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Settlement Agreements and the Collateral Order Doctrine: A Step in the Wrong Direction - Digital Equip. Corp. v. Desktop Direct, Inc.

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Settlement Agreements and the Collateral Order Doctrine: A Step in the Wrong Direction?

Digital Equip. Corp. v. Desktop Direct, Inc.[1]

I. INTRODUCTION

With the increase in lawsuits each year, the fact that a majority of cases are concluded by settlement is seen by many as "a tribute to both the trial bench and the practicing bar."[2] In furtherance of this desirable end, the judiciary has typically upheld and enforced settlement agreements whenever possible.[3] Against this backdrop, the *Digital* court faced the issue of whether an order rescinding a settlement agreement which provided a "right not to stand trial" was immediately appealable pursuant to the collateral order doctrine.

II. FACTS AND HOLDING

Desktop Direct, Inc. ("Plaintiff") brought a suit in a Utah District Court alleging unfair competition and trademark infringement by Digital Equipment Corporation ("Defendant").[4] Prior to trial, the parties reached a settlement, and Plaintiff sought a voluntary dismissal of the suit.[5] Later, however, Plaintiff moved to vacate the dismissal and to rescind the settlement agreement citing fraud and misrepresentation on Defendant's part during the settlement negotiations.[6]

The district court granted Plaintiff's motion on January 5, 1993, rescinding the settlement agreement and allowing Plaintiff to withdraw its motion to dismiss.[7] Defendant subsequently filed motions to reconsider and to stay pending appeal.[8] After the district court declined to reconsider the ruling or to stay its order to vacate the dismissal, Defendant appealed.[9]

The Court of Appeals for the Tenth Circuit, before considering the merits of Defendant's motion to stay, determined that as a threshold matter, it must consider whether it had jurisdiction to adjudge an appeal from the district court's order.[10] The court, in reviewing § 1291,[11] determined that the district court's order was

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1. 114 S. Ct. 1992 (1994).

2. Alyson M. Weiss, *Federal Jurisdiction to Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6),* 10 CARDOZO L. REV. 2137, 2137 (1989).

3. *Id.* at 2137.

4. Desktop Direct, Inc. v. Digital Equip. Corp., 993 F.2d 755, 756 (10th Cir. 1993).

5. *Id.*

6. *Id.*

7. *Id.* The District Court found that "a fact finder could determine that the defendant failed to disclose material facts during the settlement negotiations which would have resulted in rejection of the settlement offer by the plaintiff." *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 757.

11. 28 U.S.C. § 1291 (1988). This statute provides, in part, that "[t]he courts of appeals (other than the United States Courts of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States." *Id.*

"not final for purposes of § 1291."[12] Defendant, conceding that the order was not final under § 1291, argued that the case fell under the collateral order exception to the final judgment rule, first established in *Cohen v. Beneficial Indus. Loan Corp.*[13]

The appellate court, recognizing its deviation from the holdings set forth in other courts of appeals,[14] found that although the district court's order was "the final word on the subject addressed"[15] and was "completely separate from the merits of the action,"[16] the order failed to satisfy the "important issue" portion of the second *Cohen* requirement[17] and failed to satisfy the third *Cohen* requirement, that the decision be "effectively unreviewable on appeal."[18] The appellate court, therefore, concluded that the order was not immediately appealable under the "collateral order doctrine," and as a result, the court lacked jurisdiction over the appeal.[19]

After granting certiorari to resolve the conflict among the various courts of appeals,[20] the Supreme Court affirmed the court of appeal's ruling.[21] The Supreme Court determined that, contrary to the Defendant's characterization of the settlement agreement as a "right not to be tried,"[22] the settlement agreement in this case was analogous to the forum selection clause at issue in *Lauro Lines S.R.L. v. Chasser,*[23] which was determined to be "effectively vindicable"[24] on

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12. *Desktop Direct, Inc.*, 993 F.2d at 757.

13. 337 U.S. 541 (1949). To fall within the *Cohen* exception, an order must satisfy three requirements: "It must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989).

