (describing form of final decision).

4. 28 U.S.C. § 1291 (Supp. IV 1986); *see supra* note 1 (discussing appeal as of right under § 1291).

5. 28 U.S.C. § 1291 (1982 & Supp. 1986). An example of an interlocutory decision that may become moot before the end of the litigation is a denial of a motion to certify an action as a class action. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978). A decision not to certify an action as a class action may become moot because the district court may review and revise the order before terminating the action. *Id. See generally* Annotation, *Appealability of Order Allowing Action to Proceed as Class Action Under Rule 23 of Federal Rules of Civil Procedure*, 32 A.L.R. FED. 674 (1977) (discussing appealability of order certifying action as class action in federal courts); Annotation, *Appealability of Determination Adverse to Confirmation of Action as Class Action Under Rule 23 of Federal Rules of Civil Procedure*, 17 A.L.R. FED. 933 (1973) (discussing appealability of denial of motion to certify action as class action). In addition to a district court's order granting or denying certification as a class action, many other interlocutory orders present issues of appealability. *See generally* Annotation, *Finality for Appeal of Federal Habeas Corpus Orders*, 82 A.L.R. FED. 937 (1987) (discussing appealability of federal habeas corpus orders under § 1291); Annotation, *Appealability, Under 28 USCS* § 1291, of Order Awarding or Denying Attorneys' Fees, 73 A.L.R. FED. 271 (1985) (discussing appealability of grants or denials of motions to assess attorneys' fees in federal courts); Annotation, *Appealability of Discovery Order as "final decision" Under 29 U.S.C.S.* § 1291, 36 A.L.R. FED. 763 (1978) (discussing appealability of a discovery order as final under § 1291).

6. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 541-547 (1949) (developing collateral order exception). *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (discussing development of collateral order exception and appealability of district court orders under collateral order exception); J. MOORE, B. WARD & J. LUCAS, *supra* note 1, ¶ 110.10 (discussing orders that are appealable under collateral order exception); INTERLOCUTORY RESTATEMENT, *supra* note 1, 82-92 (discussing appeal of non-final district court orders). The United States Supreme Court developed a narrow exception to the final judgment rule in Cohen v. Beneficial Industrial Loan Corporation. *Cohen*, 337 U.S. at 543. In *Cohen* a shareholder, who owned less than 1% of the stock of the defendant corporation, brought a shareholder's derivative action against the directors of a corporation (the defendants). *Id.* at 543. The plaintiff's complaint alleged that the defendants mismanaged and defrauded the shareholders of the corporation. *Id.* The defendant corporation moved the district court to require the plaintiff to post security for certain litigation expenses as required under a New Jersey statute. *Id.* at 545; *see* N.J. STAT. ANN. § 14:3-15 to 17 (1945). The district court

permits appeals from a few of the many orders that district courts issue

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denied the defendant's motion stating that the New Jersey statute did not apply to an action in federal court. *Cohen*, 337 U.S. at 545. The defendant appealed the district court's decision to the United States Court of Appeals for the Third Circuit. *Id.* On appeal the Third Circuit held that courts must give a liberal and reasonable construction to the final judgment rule under § 1291, found the decision appealable and reversed. *Id.*; *see* 28 U.S.C. § 1291 (1982 & Supp. 1986). The United States Supreme Court granted certiorari to determine whether a district court must enforce a state statute requiring the plaintiff to post security in an action when jurisdiction is based on diversity of citizenship. *Cohen*, 337 U.S. at 545.

On appeal, the *Cohen* Court considered whether the district court order denying the defendant's motion was immediately appealable at the interlocutory stage under § 1291. *Id.*; *see* 28 U.S.C. § 1291 (1982 & Supp. 1986) (granting appeals from final decisions of federal district court to federal courts of appeal). The Supreme Court found that § 1291 prevents litigants from appealing tentative, informal or incomplete district court decisions. *Cohen,* 337 U.S. at 546. The Supreme Court found that, although the district court's decision was not a final decision under § 1291, the district court's decision in *Cohen* belonged to a small class of cases in which a district court's decision conclusively determines a claim of right that is separate from, and collateral to the substantive rights the litigants claimed in the litigation. *Id.* The Supreme Court stated that courts of appeal should review some rights that are independent of, but important to, the substantive cause of action even though the orders are not final decisions. *Id.* Accordingly, the Supreme Court created the collateral order exception to the final judgment rule. *Id.* Thus, the Supreme Court held that thedefendant's motion was immediately appealable because the district court conclusively had determined that the plaintiff must post the security, and because the posting of security was not an element of the underlying cause of action. *Id.* at 546-547. The Supreme Court also reasoned that the district court's denial of the defendant's motion was immediately appealable because the defendant's right to require plaintiff to post security presented the court with a serious and unsettled question. *Id.* The Supreme Court noted that if the court did not allow the defendant to appeal the security issue at the interlocutory stage, the defendant's right to require the security would become meaningless. *Id.* The Supreme Court in *Cohen* explained that the defendant's right would become meaningless because the plaintiff would have caused the corporation to expend its resources on the trial without posting the statutory security, thereby violating the statute. *Id.* at 546; *see* Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950) (holding that order vacating attachment of property was appealable under collateral order doctrine).

After the Supreme Court in *Cohen* created the collateral order exception to § 1291, the Supreme Court in *Coopers & Lybrand v. Livesay* refined the criteria of the collateral order exception by delineating a three-part test. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). First, the Supreme Court stated that the district court's order absolutely must determine the disputed issue. *Id.* Second, the district court's order must resolve a significant issue that is separate from the underlying cause of action in the case. *Id.* Third, the district court's order must be effectively unreviewable on appeal from a final judgment on the merits of the substantive claim. *Id.* Having established a three-part test, the Supreme Court held that a district court's denial of a motion to certify a case as a class action is not immediately appealable under the collateral order exception because the district court's order denying the motion failed to meet all three criteria of the collateral order exception. *Id.* at 469.

While courts of appeal immediately will hear an order that satisfies the collateral order exception, courts of appeals will dismiss an interlocutory appeal if the appeal fails to meet any one of the three criteria. *See, e.g.*, Louisiana Ice Cream Dist., Inc. v. Carvel Corp., 821 F.2d 1031, 1033-1034 (5th Cir. 1987) (holding that defendant could not appeal denial of motion to dismiss for improper venue under collateral order exception because motion failed to meet second criterion of doctrine); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 862 (7th Cir. 1984), *cert. denied*, 469 U.S. 890 (1984) (holding that plaintiff could not appeal

before rendering a final decision.[7] For an order to fall within the collateral

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order denying motion to remand action to state court under collateral order exception because motion failed to meet third criterion of doctrine); Nascone v. Spudnuts, Inc., 735 F.2d 763, 770-773 (3d Cir. 1984) (holding that plaintiff could not appeal order transferring action within federal court system under collateral order exception because court of appeals could review order on appeal from final decision). The third criterion of the collateral order exception is the most difficult criterion for litigants to meet because litigants must show that the district court order decides a claim that the litigant would lose if the litigant complied with the final judgment rule; very few motions meet the test. *See* Mitchell v. Forsyth, 472 U.S. 511, 524-527 (1985) (holding that denial of motion for summary judgment based on defendant's qualified immunity from suit satisfied third criterion of the collateral order exception); *also* Helstocki v. Meanor, 442 U.S. 500, 506-508 (1979) (holding that denial of absolute governmental immunity claim would be appealable under collateral order exception because right to be protected was right not to undergo trial); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (stating order is appealable under collateral order exception if appellate court effectively could not review district court's order after a final decision); Abney v. United States, 431 U.S. 651, 656-662 (1977) (holding denial of double jeopardy claim appealable under collateral order exception because right to be protected is right not to be subject to trial); Stack v. Boyle, 342 U.S. 1, 12 (1952) (stating order is appealable under collateral order exception if appellate court effectively could not review district court's order after a final decision); *infra* notes 46-73 and accompanying text (describing Supreme Court's decision in *Van Cauwenberghe v. Biard* narrowing third criterion of collateral order exception).

In stating that courts should interpret the collateral order exception narrowly, courts have noted that litigants whose claims do not meet the criteria of the collateral order exception may request that a district court certify an appeal under § 1292(b). *See supra* note 1 (discussing types of discretionary appeals governed by § 1292(b)). *See generally* INTERLOCUTORY RESTATEMENT, *supra* note 1, 19-21 (reviewing statutes governing appeals to federal circuit courts). Courts have not required litigants to use § 1292(b) before litigants attempt to appeal an interlocutory order under the collateral order exception. Several courts, however, that found that the claims of the litigants were not immediately appealable under the collateral order exception have indicated that § 1292(b) was available to litigants whose claims warranted immediate appeal. *See, e.g.*, Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1953 (1988) (holding that litigant could appeal order under § 1292(b) where court denied motion to dismiss based on *forum non conveniens* under § 1291); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 435 (1985) (holding that order disqualifying counsel which is not appealable under collateral order exception may be appropriate for appeal under § 1292(b)); Firestone Tire & Co. v. Risjord, 449 U.S. 368, 378-379 n.13 (1981) (same); Carlenstolpe v. Merck & Co., 819 F.2d 33, 35-37 (2d Cir. 1987) (holding that availability of § 1292(b) moderated court's refusal to hear denial of *forum non conveniens* motion that failed to satisfy criteria of collateral order exception); Nascone v. Spudnuts, Inc., 735 F.2d 763, 766 (3d Cir. 1984)(holding that litigants could appeal grant of motion to transfer action within the federal court system under § 1292(b) even though order did not meet criteria of collateral order exception); *also* Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239 (1988) (reviewing without discussing appealability of district court order denying motion to transfer within federal court system because district court certified order under § 1292(b) and circuit court accepted jurisdiction).

