An Analysis of Remittitur’s Effects on the Timing to File a Notice of Appeal

“The parties are mistaken. . . . Until the district court either enters a final order based upon the plaintiffs’ election to accept the remittitur, or proceeds to judgment after a new trial, there is nothing for this court to review.”

I. INTRODUCTION

In instances where a civil jury returns a verdict so excessive that it “shocks the conscience” of the court, trial courts may utilize the conditional practice of remittitur to offer the plaintiff a choice between accepting a reduced monetary award or facing a new trial on damages. In federal courts, Rule 59 of the Federal Rules of Civil Procedure (Rule 59) governs this practice, and it is procedurally conducted through posttrial motion practice. Although federal and state trial courts alike have utilized remittitur consistently in the past, many aspects of the practice remain unclear and unsettled.

Rule 4(a) of the Federal Rules of Appellate Procedure (Appellate Rule 4(a)) governs the time period for filing a notice of appeal in federal appellate practice, and, upon first glance, appears rather simple. Appellate Rule 4(a) requires that a party file the notice of appeal within thirty days of the date the judgment or

When a court determines that damages awarded by a jury are excessive or not supported by the evidence, however, the Seventh Amendment prohibits the court from entering an absolute judgment for a remitted sum. Instead, the trial court may allow the plaintiff to decide if he or she wants to accept the remitted judgment and forego the right to appeal, or reject the offer of remittitur and face a new trial on damages. In cases where a plaintiff has accepted remittitur, it is unclear when the time period for a defendant to file a notice of appeal begins; that is, whether it commences at the point when the plaintiff files a notice of acceptance of the remitted sum, or when the trial court executes and enters an amended judgment or order on the docket. This uncertainty puts defense

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7. See id. at 4(a)(4)(A)(v); see also 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 59.51[3] (Daniel R. Coquillette et al. eds., 3d ed. 2020) (expounding upon Rule 59 motion tolling appeal timeline and its relationship to Appellate Rule 4(a)). If a party misses the deadline for filing a notice of appeal, the party must show excusable neglect for the court to consider extending the time for filing. See Fed. R. App. P. 4(a)(5)(ii).
9. See Wright v. Byron Fin., LLC, 877 F.3d 369, 378 (8th Cir. 2017) (establishing court’s lack of authority to enter absolute judgment for remitted sum under Seventh Amendment).
10. See Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (concluding Donovan accepting remittitur precluded him from appealing order granting choice). The Supreme Court held that Donovan could not appeal the remittitur order he agreed to, even though he accepted remittitur “under protest.” See id. at 648, 650. While ratifying the use of remittitur, the Court declined to explore remittitur’s constitutionality, and instead upheld a generalized rule regarding a plaintiff’s right to appeal a remittitur decision. See id. at 649-50; see also 4 C.J.S. Appeal and Error § 284 (2020) [hereinafter Appeal and Error] (explaining plaintiff precluded from appealing consent to remittitur unless defendant cross-appeals reduced judgment).

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See Been v. O.K. Indus., 398 F. App’x 382, 389 (10th Cir. 2010) (outlining in dicta split among circuit courts regarding time to file notice of appeal). Compare Wright v. Preferred Research, Inc., 937 F.2d 1556, 1561 (11th Cir. 1991) (concluding judgment final and appealable when plaintiff accepted remittitur), and Mauriello v. Univ. of Med. & Dentistry, 781 F.2d 46, 49 (3d Cir. 1986) (determining plaintiff’s filing to accept remittitur commences appeal time computation), and Howell v. Marmpegaso Compania Naviera, S.A., 566 F.2d 992, 993 (5th Cir. 1978) (holding time limit begins at plaintiff’s filing of remittitur acceptance), with Anderson v. Roberson, 249 F.3d 539, 542-43 (6th Cir. 2001) (requiring entry of separate, amended judgment before party may appeal from remittitur). While the Sixth Circuit is in the minority by requiring the entry of a separate, amended judgment to appeal remittitur, this view has treatise support, further confusing the issue. See 12 MOORE ET AL., supra note 7, §§ 59.52-.53 (providing appeal follows entry of judgment not order because Rule 59 motion suspends judgment’s finality). Don Zupanec, Appealability—Conditional Denial—Motion for Judgment as Matter of Law or New Trial, FED. LITIGATOR (West Grp.), Jan. 2000, at 23, 23 [hereinafter Appealability—Conditional Denial] (suggesting practitioners’ filing time runs from date of entry of amended judgment); Don Zupanec, Appealability—Remittitur or New Trial—Alternative Order, FED. LITIGATOR (West Grp.), July 2001, at 185, 186 [hereinafter Appealability—Remittitur or New Trial] (suggesting practitioners not consider remittitur order final and appealable).
counsel at risk of missing the appeal deadline, which unnecessarily jeopardizes clients’ rights to have meritorious issues reviewed on appeal.11  