14. *See* Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1039-40 (11th Cir. 1992); Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 219-20 (5th Cir. 1991); Janneh v. GAF Corp., 887 F.2d 432, 434-36 (2d Cir. 1989).

15. *Desktop Direct, Inc.*, 993 F.2d at 757 (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 12-13 (1983)).

16. *Id.* (citing Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989)).

17. *Id.* at 758. The court stated that although out-of-court settlements are desirable, the expectation that no trial will occur after entering the settlement agreement is insufficiently important. In support of its conclusion, the court found that aside from the qualified immunity, "only when there is an explicit constitutional or statutory guarantee or a compelling public policy rational does the Supreme Court permit an interlocutory appeal." *Id. See, e.g.*, Abney v. United States, 431 U.S. 651 (1977).

18. *Id.* at 757, 760 (citing *Lauro*, 490 U.S. at 498). The court stated that "[f]orcing parties to go through what may turn out to be a wasted trial is just one of the inevitable costs of the final judgment rule." *Id.* at 760.

19. *Id.*

20. *See, e.g.*, Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2nd Cir 1992); *but see, e.g.*, Transtech Indus., Inc. v. A & Z Septic Clean, 5 F.3d 51 (3rd Cir. 1993).

21. *Digital Equip. Corp.*, 114 S.Ct. at 2004.

22. *See, e.g.*, Abney v. United States, 431 U.S. 651 (1977). The protection from double jeopardy found in the Fifth Amendment protects defendants against second prosecutions for the same offense after acquittal or conviction. BLACK'S LAW DICTIONARY 340 (6th ed. 1990). This Constitutional guarantee is an example of a "right not to stand trial."

23. 490 U.S. 495 (1989).

final judgment and hence not immediately appealable.[25] Furthermore, the Court determined that any "immunity" which the settlement could be characterized as providing was insufficiently important to warrant application of the collateral order doctrine.[26] As a result, the Supreme Court held that a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether did not supply a basis for immediate appeal under § 1291.[27]

III. LEGAL BACKGROUND

To fully understand the *Digital* holding, and more importantly, the Supreme Court's reluctance in expanding the collateral order doctrine, one must have an understanding not only of the collateral order doctrine, but of the traditional basis for appellate review from which the collateral order doctrine varies.

A. The "Final Judgment Rule:" 28 U.S.C. § 1291

Appellate jurisdiction is bestowed upon the federal appellate courts by 28 U.S.C. § 1291.[28] Section 1291, referred to as the final judgment rule, grants appellate jurisdiction to all final orders.[29] Although the term "finality" has evaded exact definition,[30] the generally cited description is that a final judgment is a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[31] Examples of "final judgments" are orders granting summary judgments,[32] orders dismissing cases on the grounds of forum non conveniens,[33] directed verdicts and judgments notwithstanding the verdict.[34]

The policy reasons behind requiring a final judgment have been discussed by many courts throughout this century. One major purpose for requiring a final judgment is to avoid "piecemeal litigation" and promote judicial economy.[35] By disallowing repeated interruptions of district court proceedings, the final judgment

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24. *Lauro Lines*, 490 U.S. at 501.

25. *Digital Equip. Corp.*, 114 S. Ct. at 2002.

26. *Id.*

27. *Id.* at 2004.

28. *See supra* note 11.

29. Margaret Anderson, *The Immediate Appealability of Rule 11 Sanctions*, 59 GEO. WASH. L. REV. 683, 687 (1991).

30. Nancy Berman, *Monetary Sanctions Against Attorneys for Discovery Abuses in Federal Court: When Can They Be Appealed?*, 9 CARDOZO L. REV. 1021, 1029-30 (stating that it is "difficult to formulate precisely what constitutes a 'final decision'").

31. Catlin v. United States, 324 U.S. 229, 233 (1945).

32. United States v. Brook Contracting Co., 759 F.2d 320, 323 (3d Cir. 1985).

33. Ruff v. Gay, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25 (1934).

34. *See generally* FED. R. CIV. P. 50.

35. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) (stating that "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy").

rule not only fosters efficient and orderly disposition of claims, it allows for full development of a record for subsequent review.[36] In addition, it reduces a party's ability to utilize the process of successive appeals which could "drain their opponent's desire and capacity to pursue meritorious claims."[37]

Another strong policy reason for the final judgment rule is the maintenance of the relationship between the district court, as initial adjudicator, and the appellate court as a reviewing body.[38] As the court in *Firestone Tire & Rubber Co. v. Risjord*[39] pronounced, "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that an individual plays in our judicial system."[40] By deferring appeals until the resolution of the proceeding below, the final judgment rule enhances the likelihood of a sound appellate review of the various issues in the litigation.[41]

Despite the strong policy support for the final judgment rule, there exists several shortcomings, two of which have been addressed particularly by commentators.[42] One major concern is that trial court rulings "may often have serious and continuous effects which cannot be remedied on appeal from the final judgment long in the future."[43] For example, district court rulings which grant or deny preliminary injunctions, or determine whether a suit may be maintained as a class action, can "modify a party's rights swiftly and irremediably."[44] In these situations, the promptness with which any corrective action is taken is essential to an appellate court's ability to assure justice to the litigants.[45] Another concern is that even if a party's rights are not significantly threatened, a district court may erroneously rule on a motion which would have forestalled any trial at all, thus forcing the parties to expend substantial amounts of money and time for a worthless trial.[46] Alternatively, the district court's error may "taint subsequent events as to require reversal and a new trial."[47]

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36. Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Doctrine*, 100 YALE L.J. 511, 512 (1990) (citing Richardson-Merrel, Inc. v. Koller, 472 U.S. 424, 430 (1985); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940)).

37. *Id.*

38. *Id.*

39. 449 U.S. 368 (1981).

40. *Id.* at 374.

41. *See* DiBella v. United States, 369 U.S. 121, 129 (1962).

42. Kanji, *supra* note 36, at 513.

43. R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 79 (2d ed. 1989).

44. Kanji, *supra* note 36, at 513.

45. Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS., 165 (1984).

46. Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 98 (1975).

47. Kanji, *supra* note 36, at 513.

B. Exceptions to the Final Judgment Rule: § 1292(a) & (b), Rule 54(b), and the Collateral Order Doctrine

In light of the apparent flaws in the final judgment rule, Congress and the courts have carved out exceptions which permit interlocutory appeals.[48] The most frequently invoked statutory exception to the final judgment rule is § 1292(a), which authorizes appeals from interlocutory orders[49] of the district court affecting injunctions, receiverships, and rights and liabilities in admiralty cases.[50] Another exception is § 1292(b) which allows for the district court to certify an order so the appellate court may consider the issue on an interlocutory basis.[51] Rule 54(b) allows for immediate appeal from an order from the district court judge which is conclusive as to "one or more but fewer than all of the claims or parties" in a litigation.[52] The last exception to the final judgment rule, relevant to this Note, is the court-created collateral order doctrine.

The collateral order doctrine was first established in *Cohen v. Beneficial Indus. Loan Corp.*[53] *Cohen* was a shareholder's derivative suit in which the central issue was whether a New Jersey statute which rendered an unsuccessful plaintiff liable for the defendant's litigation costs and further required the plaintiff to post a security bond for those costs in anticipation of litigation was applicable in federal court.[54] The district court refused to require the plaintiff to pay the security bond and immediate appeal was sought.[55] The Supreme Court held that the order was immediately appealable, even though it was not technically "final" under § 1291, because the order "finally determined the claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate

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48. *Id.*

49. "Interlocutory" is defined as "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." "Interlocutory appeal" is defined as "[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." BLACK'S LAW DICTIONARY 563 (6th ed. 1990).

50. 28 U.S.C. § 1292(a) (1988). Section 1291(a)(1) states that "the courts of appeals shall have jurisdiction of appeals from [i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Section 1292(a)(2) states that appeals will arise from "interlocutory orders appointing receivers, or refusing orders to wind up receiverships or take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." Section 1291(a)(3) states that an appeal will lie from "interlocutory orders . . . determining the rights and liabilities of the parties to an admiralty case in which appeals from final decrees are allowed."