7. *See Coopers & Lybrand*, 437 U.S. at 468 (clarifying test for collateral order exception as three part test and stating that collateral order exception provides immediate, appellate review of small number of interlocutory orders). Because the final judgment rule in § 1291 promotes judicial efficiency, courts interpret the collateral order exception narrowly. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (creating collateral order exception for small number of cases); United States Tour Operators Ass'n v. Trans World Airlines, Inc., 556 F.2d 126, 129 (2d Cir. 1977) (narrowly applying collateral order exception because final judgment rule protects important interests). If an order, however, satisfies the three

order exception, the order must satisfy three criteria.[8] First, the order conclusively must determine a serious and unsettled question.[9] Second, the appellate court must be able to decide the issue that the order raises without discussing the merits of the action.[10] Third, the order must be an order that an appellate court would find unreviewable on appeal from a final decision.[11]

Although the basic requirements of the collateral order exception are well-established, courts differ on its applicability to particular issues.[12] Recently, courts have disagreed in analyzing whether the collateral order exception applies to a district court's order denying a motion to dismiss based on a contract provision that selects the forum in which the litigants agree to bring disputes under the contract (forum selection clause).[13] The

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criteria of the collateral order exception, appellate courts will hear the appeal immediately. The United States Supreme Court, however, has approved only a few interlocutory orders for immediate appeal under the stringent requirements of the collateral order exception. *See supra* note 6 (discussing Supreme Court's holding interlocutory orders in *Cohen* and *Swift & Co. Packers* immediately appealable under the collateral order exception). For example, an order denying a motion to dismiss based on double jeopardy grounds is immediately appealable under the collateral order exception. *See* Abney v. United States, 431 U.S. 651, 656-662 (1977) (holding that denial of double jeopardy claim is appealable under collateral order exception). An order denying a claim of absolute immunity or qualified immunity from suit also meets the criteria of the collateral order exception. *See* Mitchell v. Forsyth, 472 U.S. 511, 524-530 (1985) (holding that claim of qualified governmental immunity is appealable under collateral order exception); Helstocki v. Meanor, 442 U.S. 500, 506-508 (1979) (holding that claim of absolute governmental immunity from suit is appealable under collateral order exception).

8. *See supra* note 6 and accompanying text (describing three criteria under collateral order exception).

9. *See supra* note 6 (describing first criterion of collateral order exception).

10. *See supra* note 6 (describing second criterion of collateral order exception).

11. *See supra* note 6 (describing third criterion of collateral order exception).

12. *See supra* notes 6-7 and accompanying text (discussing narrow interpretation of collateral order exception and various orders appealable or not under the collateral order exception).

13. *See* Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988) (holding that denial of motion to dismiss based on forum selection clause in cruiseship passenger ticket is not appealable under collateral order exception because court could review order on appeal from final decision). *But see* Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 908 (3d Cir. 1988), *petition for cert. filed*, (Dec. 21, 1988) (holding that denial of motion to dismiss based on forum selection clause is immediately appealable under collateral order exception because order would be unappealable after final decision under § 2105); In re Diaz Contracting, Inc., 817 F.2d 1047, 1048 (3d Cir. 1987) (same); General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355-56 (3d Cir. 1986) (same); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 196-197 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (same).

Courts describe a forum selection clause as a contract clause in which the parties determine the forum where the parties will litigate disputes under the contract. *See* Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239, 2241 (1988) (referring to clause which provided that parties must bring disputes under contract in Manhattan, New York as "forum-selection clause"); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972) (referring to contract clause which required litigants to bring disputes under contract in London, England court as forum-selection clause); *also* INTERLOCUTORY RESTATEMENT, *supra* note 1, 96-135 (discussing reviewability of various district court orders regarding choice of forum).

controversy centers around the definition of "matters in abatement" as the phrase is used in section 2105 of title 28 of the United States Code.[14] In *Chasser v. Achille Lauro Lines*[15] the United States Court of Appeals for the Second Circuit considered whether the collateral order exception applies to a denial of a motion to dismiss based on a forum selection clause.[16]

In *Chasser* members of the Palestine Liberation Organization (PLO) hijacked a cruise ship, Achille Lauro, which the defendant, Achille Lauro Lines (Lauro Lines), operated.[17] The PLO held hostage the passengers who were aboard the ship.[18] As a result of injuries sustained during the hijacking, many of the American passengers filed suits against Lauro Lines in the United StatesDistrict Court for the Southern District of New York.[19] Lauro Lines moved to dismiss each of the actions alleging that the passengers could not sue Lauro Lines in New York because New York was an improper forum.[20] Lauro Lines noted that the tickets which Lauro Lines had issued to the passengers contained a forum selection clause, which required the

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14. *See* 28 U.S.C. § 2105 (1982) (disallowing appellate court from reversing ruling of lower court on "matters in abatement" that are unrelated to jurisdiction of court); *infra* note 31 (citing cases in which courts have discussed definition of "matters in abatement" under § 2105).

15. 844 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988).

16. Chasser v. Achille Lauro Lines, 844 F.2d 50, 51 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988).

17. *Id.*

18. *Id.* In addition to holding passengers hostage in *Chasser*, the PLO killed one passenger, Leon Klinghoffer. *Id.*

19. *Id.* Although most of the American passengers filed suit in the United States District Court for the Southern District of New York, Frank R. Hodes and his wife, Mildred Hodes, who also were passengers on the cruiseship Achille Lauro when the PLO hijacked the ship, filed suit for their injuries in the United States District Court for the District of New Jersey. Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905 (3d Cir. 1988). As in *Chasser*, the defendant in *Hodes* moved to dismiss the action based on the forum selection clause in the passengers' tickets. *Id.* at 907; *see infra* note 20-22 and accompanying text (discussing *Chasser* defendant's motion to dismiss in the Second Circuit). The district court denied the defendant's motion because the forum selection clause was unenforceable. *Hodes*, 858 F.2d at 907-908. The defendants appealed the district court's decision to the United States Court of Appeals for the Third Circuit. *Id.*

On appeal, the Third Circuit considered whether the defendant immediately could appeal a denial of a motion to dismiss based on the forum selection clause contained in the passenger tickets. *Id.* at 908. Having recently ruled on whether a denial of a motion to dismiss based on a forum selection clause was immediately appealable, the Third Circuit in *Hodes* relied on its decision in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.* and held that the denial of the defendant's motion to dismiss based on the forum selection clause was immediately appealable under the collateral order exception. *Id.*; *see* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 194-197 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (holding that defendant could immediately appeal denial of motion to dismiss based on forum selection clause under collateral order exception); *see infra* notes 91-110 and accompanying text (discussing *Coastal Steel* court's holding that motion to dismiss based on forum selection clause was immediately appealable under collateral order exception).

20. *Chasser*, 844 F.2d at 51-52.

passengers to bring any suits against Lauro Lines in Naples, Italy.[21] The passengers argued that the trial court should not enforce the forum selection clause because the clause did not adequately inform the passengers of the rights the passengers were waiving under the clause.[22] The district court denied Lauro Lines's motion to dismiss and refused to enforce the forum selection clause because the clause did not notify the passengers that the passengers were waiving the right to sue in the United States.[23] Lauro Lines appealed the district court's order denying the motion to dismiss to the United States Court of Appeals for the Second Circuit.[24]

On appeal Lauro Lines argued that Lauro Lines immediately could appeal the district court's order denying Lauro Lines's motion to dismiss under the collateral order exception.[25] The passengers moved to dismiss the appeal, alleging that the order did not satisfy the criteria of the collateral order exception.[26] The Second Circuit granted the passengers' motion to dismiss Lauro Lines's appeal on the grounds that the order was not immediately appealable under the collateral order exception.[27] The Second Circuit held that the district court's denial of Lauro Lines's motion to dismiss based on the forum selection clause could be reviewed on appeal from a final decision and, therefore, the appeal failed to meet the third criterion of the collateral order exception.[28]

In dismissing Lauro Lines's appeal for failure to meet the third criterion of the collateral order exception, the *Chasser* court considered and rejected

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21. *Id.* at 51. In *Chasser* the forum selection clause included in the tickets for the cruise required the passengers of the Achille Lauro to bring any suits arising from the cruise in Naples, Italy. *Id.* The forum selection clause provided:

> Art. 31—VENUE OF JUDICIAL PROCEEDINGS—All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived. . . .

Brief on Behalf of Appellant Lauro Lines S.R.L. at 3, Chasser v. Achille Lauro Lines, 844 F.2d 50, 51 (2d Cir. 1988) (Nos. 87-9081, 87-9083, 87-9085, 87-9087, 87-9089 and 87-9091), *cert. granted*, 109 S. Ct. 217 (1988) (describing forum selection clause in passenger's tickets).