This Note examines the issue of when the time period commences for filing a notice of appeal after the court grants remittitur and the plaintiff accepts the adjusted jury award.12 Section II.A explores the history of remittitur in conjunction with the evolution of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure (collectively, Federal Rules of Procedure) with respect to posttrial motions.13 Section II.B focuses on the finality of judgments and the separate document requirement, while Section II.C examines the nexus of Seventh Amendment constitutionality and posttrial motion practice within the analysis and application of remittitur under the Federal Rules of Civil Procedure.14 Section II.D then discusses the current variations that exist among circuit courts addressing this issue, and ultimately Part III calls for an amendment to the Federal Rules of Procedure to resolve the ambiguity discussed in this Note.15

II. HISTORY

A. Remittitur and the Federal Rules of Procedure

Remittitur originated in the federal courts in 1822, emerging out of Blunt v. Little.16 In Blunt, Justice Story settled upon his own interpretation of a reasonable damages award and offered that amount to the plaintiff as an alternative to a new trial.17 Over a century after remittitur’s first appearance, the Supreme Court stated, in dicta, that the constitutionality of remittitur was “doubtful.”18 Contrary

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11. See Anna Benvenutti Hoffmann & Alexandra Lampert, Procedural Guide to Section 1983 Litigation in Federal Court, in SWORD & SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 178 (Mary Massaron & Edwin P. Voss, Jr. eds., 4th ed. 2015) (noting importance of preserving rights in posttrial stage and possible preclusion of appellate review); see also Glob. NAPs, Inc. v. Awiszus, 930 N.E.2d 1262, 1272 (Mass. 2010) (reversing summary judgment for attorneys in malpractice case alleging untimely filing of notice of appeal). Together with the issues of client advocacy and preservation of rights, another important consideration in the timing of posttrial motion practice is the accrual of interest on the judgment. See generally V. Woerner, Annotation, Date of Verdict or Date of Entry of Judgment Thereon as Beginning of Interest Period on Judgment, 1 A.L.R.2d 479 (1948) (noting commencement of interest issue arises in cases where plaintiff accepted remittitur).

12. See supra note 10 and accompanying text (discussing unsettled circuit split and treatise debate for evaluating time to appeal after remittitur acceptance).

13. See infra Section II.A.

14. See infra Sections II.B-C.

15. See infra Section II.D, Part III.


17. See id. at 762 (offering remittitur for first time while explaining court’s duty to “interfere[] to prevent wrong”); see also Garcia, supra note 2, at 119 (outlining “genesis” of remittitur in Justice Story’s opinion).

18. See Dimick v. Scheidt, 293 U.S. 474, 484-85 (1935) (expressing skepticism regarding remittitur’s constitutionality). Though Dimick held additur to be unconstitutional and postulated on the “doubtful” constitutionality of remittitur practice in its analysis, it ultimately declined to affirmatively hold remittitur unconstitutional as well. See id. In the years since Dimick, the legal community has considered the constitutionality of remittitur to be generally settled; however, the argument has been raised that “[c]ourts have accepted remittitur as constitutional based on an inaccurate historical assumption that the practice existed at English common law in the
to this earlier dicta, however, the Court ultimately endorsed using remittitur as a judicial tool for moderating damages in civil rights cases. Today, federal courts continue to utilize remittitur as a tool to tighten control of excessive jury awards, which some commentators argue have climbed in the past several decades. Though the Federal Rules of Civil Procedure do not explicitly endorse remittitur, it continues to exist as controlling precedent to this day.