51. 28 U.S.C. § 1292(b) (1988) (stating that the district judge shall certify that the order involves "a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

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

53. 337 U.S. 541 (1949).

54. *Id.* at 543.

55. *Id.*

consideration be deferred until the whole case is adjudicated."[56] In creating the collateral order doctrine, the Court declared that the doctrine was not to be understood as an exception to § 1291, rather it was a "practical construction" of it[57] which affected a narrow class of decisions that did not terminate the litigation, but must, in the interest of "achieving a healthy legal system,"[58] be treated as final.

After the Court's initial enunciation of the collateral order doctrine, however, it appeared that the newly created *Cohen* analysis would notably erode the final judgment rule.[59] Under the *Cohen* analysis, orders directing the defendant to pay the costs of notice in a class action,[60] orders denying a motion to reduce bail,[61] and an order denying a motion to proceed in forma pauperis[62] were all considered qualified for interlocutory appeal pursuant to the collateral order doctrine.

However, the criteria set forth in *Cohen* was further refined in *Coopers & Lybrand v. Livesay,*[63] preventing the demise of the final judgment rule.[64] In rejecting an immediate appeal of a denial of class certification, the Court articulated a three-prong test for analyzing interlocutory appeals under the collateral order doctrine. The order sought to be appealed must: (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) "be effectively unreviewable on appeal from a final judgment."[65]

Since the Court's ruling in *Coopers & Lybrand,* the Court's statement in *Cohen* that the doctrine applied only to a "narrow class" of decisions has appeared to hold true.[66] Of the orders considered for interlocutory appeal pursuant to the collateral order doctrine, the Court has found that a denial of the defense of absolute immunity in a civil rights action,[67] the granting of a stay of a federal court lawsuit while a parallel state court suit proceeds,[68] the pretrial denial of a

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56. *Id.* at 546.

57. *Id.*

58. *Cobbledick,* 309 U.S. at 326.

59. Redish, *supra* note 46, at 111-13.

60. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

61. *See* Stack v. Boyle, 342 U.S. 1 (1951) (commenting in dicta that an order denying a motion to reduce bail would be appealable under the *Cohen* analysis).

62. *See, e.g.,* Roberts v. United States District Court, 339 U.S. 844 (1950).

63. 437 U.S. 463 (1978).

64. Michael Solimine, *Revitalizing Interlocutory Appeals in the Federal Court,* 58 GEO. WASH. L. REV. 1165, 1170 (1990).

65. *Coopers & Lybrand,* 437 U.S. at 468. The *Coopers & Lybrand* court held that the denial was inherently non-final, it was entangled with the merits of the case, and was subject to review after the final judgment by the plaintiff or intervening class member. *See* Solimine, *supra* note 64, at 1170 (discussing the Court's holding).

66. Solimine, *supra* note 64, at 1170.

67. Nixon v. Fitzgerald, 457 U.S. 731 (1981) (holding that the denial of an absolute immunity from suit was immediately appealable).

68. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

qualified immunity defense in a civil rights action,[69] and an adverse ruling on a double jeopardy claim[70] were all immediately appealable under the collateral order doctrine. However, in contrast, for example, the Court declared in *Lauro Lines S.R.L. v. Chasser*[71] that a refusal to give effect to a contractual forum selection clause failed the third criteria in that the desire to be sued in another forum was "adequately vindicable," though "not perfectly" so, after a final judgment.[72]

In recent times, the Court has continued to limit the availability of the collateral order doctrine to those narrow cases where § 1291's jurisdictional requirement would, if rigidly applied, "eliminate the role of the appellate courts altogether with respect to claims deemed essential to litigants."[73] Utilizing the Supreme Court's analysis of the collateral order doctrine as a guide, several courts of appeal have recently wrestled with the issue of whether a district court's refusal to enforce a settlement agreement was immediately appealable pursuant to the collateral order doctrine.