22. *Chasser*, 844 F.2d at 51.

23. *Id.* at 51-52.

24. *Id.* at 52. Following the defendant's appeal to the United States Court of Appeals for the Second Circuit in *Chasser*, the plaintiffs moved to dismiss the defendant's appeal. *Id.* The plaintiffs argued that the district court's order denying the defendant's motion to dismiss based on the forum selection clause was neither a final order under § 1291, nor an immediately appealable collateral order under the collateral order exception. *Id.*

25. *Id.* at 52.

26. *Id.*

27. *Id.* The *Chasser* court held that a district court's order denying a motion to dismiss based on a forum selection clause was effectively reviewable after a final decision. *Id.* Even though the litigants would incur greater expenses because of the holding, the *Chasser* court noted that the Supreme Court had explicitly stated that increased trial expenses are not a basis for immediate appeal. *Id.*; *see, e.g.*, Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 436 (1985) (stating that additional expense to litigants was not sufficient to set aside final judgment rule).

28. *Chasser*, 844 F.2d at 55.

the argument that section 2105 of title 28 of the United States Code prevents review of the denial of the motion to dismiss on appeal from a final decision.[29] The Second Circuit noted that section 2105 provides "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."[30] Courts have defined the phrase "matter in abatement" under section 2105 to mean a motion which is unrelated to the underlying cause of action.[31] Courts defining the phrase explain that if a court grants the motion, the litigants can bring the action in another forum or another pleading even though the motion destroys the pending action.[32] Section 2105 does not prevent an appellate court from reviewing matters that affect the jurisdiction of the court.[33] Arguably a denial of a motion to dismiss based on a forum selection clause meets the definition of a matter in abatement.[34] However,

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29. *Id.* at 53-54; *see* 28 U.S.C. § 2105 (1982) (stating that appellate courts may not review nonjurisdictional matters in abatement). Section 2105 of Title 28 of the United States Code provides that neither the Supreme Court nor the federal courts of appeals shall overturn an erroneous ruling on a matter in abatement that does not affect the court's jurisdiction. 28 U.S.C. § 2105 (1982). *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3903 (discussing § 2105).

30. *Chasser*, 844 F.2d at 53; *see* 28 U.S.C. § 2105 (1982) (preventing appellate review of nonjurisdictional matters in abatement).

31. *See* 28 U.S.C. § 2105 (1982) (disallowing appellate court from reversing ruling of lower court on "matters in abatement" that are unrelated to jurisdiction of court); *also* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 196 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (defining "matters in abatement" as motions which, if granted by district court, would result in the dismissal of action, but would not prevent plaintiff from filing similar action in another forum or in another pleading); Hayes v. Allstate Ins. Co., 722 F.2d 1332, 1333 n.1 (7th Cir. 1983) (stating that district court's order granting stay of proceedings in district court so that parties could proceed to alternate remedy as stated in contract was not "matter in abatement" under § 2105 because order ruled on merits of action); Bowles v. Wilke, 175 F.2d 35, 37-38 (7th Cir. 1949), *cert. denied*, 338 U.S. 861 (1949) (defining "abatement" under former version of § 2105 as overthrow or destruction of pending action apart from cause of action); McHie v. McHie, 78 F.2d 351, 352-354 (7th Cir. 1935) (discussing definition of "abatement" under former version of § 2105). *See generally* 1 C.J.S. *Abatement and Revival* § 1 (1985) (discussing matters in abatement); BLACK'S LAW DICTIONARY 1037 (5th ed. 1979) (defining "plea in abatement" as plea that contests where, when or how plaintiff asserts cause of action without disputing merits of plaintiff's cause of action).

32. *See supra* note 31 (discussing courts that have defined "matters in abatement").

33. *See* Hill v. Walker, 167 F. 241, 245 (8th Cir. 1909), *cert. denied*, 214 U.S. 517 (1909) (holding that former, identical version of § 2105 permitted litigants to raise jurisdictional questions after final decisions even though question could cause abatement of action unrelated to cause of action); 28 U.S.C. § 2105 (1982). Section 2105 applies to matters relating to the court's jurisdiction over the subject matter of the complaint, rather than the court's personal jurisdiction over the defendant. Hinds v. Keith, 57 F. 10 (5th Cir. 1893). The holding in *Hinds v. Keith* is consistent with rule 12(h)(3) of the Federal Rules of Civil Procedure, which states that any party, or any court *sua sponte*, may raise the issue of subject matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3) (governing subject matter jurisdiction). Rule 12(h)(1), however, states that a defendant waives his right to contest the court's exercise of personal jurisdiction if the party asserting the court's lack of personal jurisdiction does not raise the issue of the court's jurisdiction in a timely manner. *See* FED. R. CIV. P. 12(h)(1) (governing personal jurisdiction).

34. *See supra* note 31 (citing cases in which courts have defined "matters in abatement").

as the Second Circuit in *Chasser* noted, appellate courts have reviewed denials of motions to dismiss based on both *forum non conveniens* and improper venue after final decisions without reference to section 2105's prohibition of review based on matters in abatement.[35] Accordingly, the

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35. Chasser v. Achille Lauro Lines, 844 F.2d 50, 54 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988); *see* 28 U.S.C. § 2105 (1982) (prohibiting appellate review of "matters in abatement" after final decision); Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1952-1953 (1988) (noting that court could review district court's order denying motion to dismiss based on *forum non conveniens* after final decision while holding order not appealable under collateral order exception); Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239, 2241-2250 (1988) (reviewing grant of federal *forum non conveniens* motion); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (court reviewed grant of *forum non conveniens* motion after final decision); Carlenstolpe v. Merck & Co., 819 F.2d 33, 35-36 (2d Cir. 1987) (denying interlocutory appeal of district court order that denied *forum non conveniens* motion because defendant may appeal order after final decision); Partrederiet Treasure Saga v. Joy Mfg. Co., 804 F.2d 308, 310 (5th Cir. 1986) (holding that district court's order denying *forum non conveniens* motion was not immediately appealable under collateral order doctrine because order would be reviewable on appeal from final decision); Rosenstein v. Merrell Dow Pharmaceuticals, Inc., 769 F.2d 352, 354 (6th Cir. 1985) (same); *also* Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967) (reviewing denial of motion to dismiss for improper venue after final decision); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue after final decision); Gill v. United States, 184 F.2d 49, 50-51 (2d Cir. 1950) (reviewing denial of motion to dismiss for improper venue after final decision).

Courts grant a defendant's motion to dismiss based on *forum non conveniens* when plaintiffs bring actions in forums that are so inconvenient for defendants that dismissal of the action is appropriate. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (describing factors courts may examine when deciding whether to grant *forum non conveniens* motion). In deciding whether to grant a defendant's *forum non conveniens* motion, the Supreme Court stated that courts must consider whether the forum is so inconvenient for a defendant that dismissal of the action is appropriate. *Id.* Accordingly, the Supreme Court stated that courts should consider the sources of proof available for the litigant, the compulsory service of process available to compel witnesses to attend the trial in a particular forum, and the public's interest in having an action tried in a particular forum require the court to dismiss the action. *Id.*

On the other hand, a forum selection clause in a contract represents the parties' agreement that the forum specified in the clause is the only proper forum in which to bring actions under the contract. Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239, 2244 (1988) (describing forum selection clause as significant factor for court to consider when making federal *forum non conveniens* determination). The federal courts should give a forum selection clause controlling weight in all but the most exceptional cases. *See id.* at 243 n.7; Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (defining federal policy favoring forum selection clauses). Courts need not consider the underlying cause of action to discuss whether the forum selection clause is enforceable because the forum selection clause is usually a separate and distinct provision which the court may examine separately. *See Coastal Steel*, 709 F.2d at 195 (describing forum selection clause as separable from merits of underlying cause of action).