In civil matters, Appellate Rule 4(a) dictates that a party must file the notice of appeal of a trial court’s order or judgment within thirty days of the trial court entering that order or judgment on the docket. Under the Federal Rules of

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20. See Garcia, supra note 2, at 127 (articulating American Bar Association advocates in favor of remittitur due to increasing jury verdicts).
21. See Fed. R. Civ. P. 59 (outlining posttrial motion practice and procedure relating to new trials); Neese v. S. Ry. Co., 350 U.S. 77, 77 (1955) (denying use of remittitur equates to abuse of discretion); Friedenthal et al., supra note 18, at 565 (explaining procedure trial judge and courts follow with respect to remittitur); see also 8 Federal Commercial Litigation, supra note 2, § 86:75 (noting remittitur available to trial courts). Although Rule 59(a) does not articulate the practice of remittitur, it does state that the court “may, on motion, grant a new trial on all or some of the issues . . . after a jury trial.” See Fed. R. Civ. P. 59(a)(1)(A).
22. See Fed. R. App. P. 4(a)(1)(A) (outlining timeline and procedure for filing notice of appeal); see also 12 Moore et al., supra note 7, § 59.51 (explaining how Rule 59 tolls deadline and interacts with Appellate Rule 4(a)). Because the Seventh Amendment prevents the trial court from issuing an executed, remitted judgment without the plaintiff’s consent, an appealable order does not exist until the plaintiff decides to accept or reject the remittitur. See U.S. Const. amend. VII (stating no court can reexamine facts once jury tries them); see also Wright v. Byron Fin., 877 F.3d 369, 378 (8th Cir. 2017) (disavowing district court’s purported authority to enter absolute judgment for remitted sum). Appellate Rule 4(a)’s language, however, leaves unclear whether a party needs to file an amended judgment after a plaintiff has accepted remittitur. See Fed. R. App. P. 4(a) (lacking specific rule for when plaintiff accepts remittitur). Appellate Rule 4(a) also leaves unclear whether the trial court must issue another order finally disposing of the remittitur, or if the plaintiff’s notice of acceptance of remittitur stands in place of that order procedurally. See id. (providing no guidance on how to establish final disposition). This ambiguity also raises sufficiency of designation questions under Rule 3(c) of the Federal Rules of Appellate
Appellate Procedure, however, the filing of a party’s Rule 59 motion suspends the trial court judgment’s finality, and tolls the time for a party to file a notice of appeal. As a result, the time to file the notice of appeal from the judgment does not begin to run again until after disposition of the Rule 59 motion itself. With respect to filing an appeal, the relationship between the Federal Rules of Civil Procedure—governing the trial courts—and the Federal Rules of Appellate Procedure—governing appellate courts—has been a noted source of confusion in legal practice.

In 2002, the Advisory Committee for the Federal Rules of Civil Procedure (Advisory Committee) amended Rule 58 of the Federal Rules of Civil Procedure (Rule 58) and clarified that the trial court does not need to enter a separate document following resolution of Rule 59 or other posttrial motions referred to in Appellate Rule 4(a). The Advisory Committee intended this amendment to ensure the time to file a notice of appeal does not become indefinite in circumstances where the court does not enter a separate document resolving the motions. Notwithstanding this amendment, Appellate Rule 4(a) continues to state that the “time to file an appeal runs for all parties from the entry of the order” disposing of the posttrial motions, thus requiring the entry of a separate document following resolution of Rule 59 or other posttrial motions referred to in Appellate Rule 4(a).

See FED. R. APP. P. 3(c) (outlining sufficiency of designation requirements under Federal Rules of Appellate Procedure).

23. See FED. R. APP. P. 4(a)(4)(A)(iv)-(v) (dictating suspension of judgment finality and subsequent tolling upon Rule 59 motion filing). The court may not grant remittitur without offering the plaintiff the alternative of a new trial. See Cortez v. Trans Union, LLC, 617 F.3d 688, 716 (3d Cir. 2010) (explaining principle governing remittitur requires giving plaintiff choice). Further, if the plaintiff foregoes the opportunity for a new trial and accepts the judge’s offer of remittitur, that acceptance precludes the plaintiff from appealing the judgment. See Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (holding plaintiff precluded from appeal after remittitur accepted); Eaton v. Nat’l Steel Prods. Co., 624 F.2d 863, 864 (9th Cir. 1980) (denying plaintiff’s ability to appeal after plaintiff declined remittitur); Evans v. Calmar S.S. Co., 534 F.2d 519, 522 (2d Cir. 1976) (holding plaintiff accepting remittitur akin to settling action, and therefore not appealable); see also 4 Appeal and Error, supra note 9, § 284 (explaining plaintiff may direct appeal to other issues, but not to remittitur itself).