C. The Collateral Order Doctrine and Refusals to Enforce Settlement Agreements

In *Janneh v. GAF Corp.*[74] the Second Circuit Court of Appeals addressed the issue of whether the refusal to enforce a settlement agreement reached in an employment discrimination action was immediately appealable under the collateral order doctrine.[75] Utilizing the Court's three-prong test enunciated in *Coopers & Lybrand,* the court determined that the refusal to enforce the settlement agreement was immediately appealable under the *Cohen* doctrine.[76]

The court first determined that the district court judge's order refusing to enforce the settlement agreement was clearly made with the intent that it would be the "final word on the subject addressed,"[77] therefore, satisfying the first prong of the *Cohen* doctrine. The court further stated that the order satisfied the second prong in that it resolved an important issue separate from the merits of Janneh's employment discrimination claim.[78] Refusing to enforce the settlement agreement, according to the court, was "important" because it deprived GAF Corp. of its bargained-for right to avoid trial by enforcing the settlement agreement.[79]

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69. Mitchell v. Forseyth, 472 U.S. 511 (1985).
70. Abney v. United States, 431 U.S. 651 (1977).
71. 490 U.S. 495 (1989).
72. *Id.* at 501.
73. Kanji, *supra* note 36, at 518.
74. 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990).
75. *Id.* at 434.
76. *Id.* at 436.
77. *Janneh,* 887 F.2d at 434 (citing *Moses H. Cone Memorial Hosp.*, 460 U.S. at 12-13).
78. *Id.* at 434-35.
79. *Id.*

The right to avoid trial via a settlement agreement "implicates our nation's strongest judicial and public policies favoring out-of-court settlement."[80] In addition, arriving at an out of court settlement furthers judicial administration by relieving the overwhelming dockets and avoiding timely and expensive litigation.[81]

Finally, the court determined that an asserted right not to go to trial could be based on a contract between two parties.[82] The court found that if the party attempting to enforce the settlement agreement were forced to litigate, the right to avoid trial, gained through contract negotiations, would be lost irretrievably.[83] The court, therefore, concluded that the third and final prong had been satisfied and an appeal could be heard pursuant to the collateral order doctrine.[84] Following the court's decision, several other courts of appeals similarly found that the refusal to enforce a settlement agreement was immediately appealable under the collateral order doctrine.[85]

However, despite this precedent, other courts of appeals have found precisely the opposite.[86] These courts have found the collateral order doctrine unavailable for fact-specific reasons, such as the lack of distinctness from the underlying merits of the lawsuit and the availability of effective post-judgement review,[87] as well as unavailable on policy grounds.[88]

In light of the conflicting decisions by the various courts of appeals on the issue of interlocutory appeal and the refusal to enforce settlement agreements, the instant case provided the Supreme Court an opportunity not only to resolve the split among the appellate courts, but also to reaffirm and reiterate the narrow boundaries of the collateral order doctrine.

IV. INSTANT DECISION

In *Digital*, the Supreme Court began its analysis by reaffirming its position that the collateral order doctrine is a narrow exception to the final judgment rule.[89] The Court stated that the issue of appealability "is to be determined for

80. *Id.*

81. *Id.*

82. *Id.* at 436.

83. *Id.* (citing Local 771, I.A.T.S.E. v. RKO Gen., Inc., 546 F.2d 1107, 1112 (2nd Cir. 1977)).

84. *Id.*

85. *See* Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992); Grillet v. Sears, Roebuck & Co. 927 F.2d 217 (5th Cir. 1991).

86. *See, e.g.*, Transtech Industries, Inc. v. A & Z Septic Clean, 5 F.3d 51 (3rd Cir. 1993); Desktop Direct v. Digital Equip. Corp, 993 F.2d 755 (10th Cir. 1993).

87. *Transtech Indus., Inc.*, 5 F.3d at 57. The court also discussed the fact that the settlement was between the settlor-defendant and the EPA, an entity who was not a party in the action.