While motions to dismiss based on *forum non conveniens* and forum selection clauses are distinguishable, forum selection clauses and *forum non conveniens* motions serve similar purposes. *See Chasser*, 844 F.2d at 54 (stating that forum selection clauses and *forum non conveniens* motions are similar). Forum selection clauses are similar to *forum non conveniens* motions in that litigants may utilize both as methods to choose where the action will be litigated. *Id.*; *see Stewart*, 108 S. Ct. at 2245 (stating that parties use forum selection clauses

court reasoned that motions to dismiss based on *forum non conveniens* and improper venue are not matters in abatement under section 2105.[36] The Second Circuit then concluded that denials of motions to dismiss based on forum selection clauses in contracts are similar to denials of motions to dismiss based on *forum non conveniens* or improper venue.[37] Thus, the *Chasser* court reasoned that if denials of motions to dismiss based on *forum non conveniens* or improper venue were not matters in abatement under section 2105, then matters in abatement do not include denials of motions to dismiss based on forum selection clauses.[38] In addition to basing its holding on the similarity between motions to dismiss based on forum selection clauses and those based on *forum non conveniens*, the Second Circuit noted that a forum selection clause grants an important right that courts should recognize and enforce, and thus, one that appellate courts should review after judgment.[39] The Second Circuit, therefore, held that section 2105 does not prevent an appellate court from reviewing the district court's denial of defendant's motion to dismiss after the district court had rendered a final decision because courts have not invoked section 2105 to bar post-judgment review of similar orders.[40]

In addition to holding that section 2105 does not apply to a district court's denial of a motion to dismiss based on a forum selection clause, the *Chasser* court noted that the language of section 2105 indicates that a litigant cannot appeal matters in abatement under any circumstances.[41] The Second Circuit stated that if section 2105 prevented an appellate court from reviewing a court's denial of Lauro Lines' motion after a final decision, then section 2105 seemed to prevent review of the court's order during the interlocutory stage as well.[42] The Second Circuit thus found that section 2105 would not prevent a court of appeals from reviewing a motion to dismiss after a final decision.[43] Accordingly, the court found that the district court order in *Chasser* failed to satisfy the third criterion of the collateral order exception and dismissed the appeal without reaching the first two

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to choose forum); *Gulf Oil*, 330 U.S. at 507 (holding that defendants make *forum non conveniens* motion when plaintiff's choice of forum is too inconvenient for defendant). However, the court's discussion of the choice of forum is broader under the *forum non conveniens* doctrine than under a forum selection clause; a court may use a forum selection clause to assist the court in determining whether to grant a *forum non conveniens* motion. *See Stewart*, 108 S. Ct. at 2244 (describing forum selection clause as one factor for court to consider when making federal *forum non conveniens* determination).

36. *Chasser*, 844 F.2d at 54.

37. *Id.*; *see supra* note 35 and accompanying text (comparing forum selection clause with *forum non conveniens* motion).

38. *Chasser*, 844 F.2d at 54; *see* 28 U.S.C. § 2105. *But see infra* notes 95-103 and accompanying text (discussing Third Circuit's holding in *Coastal Steel* that forum selection clause satisfied definition of "matters in abatement" under § 2105).

39. *Chasser*, 844 F.2d at 54.

40. *Id.*

41. *Id.* at 53.

42. *Id.* at 53-54.

43. *Id.*

criteria of the collateral order exception.[44] Following the Second Circuit's decision, the United States Supreme Court granted certiorari in the *Chasser* case to determine whether a defendant immediately may appeal a denial of a motion to dismiss based on a foreign forum selection clause under the collateral order exception.[45]

After the Second Circuit's *Chasser* decision, the United States Supreme Court handed down an opinion construing the collateral order exception. In *Van Cauwenberghe v. Biard*[46] the United States Supreme Court considered whether the collateral order exception applies to a denial of a motion to dismiss based on the grounds of immunity from civil service of process or a denial of a motion to dismiss based on the doctrine of *forum non conveniens*.[47] In *Van Cauwenberghe* the plaintiff served the defendant with a civil summons and complaint while the defendant was in the United States under the extradition treaty between the United States and Switzerland.[48] The defendant moved in the United States District Court for the Central District of California to dismiss the action on the grounds of *forum non conveniens* or, alternatively, on the grounds of immunity from civil service of process.[49] The district court summarily denied the defendant's motion to dismiss on both claims.[50] As a result, the defendant appealed the district court's order to the United States Court of Appeals for the Ninth Circuit.[51] The Ninth Circuit, in a one-line opinion, dismissed the defendant's appeal for lack of jurisdiction.[52] The United States Supreme Court granted certiorari.[53] The Supreme Court stated that the district court's order denying defendant's motion to dismiss was appealable only if the district court's order satisfied the three criteria of the collateral order exception.[54]

In deciding whether the district court's order satisfied the collateral order exception, the *Van Cauwenberghe* court first considered whether the defendant immediately could appeal the district court's denial of the defendant's motion to dismiss based on immunity from civil service of process

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44. *Id.* at 53-55; *see* 28 U.S.C. § 2105 (1982). In addition to finding that § 2105 did not prevent appellate review of the district court's order denying the motion to dismiss after a final decision, the *Chasser* court noted that the defendant had not asked the district court to certify the matter for appeal pursuant to § 1292(b). *Chasser*, 844 F.2d at 55; *see* 28 U.S.C. § 1292(b); *supra* note 1, 6 and accompanying text (describing appeals under § 1292(b)).

45. Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988).

46. 108 S. Ct. 1945 (1988).

47. Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1949-1953 (1988); *see supra* notes 29-40 and accompanying text (discussing *Chasser* court's holding that denial of motion to dismiss based on forum selection clause is not appealable under collateral order exception).

48. *Van Cauwenberghe*, 108 S. Ct. at 1948.

49. *Id.* at 1948-1949.

50. *Id.* at 1949.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

and *forum non conveniens*.[55] The defendant argued that under an extradition treaty, the defendant was immune from civil service of process.[56] The defendant further contended that immunity from civil service of process included the right not to stand trial.[57] Accordingly, the defendant argued that because the treaty gave the defendant the right not to stand trial, the district court's denial of the defendant's motion to dismiss could not be effectively reviewed and corrected after a final decision.[58] Therefore, the defendant concluded, the third criterion of the collateral order exception was met.[59]

While agreeing that the right not to stand trial is a right which the defendant loses if the appellate court does not review the decision at the pre-trial stage, the Supreme Court found that the right of immunity from civil service of process does not include the right not to stand trial.[60] Therefore, the Supreme Court held that a denial of a motion to dismiss based on immunity from civil service of process did not meet the third criterion of the collateral order exception, and was not immediately appealable.[61] Assuming that the defendant had a meritorious claim of immunity from service of process, the *Van Cauwenberghe* Court stated that the critical question in determining whether the defendant's claim met the third criterion of the collateral order exception was whether the essence of the right that the defendant claimed was the right not to stand trial.[62] The *Van Cauwen-*

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55. *Id.* at 1949-1952.

56. *Id.* at 1950.

57. *Id.* at 1950. In *Van Cauwenberghe* the defendant argued that the principle of specialty in extradition law gave the defendant a right not to stand trial. *Id.* The United States Supreme Court created the principle of specialty in United States v. Rauscher. United States v. Rauscher, 119 U.S. 407, 430 (1886). In creating the principle of specialty, the Supreme Court stated that if a court gains jurisdiction over a defendant brought under the provisions of an extradition treaty, the court only may try the defendant for one of the offenses described in the extradition treaty. *Id.* In addition the court may try the defendant only for the offense with which he is charged in the proceeding for his extradition. *Id.*

58. *Van Cauwenberghe*, 108 S. Ct. at 1949-1950.

59. *Id.*

60. *Id.* at 1950.

61. *Id.*

62. *Id.*; *see* Mitchell v. Forsyth, 472 U.S. 511, 525-527 (1985) (holding that interlocutory order does not satisfy third criterion of collateral order exception unless defendant has right not to stand trial). In *Mitchell v. Forsyth*, the Supreme Court noted that the issue in determining whether the defendant's claim met the third criterion of the collateral order exception was whether the appellant claimed immunity from suit or immunity from a binding judgment of the court. *Id.* at 525. After *Mitchell*, litigants must claim immunity from suit in order to meet the third criterion of the collateral order exception. *Van Cauwenberghe*, 108 S. Ct. at 1950.

In deciding whether the essence of the right the defendant claimed was the right not to stand trial, the Supreme Court in *Van Cauwenberghe* noted that all meritorious pretrial claims essentially are a right not to stand trial. *Van Cauwenberghe*, 108 S. Ct. at 1950. The *Van Cauwenberghe* Court mentioned the ease with which litigants can transform pretrial claims for dismissal into claims of the right not to stand trial. *Van Cauwenberghe*, 108 S. Ct. at 1951. The Supreme Court, however, found that the finality requirement in § 1291 demands that the right asserted effectively would be lost if the litigant could not immediately appeal the order

berghe Court stated that the right of immunity from service of process does not include the right to be free from a civil trial.[63] The *Van Cauwenberghe* Court explained instead, that the right of immunity from service of process is a right not to be subject to a binding judgment of a particular forum.[64] The *Van Cauwenberghe* Court reasoned that an appellate court does not have to reverse a denial of a motion to dismiss based on immunity from civil service of process at the interlocutory stage to protect the defendant's right not to be bound by the judgment of a particular forum.[65] Accordingly, the Supreme Court held that an appellate court could review the district court's order denying the defendant's motion to dismiss based on immunity from service of process on appeal from a final decision.[66] Finding that the order failed to meet the third criterion of the collateral order exception, the *Van Cauwenberghe* Court held that the defendant's appeal of the motion to dismiss based on immunity from civil service of process was not an immediately appealable collateral order.[67]

In addition to deciding whether the defendant's motion to dismiss based on immunity from civil service of process was immediately appealable, the *Van Cauwenberghe* Court considered whether the denial of the defendant's motion to dismiss based on *forum non conveniens* met the three criteria of the collateral order exception.[68] The *Van Cauwenberghe* Court analyzed the defendant's *forum non conveniens* argument under the second criterion of the collateral order exception, which provides that the district court's order must be completely separate from the merits of the underlying cause of action.[69] The Supreme Court noted that courts considering a *forum non conveniens* motion have substantial flexibility to consider the merits of each dispute.[70] The Supreme Court observed that when courts inquire into the convenience of the forum, courts consider the choice of law issues raised by the dispute, the distance the litigants must travel, and the likelihood that the plaintiff would find alternative forums so inconvenient that the plaintiff would not maintain the suit.[71] The Supreme Court also noted that courts ruling on *forum non conveniens* motions consider the substance ofthe dispute between the parties to determine the availability of sources of proof which

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affecting the right. *Id.*; *see* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) (noting that district court's order does not satisfy collateral order exception unless litigants would lose right which order decides if appellate court refuses to review order immediately). Accordingly, the Supreme Court found that the right to immunity from service of process did not include the right to avoid a civil trial. *Van Cauwenberghe*, 108 S. Ct. at 1951.