24. See FED. R. APP. P. 4(a)(4)(A)(v) (tolling time to file notice of appeal upon filing of Rule 59 motion). Appellate Rule 4(a)’s language provides that “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . for a new trial under Rule 59.” Id.

25. See FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment (noting “many and horribly confused problems under Appellate Rule 4(a)” in conjunction with posttrial motions). Congress codified the federal courts of appeals’ jurisdiction over district courts’ final decisions in 28 U.S.C. § 1291. See 28 U.S.C. § 1291 (2018). Another rule at play in this relationship is Appellate Rule 3(c), relating to the sufficiency of designation. See FED. R. APP. P. 3(c) (requiring appellant to designate judgment or order thereof subject to appeal). See generally Healey et al., supra note 3 (providing guide to content of Appellate Rule 3(c)); Roger P. Freeman, Annotation, Sufficiency of “Designation” Under Federal Appellate Procedure Rule 3(c) of Judgment or Order Appealed from in Civil Cases by Notice of Appeal Not Specifically Designating Such Judgment or Order, 141 A.L.R. Fed. 445 (1997) (discussing sufficiency designation under Appellate Rule 3(c)).

26. See FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment (addressing indefiniteness issue in relationship between Rule 59 and Appellate Rule 4(a)). The Advisory Committee’s notes also explain that the disposition of a Rule 59 motion resulting in an amended judgment must be set forth on a separate document. See id.

27. See id. (maintaining integration of time periods set for Rule 59 and Appellate Rule 4(a)). In reiterating the requirement of a separate document for a final judgment, the Advisory Committee intended to encourage certainty in the rules and in practice. See id.
before the appeal period commences. Therefore, the Federal Rules of Procedure are ambiguous as to when the time for appeal commences, particularly in circumstances involving an interlocutory grant of remittitur, which the plaintiff must either accept or reject at some later date.

B. When Is a Final Judgment Final? The Separate Document Requirement

Rule 58 mandates that “[e]very judgment and amended judgment must be set out in a separate document,” and explains that “a separate document is not required for an order disposing of a motion . . . for a new trial, or to alter or amend the judgment, under Rule 59.” Nevertheless, the Advisory Committee’s 2002 notes provided that “if disposition of the [Rule 59] motion results in an amended judgment, the amended judgment must be set forth on a separate document.” Historically, the separate document requirement promotes certainty and resolves the “protracted litigation [that spawns] over a technical procedural matter.”

In the context of remittitur, however, the finality of a conditional remittitur order

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29. See Fed. R. Civ. P. 58 advisory committee’s note to 2002 amendment (leaving issues relating to conditional remittitur orders in context of Rule 59 unaddressed); Fed. R. App. P. 4(a)(4) (outlining time requirements for filing different notices of appeal, but not expressly mentioning remittitur). While the Federal Rules of Civil Procedure may leave unclear issues relating to the finality of conditional remittitur orders, trial court judges’ orders may be drafted so that finality is apparent. See Davis v. Advocate Health Ctr. Patient Care Express, 523 F.3d 681, 683 (7th Cir. 2008) (holding suit ended at district court level where time given for plaintiff to act expired).
30. See Fed. R. Civ. P. 58(a)(4) (outlining separate document requirement); see also Emp’rs Ins. of Wausau v. Titan Int’l, Inc., 400 F.3d 486, 489 (7th Cir. 2005) (confirming order granting motion for amended judgment requires separate document). In analyzing the separate document requirement’s ambiguity in the context of Rule 59 motions, the Wausau court aptly noted that “[n]onsensical, or as here logically impossible, interpretations of statutes, rules, and contracts are unacceptable.” See Wausau, 400 F.3d at 489; see also Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 79 (2000) (reiterating final decision leaves nothing more for court to do but execute judgment); FirsTier Mortg. Co. v. Inv’rs Mortg. Ins. Co., 498 U.S. 269, 273 (1991) (holding final ruling must end litigation on merits and court must declare intention of same); Harbert v. Healthcare Servs. Grp., 391 F.3d 1140, 1145 (10th Cir. 2004) (identifying court’s decision regarding party recovering only sum certain touchstone of final order); see also Healey et al., supra note 3, at 2 (providing final judgment not effective until separate document entered).
31. See Fed. R. Civ. P. 58 advisory committee’s notes to 2002 amendment (clarifying Rule 59’s separate document requirement). In United States v. Indrelinus, the Supreme Court, looking to the Advisory Committee’s 1963 notes, explained that before 1963 “there was considerable uncertainty over what . . . would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. To eliminate these uncertainties, . . . Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.” 411 U.S. 216, 220 (1973) (citation omitted). In Bankers Trust Co. v. Mallis, the Court later held that an appellate court may deem Rule 59’s separate document requirement waived and take jurisdiction over the appeal where: the district court intends a document to be a final judgment; the judgment is entered in accordance with the Federal Rules of Civil Procedure; one party appeals despite the absence of a separate document; and the appellee does not object to the lack of a separate document. See 435 U.S. 381, 387-88 (1978). The Mallis Court determined the “sole purpose” of the separate document requirement was to clarify when the time to file the notice of appeal begins to run. Id. at 384. As a result, requirement was designed to encourage certainty, not to deceive the inexperienced practitioner. See id. at 386.
32. See Indrelinus, 411 U.S. at 220 (analyzing Advisory Committee’s intent behind separate document requirement for judgment effectiveness).
under Rule 59 is complicated by a plaintiff’s Seventh Amendment rights under the Re-Examination Clause.33