88. *See, e.g., Transtech,* 5 F.3d at 57-58. The court stated that allowing interlocutory appeals pursuant to the collateral order doctrine in instances when a district court refuses to enforce a settlement agreement "undermine[s] the final judgment rule and expand[s] the immunity concept beyond that which the Supreme Court has approved." *Id.* at 57.

89. *Digital Equip. Corp.*, 114 S. Ct. at 1996.

the entire category to which a claim belongs,"[90] explicitly rejecting a case-by-case determination of appealability.[91]

With this foundation laid, the Court began its analysis by averring to the court of appeal's determination that the order vacating a dismissal and thereby rescinding the settlement agreement was the "final word on the subject addressed" and that it resolved an issue completely separate from the merits of the lawsuit.[92] Although the Supreme Court stated that the aforementioned conclusions were not beyond question,[93] it declined to take issue with them since Desktop did not attempt to defend the court of appeal's judgment on those points. More importantly, the Supreme Court concluded that the failure to satisfy the third *Cohen* criteria[94] was sufficient to foreclose the availability of an immediate appeal.[95]

In discussing the third *Cohen* requirement, the Court noted that orders which deny certain immunities are "strong candidates" for immediate appeal.[96] However, the Court took issue with Digital's broad contention that a party's characterization of a district court's decision as a denial of an irreparable "right not to stand trial" was "sufficient and necessary" for a collateral appeal.[97] First, the Court held that mere identification of some interest that would be irretrievably lost was insufficient to meet the third *Cohen* condition since "almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewrite history."[98] Secondly, the Court stated that characterizing something as "a right not stand trial" was similarly insufficient to warrant immediate appeal.[99] The Court reasoned that such a characterization was suspect since the description could loosely be applied to a multitude of claims,[100] such as a court's lack of personal jurisdiction,[101] which are not immediately

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90. *Id.*

91. *Id.* (citing Carroll v. United States, 354 U.S. 394, 405 (1977)).

92. *Id.*

93. *Id.* at 1996 n.2 (discussing the possible fact based arguments against satisfaction of the first and second *Cohen* criteria).

94. *Id.* The Court's formulation of the third *Cohen* condition was that "the decision on an 'important' question be 'effectively unreviewable' upon final judgment." *Id.* at 1996. Note that the traditionally quoted formulation of the collateral order doctrine set forth in *Coopers & Lybrand,* includes the "importance element in the second requirement." *See supra* note 63.

95. *Id.* at 1996.

96. *Id.* at 1993.

97. *Id.* at 1996-97.

98. *Id.* at 1998.

99. *Id.* at 1999.

100. *Id.* at 1998. The Court states that the description of a "right not to be tried" could be applied to claims that "an action is barred on claim preclusion, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim." *Id.* at 1998.

101. *See* Van Cauwenberghe v. Biard, 486 U.S 517, 524 (1988).

appealable. Therefore, the courts of appeals should "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye."[102]

The Court further reasoned that even if *Mitchell v. Forseyth*[103] could not be squared with *Midland Asphalt Corp. v. United States,*[104] thereby opening the possibility that an explicit statutory or constitutional grant of immunity is not necessary for immediate appeal, this possibility alone did not explain why the privately negotiated right not to stand trial provided in the settlement agreement was in need of more protection than the implicit right not to stand trial which arguably could be found in the aforementioned claims.[105] Although Digital argued that the clarity with which the "right not to stand trial" was embodied in the settlement agreement warranted immediate appeal, the Court reiterated that "the availability of collateral order appeal[s] must be determined at a higher level of generality."[106] Furthermore, the Court stated that it was deciding this case "on the assumption that if Digital prevailed here, any district court order denying effect to a settlement agreement could be appealed immediately."[107]

According to the Court, the fundamental response to the claim that an agreement's provision for immunity from suit is distinguishable from other arguable rights to be trial-free, is that the immunity by agreement is insufficiently important to warrant immediate appeal.[108] The Court stated that when an immunity is rooted in a statute or in the Constitution, there is little room for the judiciary branch to "gainsay its importance."[109] Furthermore, the Court stated that simply because the immunity from suit is embodied in a private agreement, this does not conclusively determine that the "right not to be tried" is more "important" than other rights which arguably confer a right not to be sued, that this right is worthy of an exception to the final judgment rule, or that it is even important to the party to whose benefit such a provision works.[110] The Court further agreed with the court of appeal's characterization of the right conferred by the settlement agreement in the instant case as being similar to the forum selection clause in *Lauro Lines,* and therefore, must similarly fail.[111] Finally, the Court stated that disallowing immediate appeal was not contrary to the public policy of

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102. *Digital Equip. Corp.,* 114 S. Ct. at 1999.