63. *Van Cauwenberghe*, 108 S. Ct. at 1951.

64. *Id.* at 1951-1952.

65. *Id.* at 1952.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1953; *see supra* note 35 and accompanying text (describing criteria court may consider when deciding whether to grant *forum non conveniens* motion).

71. *Van Cauwenberghe*, 108 S. Ct. at 1952-53.

will be necessary during the litigation.[72] Because courts are free to focus on the facts of each case, the Supreme Court found that the court's decision not to dismiss based on *forum non conveniens* is too deeply involved with the underlying matter in dispute to meet the second criterion of the collateral order exception.[73]

Van Cauwenberghe is the Supreme Court's most recent decision construing the collateral order exception.[74] In *Van Cauwenberghe* the Supreme Court held that neither *forum non conveniens* nor immunity from service of process are sufficient grounds to justify interlocutory appeal from a denial of a motion to dismiss.[75] The Supreme Court's reasoning in *Van Cauwenberghe* may be influential when the Supreme Court considers the *Chasser* case and attempts to resolve the disagreement among the circuit courts over whether the denial of a motion to dismiss based on a forum selection clause satisfies the collateral order exception.[76] Until the Supreme Court decides the *Chasser* case, the Second Circuit's opinion in *Chasser* represents a majority of circuit courts holding that denials of motions to dismiss based on forum selection clauses do not meet the third criterion of the collateral order exception and are not immediately appealable.[77] A

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72. *Id.* at 1953.

73. *Id.* at 1952-1953. Like the *Van Cauwenberghe* court, other courts have ruled on the question of whether a motion to dismiss meets the second criterion of the collateral order exception; the Supreme Court in *Van Cauwenberghe* polled the circuits that have ruled on the appealability of a *forum non conveniens* motion under the collateral order exception. *Id.* at 1952 n.6. The *Van Cauwenberghe* court found that only one circuit had granted an appeal of a denial of a motion to dismiss based on *forum non conveniens* under the collateral order exception. *See id.* (listing courts that have held that *forum non conveniens* motion is not immediately appealable under collateral order exception).

The Supreme Court acknowledged that courts would not always have to explore the merits of a case in deciding whether to grant a *forum non conveniens* motion. *Id.* at 1953. The Supreme Court, however, reasoned that categories of cases rather than individual fact scenarios were determinative in formulating a rule of appealability under § 1291. *Id.*; *see* 28 U.S.C. § 1291 (governing appeals from final decisions). The Supreme Court noted that § 1292(b) allows appellate courts to review interlocutory orders in exceptional cases. *Van Cauwenberghe*, 108 S. Ct. at 1953-1954. Accordingly, the Supreme Court held that in an appropriate *forum non conveniens* case, in which the merits of the underlying cause of action are sufficiently separate from the court's analysis of the *forum non conveniens* motion, the district court may certify the matter for appeal pursuant to the provisions of § 1292(b). *Id.*; *see supra* note 6 (discussing courts' use of § 1292(b) when courts deny appeals under collateral order exception).

74. *See Van Cauwenberghe*, 108 S. Ct. 1950 (construing collateral order exception).

75. *Id.* at 1949-1953.

76. *See id.* at 1952, 1953 (holding that neither denial of motion to dismiss based on *forum non conveniens* nor motion to dismiss based on immunity from civil service of process was appealable under collateral order exception); *supra* notes 29-40 and accompanying text (describing Second Circuit's holding in *Chasser* that district court order denying motion to dismiss based on forum selection clause was not appealable under collateral order exception). *But see infra* notes 91-110 and accompanying text (describing Third Circuit's holding that district court order denying motion to dismiss based on forum selection clause was immediately appealable under collateral order exception).

77. *See* Chasser v. Achille Lauro Lines, 844 F.2d 50, 53-55 (2d Cir.), *cert. granted*, 109

minority of circuit courts, however, hold that denials of motions to dismiss based on forum selection clauses meet all three criteria of the collateral order exception, and are immediately appealable collateral orders.[78] For example, the United States Court of Appeals for the Third Circuit, in *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*[79], held that a denial of a motion to dismiss based on a forum selection clause in a contract met the three criteria of the collateral order exception and was an immediately appealable, collateral order.[80] In *Coastal Steel* the plaintiff, Coastal Steel Corp. (Coastal), contracted with Sir James Farmer Norton & Co. (Farmer Norton) to build a steel plant.[81] To obtain a part for the steel plant, Farmer Norton sub-contracted with the defendant, Tilghman-Wheelabrator, Ltd. (Tilghman).[82] The sub-contract contained a forum selection clause requiring the parties to bring disputes arising out of the sub-contract in an English court.[83] As a result of damages to Coastal's steel plant, Coastal sued Tilghman and alleged that the component part, which Tilghman had installed in the plant, had caused the damages.[84] Because Coastal had filed a petition

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S. Ct. 217 (1988) (holding that denial of motion to dismiss based on forum selection clause did not satisfy collateral order exception and was not immediately appealable); Louisiana Ice Cream Distrib., Inc. v. Carvel Corp., 821 F.2d 1031, 1032-34 (5th Cir. 1987) (holding motion to dismiss for improper venue based on forum selection clause not immediately appealable under collateral order exception); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 862 (7th Cir. 1984), *cert. denied*, 469 U.S. 890 (1984) (holding that denial of motion to dismiss action in federal court based on forum selection clause was not immediately appealable under collateral order exception). *But see* Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 908 (3d Cir. 1988) (holding denial of motion to dismiss based on forum selection clause immediately appealable under collateral order exception); *Coastal Steel*, 709 F.2d at 195-197 (same); Farmland Indus., Inc. v. Frazier-Parrott Commodities, 806 F.2d 848, 850-851 (8th Cir. 1986) (holding that denial of motion to dismiss for improper venue based on forum selection clause was immediately appealable under collateral order exception).

78. *See supra* note 77 (describing split among circuits on whether parties immediately may appeal denial of motion to dismiss based on forum selection clause under collateral order exception).

79. 709 F.2d 190 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983).

80. *See* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 197 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (holding that denial of motion to dismiss based on forum selection clause satisfied collateral order exception); *also* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3903 (Supp. 1988) (discussing *Coastal Steel* court's use of § 2105 to hold denial of motion to dismiss based on forum selection clause immediately appealable under collateral order exception).

81. *Coastal Steel*, 709 F.2d at 192. In *Coastal Steel* the contract between the plaintiff and Sir James Farmer Norton & Co. (Farmer Norton) did not specify the supplier of the blast unit. *Id.* The plaintiff, however, did suggest to Farmer Norton that a British firm, St. Georges Engineers, Ltd. (St. Georges) might supply an adequate unit. *Id.* Farmer Norton received a quotation from St. Georges for the production of the blast unit. *Id.* Tilghman Wheelabrator Ltd. (Tilghman) acquired St. Georges. *Id.*

82. *Id.*

83. *Id.* at 193. In addition to noting that the forum selection clause in the sub-contract between Farmer Norton and St. Georges required the parties to bring any action arising out of the sub-contract in an English court, the *Coastal Steel* court stated that the forum selection clause required the court to apply English law in deciding the case. *Id.*

84. *Id.*

for reorganization, Coastal filed its complaint against Tilghman in bankruptcy court.[85] Tilghman moved to dismiss the suit under the forum selection clause in the sub-contract and the doctrine of *forum non conveniens*.[86] The bankruptcy court denied Tilghman's motion to dismiss.[87] Tilghman appealed the decision of the bankruptcy court to the United States District Court for the District of New Jersey.[88] The district court affirmed the bankruptcy court's denial of Tilghman's motion to dismiss.[89] As a result, Tilghman appealed the district court's order to the United States Court of Appeals for the Third Circuit.[90]

On appeal, the Third Circuit found that Tilghman immediately could appeal the order because the order satisfied the three criteria of the collateral order exception.[91] The Third Circuit reasoned that the district court's order denying Tilghman's motion to dismiss met the first criterion of the collateral order exception because the district court's denial of Tilghman's motion finally determined a serious question: where the parties would litigate the action.[92] In addition the Third Circuit found that the district court's order met the second criterion of the collateral order exception because the court's review of a forum selection clause would not require the court to discuss the merits of the action.[93] Finding that a court would not have to consider

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85. *Id.* Although the plaintiff in *Coastal Steel* brought the action in bankruptcy court with the plaintiff's petition for reorganization, the Supreme Court since has held that bankruptcy courts may not hear any collateral claims of parties in bankruptcy proceedings. *Id.* at 199; *see* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982) (holding that bankruptcy courts no longer have jurisdiction over collateral claims of parties in bankruptcy proceedings).