C. The Nexus of Seventh Amendment Constitutionality and Posttrial Motion Practice

Under the Seventh Amendment’s Re-Examination Clause, which states that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law[,]” a trial court judge’s implementation of remittitur raises significant constitutional issues.34 Pursuant to the Re-Examination Clause, a trial court cannot unilaterally enter judgment in some amount less than the jury’s verdict.35 Instead, a trial court must couple the remittitur offer with the option of a new trial, which effectually renders the order granting remittitur interlocutory.36

Despite remittitur’s complicated relationship with the Re-Examination Clause, appellate courts will reverse a conditional remittitur and new trial ruling only for an abuse of discretion.37 The Supreme Court reiterated this standard in Gasperini v. Center for Humanities, Inc.,38 holding that a trial court could apply state law standards when determining excessive verdicts, but an appellate court must use an abuse of discretion standard when reviewing those decisions.39 Gasperini further held that limiting appellate review to an abuse of discretion standard was consistent with the Seventh Amendment’s Re-Examination Clause.40

33. See U.S. Const. amend. VII (articulating Re-Examination Clause); see also Cortez v. Trans Union, LLC, 617 F.3d 688, 716 (3d Cir. 2010) (explaining court unable to order remittitur without affording party new trial alternative).

34. See U.S. Const. amend. VII (establishing federal right to jury trial and protection from reexamination under Constitution); see also Hansen, supra note 18, at 637 (comparing additur’s constitutionality with remittitur under Seventh Amendment); Thomas, supra note 18, at 732 (discussing remittitur’s constitutionality under Seventh Amendment).

35. See Friedenthal et al., supra note 18, at 564 (discussing circumstances required for remittitur to meet constitutional compliance).

36. See id. (analyzing remittitur’s constitutionality and practice). “[T]he Supreme Court has ruled that the use of remittitur must be coupled with the option of a new trial in order to comply with the Seventh Amendment. To impose remittitur without that option would violate the Amendment’s Re-Examination clause.” Id.

37. See id. at 566 (summarizing appellate courts’ abuse of discretion standard when reviewing remittitur). Appellate courts allow “enormous deference” to the trial judge when evaluating a trial judge’s grant of remittitur. See id. In theory, the trial judge is in the best position to evaluate any prejudicial effects that may have influenced the jury because they were present at trial, while the appellate court was not. See id. There has been some debate about this “traditional narrow review standard,” and whether the judge’s decision intrudes on the jury’s decision-making authority and the party’s Seventh Amendment right to a jury trial. See id.


39. See id. at 417 (approving line of circuit court decisions recognizing appellate review confined to abuse of discretion); see also Friedenthal et al., supra note 18, at 567 (characterizing history and standard of remittitur abuse of discretion review).