103. 472 U.S. 511 (1985) (holding that a denial of a qualified immunity is immediately appealable).

104. 489 U.S. 794 (1989) (holding that only explicit statutory and constitutional immunities may be immediately appealable).

105. *See supra* note 100. Digital argued that because the settlement agreement offered an explicit "right not to stand trial," it should be immediately appealable. The Court stated that "we cannot attach much significance one way or another to the supposed clarity of the agreement's terms in this case." *Digital Equip. Corp.,* 114 S. Ct. at 2000.

106. *Id.*

107. *Id.*

108. *Id.* at 2001.

109. *Id.*

110. *Id.*

111. *Id.* at 2002 (discussing *Lauro Lines,* 490 U.S. 495 (1989)).

encouraging pre-trial dispute resolution because such a ruling would not have any adverse effect on a party's willingness to settle.[112]

In further support of its decision, the Court stated that even if the "importance" requirement were not included in the *Cohen* analysis, a district court's refusal to enforce a settlement agreement would be "adequately vindicable" on final judgment.[113] In addition, the Court reasoned that the "right not to be tried" was rarely the essence of a negotiated settlement agreement.[114] In further support of its conclusion that adequate vindication is possible, the Court stated that parties to a settlement agreement have other avenues to recourse, unlike those dependant on immunities rooted in statutes and the Constitution.[115] Parties could not only sue for breach of contract, but they could seek Rule 11 sanctions if the party seeking to renege the settlement is doing so because of later disappointment with the settlement terms.[116]

Finally, the Court stated that it was not ruling on the availability of other interlocutory routes, such as § 1292(b).[117] Furthermore, the Court noted in a footnote to its decision that in light of Title 9, § 16,[118] it was not deciding that a privately conferred right could never supply the basis of a collateral order appeal.[119] Accordingly, the Court concluded that refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.[120]

V. COMMENT

Given the Supreme Court's insistence on maintaining the collateral order doctrine as a "narrow" exception to the final judgment rule,[121] *Digital,* as representative of that policy, falls right in line. In contrast to the Court's continued interest in preserving the integrity of the "final judgment rule" as exemplified by *Digital*, however, is the competing judicial and societal interests favoring out-of-court settlement agreements. Imperative to this latter interest is

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112. *Id.* at 2003.

113. *Id.* The court contrasted the reviewability of the district court's order refusing to enforce a settlement agreement with the irreparable right to be free of a second trial on a criminal charge guaranteed by the Fifth Amendment.

114. *Id.* The Court stated that this limiting exposure to liability was fully vindicable on final appeal.

115. *Id.*

116. *Id.*

117. *Id.* at 2004.

118. 9 U.S.C. § 16 (1988). This statute holds that an immediate appeal may be had when a district court rejects a party's assertion that, under the Arbitration Act, a case belongs before a commercial arbitrator and not in court.

119. *Digital Equip. Corp.,* 114 S. Ct. at 2002 n.7.

120. *Id.* at 2004.

121. *Id.* at 1996.

the availability of judicial means to "encourage and facilitate compromise."[122] When a district court refuses to give credence to a provision in a contract calling for alternative dispute resolution (hereinafter ADR), or refuses to enforce an agreement reached via ADR means, the benefit of the collateral order doctrine becomes immediately apparent. Appellate review, in these instances, ensures that the controversy in question must go to trial.