86. *Coastal Steel*, 709 F.2d at 193.

87. *Id.*

88. *Id.* The defendant appealed the bankruptcy court's denial of the defendant's motion to dismiss to the district court under section 1334(b) of title 28 of the United States Code which, at that time, allowed litigants in bankruptcy court to appeal decisions of the bankruptcy judge to a federal district court. *Id.*; *see* 28 U.S.C. § 1334(b) (1982) (giving district court jurisdiction to hear appeals from decisions of bankruptcy courts).

89. *Coastal Steel*, 709 F.2d at 193.

90. *Id.* Before appealing to the district court's denial of defendant's motion to dismiss to the Third Circuit under § 1291, the defendant in *Coastal Steel* asked the district court to certify the appeal under § 1292(b). *Id.*; *see supra* note 1 (distinguishing § 1291 from § 1292); *supra* note 6 (discussing courts that mention the utility of § 1292(b) when denying defendant's appeal under the collateral order exception). The district court refused to certify the motion to dismiss for immediate appeal under § 1292(b). *Coastal Steel*, 709 F.2d at 193. Therefore, the defendant tried to appeal under § 1291 and the collateral order exception. *Id.*

91. *Coastal Steel*, 709 F.2d at 197; *see supra* notes 1-5 and accompanying text (discussing § 1291). Although the defendant in *Coastal Steel* only argued that the district court's order was a final decision under § 1291, a federal bankruptcy statute required the Third Circuit to examine all possible sources of jurisdiction over the appeal because the action arose in a bankruptcy proceeding. *Id.* at 193; *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 236-41, 409, 92 Stat. 2667-71, 2685 (1978) (former version of bankruptcy code requiring appellate court to examine all possible avenues of appeal from bankruptcy proceedings).

92. *Coastal Steel*, 709 F.2d at 195.

93. *Id.* In *Coastal Steel* the Third Circuit determined that the selection of a forum in a

the merits of the underlying cause of action, the Third Circuit stated that a forum selection clause establishes a legal right which is separate from the merits of the underlying case.[94]

In addition to finding that the district court's order satisfied the first two criteria of the collateral order exception, the Third Circuit in *Coastal Steel* found that the district court's order met the third criterion of the collateral order exception.[95] The Third Circuit reasoned that the district court's order met the third criterion because section 2105, which prevents appellate review based upon non-jurisdictional matters in abatement, prevented an appellate court from reviewing the district court's order after a final decision.[96] The Third Circuit found that the district court's order refusing to dismiss based on a forum selection clause was a matter in abatement.[97] Relying on the accepted definition of "matters in abatement," the Third Circuit reasoned that an appellate court's reversal of the district court's order would terminate the action, but would not prohibit Coastal subsequently from filing the action in a different court.[98] In addition the Third Circuit noted that an appellate court does not address the merits of a plaintiff's claim in deciding whether to reverse the district court's order.[99] The Third Circuit noted further that a denial of a motion to dismiss based on a forum selection clause was not a jurisdictional matter.[100] Accordingly, the Third Circuit found that a denial of a motion to dismiss based on a forum selection clause is a "matter in abatement" within the meaning of section 2105.[101] The Third Circuit, therefore, found that the district court's order denying Tilghman's motion to dismiss fell under section 2105 and

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contractual provision is analytically distinct from the substantive cause of action that the litigants argue in the forum. *Id.* The *Coastal Steel* court found that, like the right against double jeopardy or the right of governmental immunity from suit, the right that a forum selection clause establishes is separate from the cause of action. *Id.* The *Coastal Steel* court also found that a forum selection clause provides litigants an important right that courts should enforce. *Id.* Accordingly, the *Coastal Steel* court found that a denial of a motion to dismiss based on a forum selection clause meets the second criterion of the collateral order exception because the denial of the motion determines an important issue that is separate from the merits of the underlying substantive claim. *Id.*

94. *Id.*

95. *Id.* at 196-197.

96. *Id.*; *see* 28 U.S.C. § 2105 (1982) (preventing appellate review of nonjurisdictional matters in abatement). *But see supra* notes 29-40 and accompanying text (discussing *Chasser* court's holding that § 2105 does not prevent appeal of denial of motion to dismiss based on a forum selection clause after final decision).

97. *Coastal Steel*, 709 F.2d at 196-197.

98. *Id.*; *see supra* note 31 and accompanying text (discussing definition of "matters in abatement").

99. *Coastal Steel*, 709 F.2d at 197.

100. *Id.* at 196. The *Coastal Steel* court, however, did not discuss why the district court's order denying Tilghman's motion to dismiss was not a decision based on the jurisdiction of the court. *Id.*

101. *Id.*; *see* 28 U.S.C. § 2105 (1982) (prohibiting appellate review of nonjurisdictional matters in abatement).

thus met the third criterion of the collateral order exception.[102] Accordingly, the Third Circuit found that the order was immediately appealable under the collateral order exception.[103]

Although the Third Circuit in *Coastal Steel* found that section 2105 prevented appellate review of the district court's order after a final decision, the Third Circuit found that section 2105 does not apply to interlocutory appeals under the collateral order exception.[104] Noting that the language of section 2105 originated in the Judiciary Act of 1789,[105] the Third Circuit stated that when Congress enacted the Judiciary Act, Congress did not provide for interlocutory appeals.[106] The Third Circuit reasoned that, because the Judiciary Act did not include provisions for interlocutory appeal, section 2105 should not apply to interlocutory appeals.[107] Similarly, the Third Circuit reasoned that because the collateral order exception did not exist when Congress enacted the original version of section 2105, section 2105 does not apply to an order of a district court that satisfies the collateral order exception.[108] Having found that section 2105 prevented review of the district

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102. *Id.* at 196.

103. *Id.* at 197. While the majority in *Coastal Steel* held that the district court's order denying the defendant's motion to dismiss satisfied the third criterion of the collateral order exception, the concurrence in *Coastal Steel* stated that the majority did not need to discuss § 2105 in order to hear the defendant's appeal. *Id.* at 212; *see* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (holding that courts should interpret final judgment rule as practical rather than technical). The concurrence in *Coastal Steel* noted that the Supreme Court in *Gillespie v. United States Steel Corp.* granted courts of appeal discretion to hear appeals of orders that are not final decisions, but are appeals that courts should hear immediately. *Coastal Steel*, 709 F.2d at 212-213; *see Gillespie*, 379 U.S. at 152 (noting that courts should give finality requirement of § 1291 practical rather than technical construction). The concurrence in *Coastal Steel* recognized that courts should grant appeals under *Gillespie* sparingly because the power *Gillespie* granted was extraordinary. *Coastal Steel*, 709 F.2d at 213. The concurrence in *Coastal Steel*, however, stated that the defendant could appeal the district court's order denying the defendant's motion to dismiss under *Gillespie*. *Id.* Accordingly, the concurrence in *Coastal Steel* reasoned that the majority incorrectly based its decision to hear the defendant's appeal under the collateral order exception on § 2105. *Id.* at 212. The concurrence in *Coastal Steel* also noted that § 2105 seems to prevent review of all nonjurisdictional matters in abatement. *Id.* at 212 n.6. The concurrence further reasoned that if § 2105 prevents review of a district court's order denying a motion to dismiss based on a forum selection clause after a final decision, then § 2105 also prevents review of the order at the interlocutory stage. *Id.*; *see supra* notes 41-43 and accompanying text (stating *Chasser* court's reasoning that § 2105 would prevent review at all stages of litigation if § 2105 applied to denial of motion to dismiss based on forum selection clause).

104. *Coastal Steel*, 709 F.2d at 196.

105. *Id.*; *see* Judiciary Act of 1789, 1 Stat. 73, 84 (1789) (formulating original version of present § 2105).

106. *Coastal Steel*, 709 F.2d at 196. Although the original Judiciary Act did not include provisions for interlocutory appeal, Congress later enacted § 1292. *See supra* note 1 (describing § 1292). Section 1292(a) provides circumstances when litigants have interlocutory appeals as of right, and § 1292(b) provides for interlocutory appeals at the discretion of the trial court. *See supra* note 1 (describing § 1292(a)); *supra* notes 1, 6 and accompanying text (describing § 1292(b)).

107. *Coastal Steel*, 709 F.2d at 196.

108. *Id.*

court's order after a final decision, but did not prevent review at the interlocutory stage, the Third Circuit held that the district court's order denying Tilghman's motion to dismiss met the third criterion of the collateral order exception.[109] Because the district court's order satisfied the collateral order exception, the Third Circuit found jurisdiction to hear Tilghman's appeal.[110]

Additionally, the Third Circuit found that the district court's order denying Tilghman's alternative motion to dismiss based on *forum non conveniens*, unlike the district court's order denying Tilghman's motion to dismiss based on a forum selection clause, did not satisfy the collateral order exception.[111] The *Coastal Steel* court found that the district court's denial of the motion to dismiss based on *forum non conveniens* did not meet the second criterion of the collateral order doctrine because the order was not distinct from the merits of the substantive cause of action.[112] The Third Circuit noted that a court ruling on a *forum non conveniens* motion may consider factors intermingled with the merits of the case, such as the ease of access to sources of proof, the availability of witnesses and location of property in dispute.[113] Accordingly, the Third Circuit reasoned that an appellate court cannot rule on a *forum non conveniens* motion without considering the facts of the underlying dispute.[114] Having found that the order did not satisfy the second criterion of the collateral order exception, the Third Circuit determined that the denial of a motion to dismiss based on *forum non conveniens* grounds was not appealable as a final order under the collateral order exception.[115]

Courts that have ruled on the applicability of the collateral order exception to denials of motions to dismiss based on forum selection clauses have considered whether the order under consideration meets the three criteria of the collateral order exception.[116] Courts that discuss the first criterion of the collateral order exception agree that a denial of a motion to dismiss satisfies the first criterion.[117] Thus, the courts agree that when courts deny a motion to dismiss based on a forum selection clause, courts

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109. *Id.* at 197.

110. *Id.* at 196-197.

111. *Id.* at 195; *see supra* notes 68-73 and accompanying text (describing Supreme Court's holding in *Van Cauwenberghe* that *forum non conveniens* motion did not meet three criteria of collateral order exception).

112. *Coastal Steel*, 709 F.2d at 195.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* note 77 and accompanying text (describing circuit courts that have considered whether parties may appeal denial of motion to dismiss based on forum selection clause under collateral order exception).

117. *See* Farmland Indus., Inc. v. Frazier-Parrot Commodities, Inc. 806 F.2d 848, 850 (8th Cir. 1986) (holding that denial of motion to dismiss based on forum selection clause conclusively determined matter in question and met first criterion of collateral order exception); *Coastal Steel*, 709 F.2d at 195 (same).

have conclusively determined that the action may continue in the forum where the defendant moved to dismiss.[118] Most circuit courts that have discussed the second criterion agree that a district court's order denying a motion to dismiss based on a forum selection clause is separate from the merits of the underlying cause of action.[119] Accordingly, a majority of circuit courts that have discussed the second criterion hold that the order satisfies the second criterion.[120]

Courts, however, do not agree whether a district court's order denying a motion to dismiss based on a forum selection clause meets the third criterion of the collateral order exception.[121] Accordingly, the circuit courts are divided on whether an appellate court effectively can review the order on appeal from a final decision.[122] In considering whether the order meets the third criterion of the collateral order exception, the circuit courts disagree on whether section 2105 prevents a court from reviewing the order after a final decision.[123] The Second Circuit in *Chasser* held that a district court's order denying a motion to dismiss based on a forum selection clause was

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118. *See supra* note 117 (listing courts that have held district court order denying motion to dismiss based on forum selection clause conclusively determined where parties must bring action).

119. *See Farmland Indus.*, 806 F.2d at 850 (holding that district court order denying motion to dismiss based on forum selection clause satisfied second criterion of collateral order exception because order conclusively determined where parties must bring action and order was completely separate from merits of cause of action); *Coastal Steel*, 709 F.2d at 195-196 (same). *But see supra* note 44 and accompanying text (noting that *Chasser* court declined to discuss second criterion of collateral order exception because order failed to meet third criterion).

120. *See supra* note 119 and accompanying text (listing cases that hold that denial of motion to dismiss based on forum selection clause satisfied second criterion of collateral order exception).

121. *See supra* note 77 and accompanying text (describing split among circuit courts that have ruled on whether denial of motion to dismiss based on forum selection clause satisfied criteria of collateral order exception).

122. See Chasser v. Achille Lauro Lines, 844 F.2d 50, 54 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988) (holding that appellate court could review denial of motion to dismiss based on forum selection clause after final decision); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 862 (7th Cir. 1984), *cert. denied*, 469 U.S. 890 (1984) (holding that defendant did not show that denial of motion to remand to state court based on forum selection clause would be unreviewable on appeal from final decision); *Farmland Indus.*, 806 F.2d at 850-852 (holding that denial of motion to dismiss based on forum selection clause satisfied third criterion of collateral order exception); *Coastal Steel*, 709 F.2d at 196-197 (holding that denial of motion to dismiss based on forum selection clause would be unreviewable on appeal from final decision because § 2105 prevented review).

123. *See supra* notes 29-40 and accompanying text (discussing *Chasser* court's holding that § 2105 would not prevent review of denial of motion to dismiss based on forum selection clause); *supra* notes 95-103 and accompanying text (discussing *Coastal Steel* court's holding that § 2105 prevented review of denial of motion to dismiss based on forum selection clause after final decision). In addition to determining whether a denial of a motion to dismiss based on a forum selection clause meets the collateral order exception, courts mention whether the litigants asked the district court to certify the order under section 1292(b). *See supra* notes 1, 6 (discussing § 1292(b)).

not a matter in abatement.[124] The *Chasser* court, therefore, held that section 2105 would not prevent an appellate court from reviewing the order after a final decision.[125] The *Chasser* court further reasoned that because an appellate court could correct an erroneous district court order after a final decision, the order was effectively reviewable after a final decision.[126] In contrast, the Third Circuit in *Coastal Steel* held that a district court's order denying a motion to dismiss based on a forum selection clause was a matter in abatement.[127] The *Coastal Steel* court, therefore, held that section 2105 prevents an appellate court from reviewing the order after a final decision.[128] The Supreme Court's decision in *Chasser* on whether a denial of a motion to dismiss based on a forum selection clause is immediately appealable should resolve the division between the circuits.[129] The Supreme Court may also clarify the meaning of the phrase "matters in abatement" under section 2105.[130]

The Second Circuit in *Chasser* correctly determined that a denial of a motion to dismiss based on a forum selection clause is not immediately appealable under the collateral order exception.[131] The result reached by the Second Circuit is consistent with prevailing practice and the purpose of the final judgment rule.[132] However, the Second Circuit's reasoning is not entirely persuasive.[133]

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124. *See supra* notes 34-40 and accompanying text (discussing *Chasser* court's holding that denial of motion to dismiss based on forum selection clause was not matter in abatement under § 2105).

125. *See supra* note 40 and accompanying text (stating *Chasser* court's holding that § 2105 does not prevent appellate court from reviewing denial of motion to dismiss based on forum selection clause).

126. *See supra* note 27 and accompanying text (discussing *Chasser* court's holding that denial of motion to dismiss based on forum selection clause is effectively reviewable after final decision despite increased expense to parties that continue action in potentially wrong forum).

127. *See supra* notes 95-101 and accompanying text (discussing *Coastal Steel* court's holding that denial of motion to dismiss based on forum selection clause was matter in abatement under § 2105).

128. *See* Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 196-197 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (discussing *Coastal Steel* court's holding that appellate court could not review denial of motion to dismiss based on forum selection clause after final decision).

129. *See supra* note 77 and accompanying text (describing split among circuits that have considered whether denial of motion to dismiss based on forum selection clause met collateral order exception).

130. *See supra* note 31 and accompanying text (discussing definitions of phrase "matters in abatement").

131. *See* Chasser v. Achille Lauro Lines, 844 F.2d 50, 53-55 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 217 (1988) (holding that defendant could not appeal denial of motion to dismiss based on forum selection clause immediately under collateral order exception).

132. *See supra* note 35 and accompanying text (describing similarities between forum selection clauses and *forum non conveniens*); *supra* note 35 and accompanying text (listing courts that have heard appeals from *forum non conveniens* motions after full trial); *supra* note 5 and accompanying text (describing purpose of final judgment rule).

133. *See infra* notes 134-151 and accompanying text (evaluating *Chasser* court's reasoning).

Under the third criterion, an order is effectively unreviewable if the litigant will lose forever the right decided in the order unless the order is immediately appealable.[134] A denial of a motion to dismiss based on a contractual forum selection clause is comparable to a denial of a motion to dismiss based on immunity from civil service of process.[135] The Second Circuit in *Chasser* described the right provided in a forum selection clause as the parties' right to choose the forum in which the binding adjudication of the action will occur.[136] Similarly, the Supreme Court in *Van Cauwenberghe* characterized a defendant's right of immunity from civil service of process as the defendant's right not to be subject to a binding judgment of a court.[137] The Second Circuit further stated that litigants do not lose the right to litigate the claim in the forum simply because enforcement of the forum selection clause is postponed.[138] Because a denial of a motion to dismiss based on a forum selection clause is similar to a denial of a motion to dismiss based on immunity from civil service of process, the Second Circuit's reasoning in *Chasser* in consistent with the Supreme Court's reasoning in *Van Cauwenberghe*.[139]

However, applying the existing definitions of the phrase "matters in abatement" under section 2105, the *Chasser* court incorrectly reasoned that section 2105 would not apply to the order.[140] The *Chasser* court noted that the Supreme Court has allowed litigants to appeal denials of *forum non conveniens* motions after a final decision.[141] Because the *Chasser* court found that a *forum non conveniens* motion and a motion to dismiss based on a forum selection clause were similar, the *Chasser* court reasoned that the Supreme Court also would allow litigants to appeal a denial of a motion

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134. *See supra* note 62 and accompanying text (discussing requirement in *Mitchell* that right protected by immediate appeal must be immunity from suit).

135. *See supra* note 35 (describing similarities between forum selection clause and *forum non conveniens*).

136. *Chasser*, 844 F.2d at 55.