A Congressional example reflecting society's interest in minimizing the pressure on courts in favor of ADR is provided in 9 U.S.C. § 16.[123] The statute provides that when a District Court rejects a party's assertion that, under the Arbitration Act, a case belongs before a commercial arbitrator and not in court, that order can be immediately appealed pursuant to the collateral order doctrine.[124]

Given the opportunity in *Digital* to address an issue concerning which Congress has not enacted a statute, the Court favored maintaining the narrow bounds of § 1291, rather than further "facilitating and encouraging" settlement by allowing immediate appeals of orders rescinding settlement agreements.[125] In stating that the passage of 9 U.S.C. § 16 "by no means suggests that they [the Supreme Court] should now be more willing to make similar judgments for themselves,"[126] the *Digital* Court stands in stark contrast to the numerous courts which have found the rights provided in a settlement agreement "important" enough to warrant immediate appeal.

In *Janneh v. GAF Corp.*, the court stated that "one crucial benefit of a settlement agreement . . . is the avoidance of trial."[127] When the district court in *Janneh* determined that a settlement was never reached, the court of appeals found the issue important because the order involved the "deprivation of significant rights, namely, GAF's bargained-for right to avoid trial by enforcing the settlement agreement."[128] The right to avoid trial, according to the *Janneh* court, "implicates our nation's strong judicial and public policies favoring out of court settlements."[129] The *Digital* court, however, fails to fully consider that the right to avoid trial embodied in the settlement agreement is imperative for the protection of the parties involved. Without such a provision, the sense of finality and resolution stemming from the agreement is, at best, illusory.

Furthermore, the prospect that the appellate court would find the settlement agreement enforceable after trial has occurred offers little comfort. As the *Janneh* court stated, "[r]eversing the order after an appeal from a final judgment would

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122. Alyson M. Weiss, *Federal Jurisdiction to Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)*, 10 CARDOZO L. REV. 2137, 2137 (1989).

123. 9 U.S.C. § 16 (1988 Ed. Supp. IV).

124. *See supra* note 118.

125. *See generally Digital Equip. Corp.*, 114 S. Ct. 1992.

126. *See supra* note 119.

127. *Janneh*, 887 F.2d at 436.

128. *Id.* at 435.

129. *Id.* at 434.

be as effective as slamming the barn door after the horse has already bolted."[130] Immediate appellate review of orders rescinding settlement agreements not only "encourages and facilitates" the settlement process, it reinforces the importance and legitimacy of the settlement agreement in the broader context of the judicial system. In finding that the right to avoid trial is "effectively reviewable" and "unimportant," the *Digital* decision fails to fully take into account the true benefits of the settlement process. As the wealth of judicial opinions suggest, "[t]he judiciary has strongly favored voluntary settlement of litigation by upholding and enforcing settlement agreements whenever possible."[131] Against this strong judicial and societal policy, the *Digital* decision appears to be a step backwards.

Although the *Digital* court determined that the "right not to go to trial" is insufficiently important to warrant immediate appeal, a conclusion not beyond question, the Court recognized that there are other routes to obtain immediate appellate review.[132] Although, as a practical matter, this result is encouraging, the *Digital* opinion can still be seen as striking a blow to the furtherance of the judicial and societal policy favoring settlement agreements.

VI. CONCLUSION

At the very least, *Digital* can be seen as a confrontation between two diametrically opposed policies. On one side is the policy, as represented by *Digital*, favoring maintaining the collateral order doctrine as a "narrow" exception to the final judgment rule. On the other side, is the policy which seeks to further facilitate out-of-court dispute resolution.[133] Although the Supreme Court was unwilling to extend the collateral order doctrine to include orders refusing to enforce settlement agreements in the present case, future congressional action, similar to 9 U.S.C. § 16, could reverse the effect of this decision. Until that time, counsel seeking an interlocutory appeal of a district court's order refusing to enforce a settlement agreement must do so by the traditional statutory avenues.[134]

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130. *Id.* at 436.
131. *See* Weiss, *supra* note 122.
132. *See supra* note 119.
133. As representative of this policy, *see supra* note 14 and 118.
134. *See supra* note 50-51.