137. *See* Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 1951-1952 (1988) (finding that right defendant sought to protect did not include right not to stand trial); *supra* note 62 and accompanying text (describing Supreme Court's holding in *Mitchell* that right order invades must be right not to stand trial).

138. *See supra* note 27 and accompanying text (discussing *Chasser* court's holding that additional expense to litigants was not proper reason to immediately hear defendant's appeal under collateral order exception).

139. *See Chasser*, 844 F.2d at 55 (rejecting defendant's argument that defendant would lose right to litigate action in particular forum if not immediately appealable); *Van Cauwenberghe*, 108 S. Ct. at 1949-1952 (1988) (rejecting defendant's argument that defendant would lose right not to be bound by judgment of particular forum if not immediately appealable).

140. *See supra* notes 29-40 (discussing *Chasser* court's holding that denial of motion to dismiss based on forum selection clause did not meet definition of matters in abatement). *But cf. supra* notes 95-101 (discussing *Coastal Steel* court's holding that denial of motion to dismiss based on forum selection clause satisfied definition of matters in abatement).

141. *See supra* note 35 and accompanying text (stating that *Chasser* court noted that courts have reviewed *forum non conveniens* motions after final decision).

to dismiss based on a forum selection clause after a final decision.[142] The *Chasser* court's reasoning that courts should not read section 2105 literally because courts have ignored section 2105 is not persuasive.[143] Courts may not ignore an applicable statute simply because courts have overlooked the statute in the past.[144] Congress enacted section 2105 to prevent review of non-jurisdictional matters in abatement.[145] Even though courts have heard appeals of denials of *forum non conveniens* motions after final decisions, a court's denial of a *forum non conveniens* motion may be a matter in abatement under section 2105.[146] A *forum non conveniens* motion may be a matter in abatement because the motion, if granted, would terminate the action, but would not prevent the plaintiff from bringing the action in a more convenient forum.[147] Similarly, if an appellate court reverses a district court's order denying a motion to dismiss based on a forum selection clause after a full trial and grants the defendant's motion to dismiss, the plaintiff could bring the same action in the forum set forth in the forum selection clause.[148] Both *forum non conveniens* motions and motions to dismiss based on a forum selection clause meet the existing definition of matters in abatement.[149] Neither motion affects the jurisdiction of the court.[150] Section 2105, therefore, appears to prevent review of both a *forum non conveniens* motion and a motion to dismiss based on a forum selection clause.[151]

Although the *Chasser* court's reasoning that section 2105 did not prevent appellate review of a denial of a motion to dismiss based on a forum selection clause is unpersuasive, the *Chasser* court correctly noted that section 2105 does apply to an interlocutory appeal as well as to an appeal after a final decision.[152] The *Chasser* court reasoned that section 2105 would

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142. *See supra* notes 38-40 and accompanying text (discussing *Chasser* courts holding that courts should not read § 2105 literally because courts have heard appeals of motions to dismiss based on *forum non conveniens*).

143. *See supra* note 40 and accompanying text (stating *Chasser* court's holding that because courts have ignored § 2105, § 2105 does not apply literally).

144. *See supra* notes 95-110 (discussing *Coastal Steel* court's recognition that literal reading of § 2105 prevents review of denials of motions to dismiss based on forum selection clauses).

145. *See* 28 U.S.C. § 2105 (1982) (preventing appellate review of nonjurisdictional matters in abatement).

146. *See supra* note 35 (discussing similarities between forum selection clause and *forum non conveniens*).

147. *See supra* note 31 and accompanying text (defining matters in abatement under section 2105).

148. *See supra* note 13 and accompanying text (discussing cases hearing appeal from various motions regarding plaintiff's choice of forum as inconvenient for defendant).

149. *See supra* note 31 (discussing definition of "matter in abatement).

150. *See supra* note 33 (discussing FED. R. CIV. P. 12 governing jurisdiction).

151. *See supra* note 29 and accompanying text (describing § 2105 as preventing review of nonjurisdictional matters in abatement).

152. *See supra* notes 41-42 and accompanying text (stating *Chasser* court's reasoning that, if § 2105 prevented review after a final judgment, § 2105 also would prevent review at interlocutory stage); *also supra* note 103 (discussing reasoning of concurrence in *Coastal Steel* that if § 2105 prevents review after final judgment, § 2105 prevents review at all stages of litigation).

also prevent review at the interlocutory stage because Congress did not include exceptions to section 2105 and the Supreme Court has not created exceptions to section 2105.[153] The *Chasser* court's reasoning is more persuasive than the Third Circuit's reasoning in *Coastal Steel.*[154] The *Coastal Steel* court inaccurately reasoned that, because the Supreme Court created the collateral order exception after Congress enacted section 2105, Congress could not have intended section 2105 to apply to appeals under the collateral order exception.[155] When Congress enacts a statute, Congress cannot anticipate every situation that the statute may cover in the future.[156] The Supreme Court, therefore, could determine that section 2105 prevents review of a denial of a motion to dismiss based on a forum selection clause at any point in the action.[157] The Supreme Court, however, may bow to prevailing practice and redefine the phrase "matters in abatement" so that it includes neither denials of motions to dismiss based on forum selection clauses nor denials of motions to dismiss based on *forum non conveniens.*[158]

In *Chasser v. Achille Lauro Lines*[159] the Second Circuit held that the district court's denial of the defendant's motion to dismiss based on a forum selection clause was not immediately appealable under the collateral order exception.[160] Under the existing definition of "matters in abatement", however, the Second Circuit's holding that a denial of a motion to dismiss based on a forum selection clause did not fall under section 2105 is largely unsupported.[161] When the Supreme Court hears the *Chasser* case, the Supreme Court must interpret section 2105 and decide whether a denial of a motion to dismiss based on a forum selection clause is a matter in abate-

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153. *See supra* note 29 and accompanying text (describing § 2105 as preventing review of nonjurisdictional matters in abatement without exception).

154. *See supra* notes 29-40 and accompanying text (discussing *Chasser* court's reasoning that § 2105 does not apply to denial of motion to dismiss based on forum selection clause). *But see* Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc. 806 F.2d 848, 850-51 (8th Cir. 1986) (holding denial of motion to dismiss based on forum selection clause immediately appealable, but doing so under Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) and not adopting Third Circuit's reasoning that § 2105 applies only after final decision).

155. *See supra* notes 104-110 and accompanying text (describing *Coastal Steel* court's reasoning that because Congress enacted § 2105 when no provisions existed for interlocutory review, § 2105 would not apply to interlocutory appeals).

156. *See supra* notes 154-155 (discussing inaccuracy of Third Circuit's reasoning).

157. *See supra* notes 41-42 and accompanying text (describing *Chasser* court's discussion of whether denial of motion to dismiss based on forum selection clause is a "matter in abatement").

158. *Id.*; *see supra* note 31 and accompanying text (discussing definition of phrase "matters in abatement"); *supra* note 6 (describing Supreme Court's narrow interpretation of collateral order exception); *supra* note 7 (noting that Supreme Court has held very few interlocutory orders appealable under collateral order exception).

159. 844 F.2d 50 (2d Cir. 1988), *cert. granted,* 109 S. Ct. 217 (1988).

160. *See supra* notes 29-40 and accompanying text (discussing *Chasser* court's holding that denial of motion to dismiss based on forum selection clause did not satisfy collateral order exception and was not immediately appealable).

161. *See supra* note 31 and accompanying text (discussing definition of "matters in abatement").

ment.[162] The Supreme Court may follow the Third Circuit's reasoning in *Coastal Steel* that section 2105 only applies after a final decision.[163] On the other hand, the Supreme Court may decide to clarify the definition of matters in abatement under section 2105 so that the phrase no longer includes a denial of a motion to dismiss based on a forum selection clause.[164] Until the Supreme Court decides the *Chasser* case and adds meaning to the phrase "matters in abatement", the *Chasser* court's determination that section 2105 did not prevent review of the district court's order denying the defendant's motion to dismiss based on the forum selection clause has little support in the language of section 2105 or in judicial decisions.[165] Nevertheless, in light of prevailing practice and the purposes of the final judgment rule, the Second Circuit in *Chasser* properly held that a denial of a motion to dismiss based on a forum selection clause is not immediately appealable under the collateral order exception.[166]

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162. Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir.), *cert. granted*, 109 S. Ct. 217 (1988).

163. *See supra* notes 91-110 and accompanying text (discussing Third Circuit's holding in *Coastal Steel*).

164. *See supra* note 6 and accompanying text (indicating that Supreme Court has ability to create judicial exceptions to legislative statutes, such as collateral order exception).

165. *See* 28 U.S.C. § 2105 (1982); *also supra* note 31 and accompanying text (discussing limited case law defininig "matters in abatement" under § 2105).

166. *See supra* notes 29-40 and accompanying text (describing *Chasser* court's holding that § 2105 did not prevent review of denial of motion to dismiss, that denial of motion to dismiss was reviewable on appeal from final decision, and that denial of motion to dismiss based on forum selection clause did not satisfy criteria of collateral order exception); *supra* note 35 (discussing similarity between forum selection clause and *forum non conveniens*); *supra* notes 2, 5 and accompanying text (discussing final judgment rule and purpose of final judgment rule).