40. See 518 U.S. at 435 (holding abuse of discretion standard “control necessary and proper to the fair administration of justice”).
D. Variations Among the Courts in Addressing Remittitur’s Appellate Timeline

Courts across the country diverge in their approach to the question of when the appeal period begins to run after a plaintiff accepts remittitur. Some courts take the position that a conditional order granting remittitur becomes final, for appeal purposes, when the plaintiff accepts remittitur. Yet, others view the remittitur order as an interlocutory order that may not be appealed until the trial court enters a final judgment. Specifically, a majority of circuits, including the Third, Fifth, Tenth, and Eleventh Circuits, have held that the thirty-day limit to file a notice of appeal begins when the plaintiff files an acceptance of remittitur. The Sixth Circuit, however, has required the entry of a separate, amended judgment before a defendant may appeal from remittitur. Additionally, the circuits weighing in on this issue have reviewed various attempts by trial courts and counsel to comply with the Federal Rules of Procedure, and thus have addressed timeliness of appeals following remittitur against nonidentical procedural backdrops that may, in part, account for their divergent holdings.

41. See Wright v. Preferred Research, Inc., 937 F.2d 1556, 1561 (11th Cir. 1991) (concluding judgment final and appealable when plaintiff accepted remittitur); Mauriello v. Univ. of Med. & Dentistry, 781 F.2d 46, 49 (3d Cir. 1986) (holding appeal time begins when plaintiff accepts remittitur); Howell v. Marmpegaso Compania Naviera, S.A., 566 F.2d 992, 993 (5th Cir. 1978) (determining appellate timeline triggered by plaintiff’s acceptance filing); see also Been v. O.K. Indus., 398 F. App’x 382, 389 (10th Cir. 2010) (postulating existence of circuit split with respect to notice of appeal filing after remittitur acceptance).

42. See Anderson v. Roberson, 249 F.3d 539, 542-43 (6th Cir. 2001) (requiring entry of separate, amended judgment before party may appeal from remittitur); Ortiz-Del Valle v. Nat’l Basketball Ass’n, 190 F.3d 598, 600 (2d Cir. 1999) (noting lack of appellate jurisdiction until district court enters separate, amended judgment).

43. See Been, 398 F. App’x at 389 (calling reasoning of Third, Fifth, and Eleventh Circuits “persuasive”); Wright, 937 F.2d at 1561 (confirming plaintiff accepting remittitur deems judgment final and appealable); Mauriello, 781 F.2d at 49 (computing appeal time begins at point of plaintiff’s remittitur acceptance filing); Howell, 566 F.2d at 993 (determining notice of appeal filing time limit commences when plaintiff files of remittitur acceptance).

44. See Anderson, 249 F.3d at 542-43 (holding appellate courts lack jurisdiction over appeal of remittitur until final judgment entered); see also Eaton v. Nat’l Steel Prods. Co., 624 F.2d 863, 864 (9th Cir. 1980) (reiterating order granting new trial interlocutory and not appealable final judgment); Evans v. Calmar S.S. Co., 534 F.2d 519, 522 (2d Cir. 1976) (refusing modification of “long standing rule” deeming remittitur order not final nor appealable). The Second Circuit, citing Rule 58, has also stated that “[w]here the plaintiff elects the remittitur, the defendant’s time for filing the notice of appeal runs from the date of entry of the amended judgment reduced as a result of the remittitur.” Ortiz-Del Valle, 190 F.3d at 600.

45. Compare Been, 398 F. App’x at 389 (holding plaintiff accepting remittitur renders judgment final where district court never entered amended judgment), with Anderson, 249 F.3d at 542-43 (holding final, separate judgment required in remittitur case filed under Fair Credit Reporting Act), and Wright, 937 F.2d at 1561 (dismissing appeal for lack of jurisdiction after defendant filed three notices of appeal), and Mauriello, 781 F.2d at 49 (analyzing time to file appeal notice after accepting remittitur in procedural due process case), and Eaton, 624 F.2d at 864 (requiring entry of final judgment before appellate court accepts jurisdiction over case), and Howell, 566 F.2d at 993 (denying plaintiff’s motion to dismiss third-party defendant’s appeal based on timeliness of appeal notice), and Evans, 534 F.2d at 522 (analyzing remittitur issue where plaintiff attempted to appeal during second trial). Notably, despite the discrepancy among courts in approaching this issue, judicial interpretation cannot alter a Federal Rule of Civil Procedure—only an amendment to the rules can. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2006) (discussing interpreting procedural rule in context of pleading requirements); see
One recent illustrative decision addressing the issue is *Been v. O.K. Industries*. In *Been*, the plaintiff was a poultry grower who sued a vertically-integrated poultry producer under the Packers and Stockyards Act. A jury awarded damages to the plaintiff, the plaintiff accepted remittitur, and the defendant appealed. The Court of Appeals for the Tenth Circuit held that the judgment was final—and appealable—when the plaintiff accepted remittitur, and that a separate, amended judgment was not required. In arriving at this conclusion, the *Been* court looked to its sister circuits and found that the majority of appellate courts have held the plaintiff’s decision to accept remittitur renders the district court’s decision final. The *Been* court noted that the Sixth Circuit opposed this approach in *Anderson v. Roberson*, in which the Sixth Circuit stated:

> Both plaintiffs and defendants have missed the point. Once the district court entered its order giving the plaintiff the choice between accepting the remittitur or having a new trial, there was no final order from which the parties could appeal. The parties appear to believe that the plaintiff’s action—either accepting or rejecting the remittitur—ends the district court’s jurisdiction and opens the door for the case to proceed on appeal. The parties are mistaken. . . . Until the district court either enters a final order based upon the plaintiff’s election to accept the remittitur, or proceeds to judgment after a new trial, there is nothing for this court to review.

As *Anderson* articulated, while most circuits view the plaintiff’s acceptance of remittitur as the starting point to the defendant’s thirty-day appellate deadline, a minority of circuits disagree. While federal circuits take different approaches to the timing of appeal following remittitur, state courts have been more consistent. For example, the Massachusetts Appeals Court has held its state equivalent of Appellate Rule 4(a) dictates that the time for a defendant to file a notice of appeal effectively begins

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47. See 398 F. App’x at 387 (describing “split” among circuits in addressing appellate timeline in remittitur context).

48. See *Been v. O.K. Indus.*, 398 F. App’x 382, 384-85 (10th Cir. 2010) (recounting case’s background).

49. See id. (detailing procedural history).

50. See id. at 389 (analyzing judgment’s finality in context of plaintiff accepting remittitur).

51. See id. (weighing reasoning and analysis of sister circuits in approaching present case).

52. 249 F.3d 539, 542-43 (6th Cir. 2001); see *Been*, 398 F. App’x at 387-88 (acknowledging Sixth Circuit’s different reasoning).

53. See *Anderson*, 249 F.3d at 542-43 (criticizing parties for mistaken interpretation of plaintiff’s acceptance of remittitur starts point for appeal); *Eaton v. Nat’l Steel Prods. Co.*, 624 F.2d 863, 864 (9th Cir. 1980) (explaining new trial order interlocutory and not appealable final judgment); *Evans v. Calmar S.S. Co.*, 534 F.2d 519, 522 (2d Cir. 1976) (asserting “long standing rule” regarding conditional remittitur order not final until separate judgment issued).

54. See FRIEDENTHAL ET AL., supra note 18, at 564 (noting state and federal differences in context of Re-Examination Clause requirements); see infra note 55 (outlining state court examples).
on the day the court docket the plaintiff’s acceptance of remittitur; Ohio has come to a similar conclusion. Notably, prominent treatises on the matter oppose the majority circuit approach. Both Moore’s Federal Practice and Wright & Miller—to which courts and practitioners frequently cite—advocate that an order granting a new trial is purely interlocutory, and therefore not appealable, asserting a separate document amending the judgment is required before filing a notice of appeal.

Though these variations may seem like esoteric technicalities lacking real world repercussions, certainty in the appellate timeline is of significant importance to defendants. As a trend, some courts and commentators have observed that jury verdict awards across the country have been increasing in value over the past several decades. Although the rates of prejudgment and

55. See Stephens v. Naps, 876 N.E.2d 452, 457-58 (Mass. App. Ct. 2007) (holding plaintiff accepting remittitur starts notice of appeal filing clock); see also Okungwu v. Stephens, 488 N.E.2d 765, 768 (Mass. 1986) (deeming plaintiff’s remittitur acceptance effective denial of new trial motion and commencement of appeal period); Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 675 N.E.2d 403, 417 n.3 (Mass. App. Ct. 1997) (reiterating Okungwu holding and stating court must dismiss premature appeals of conditional remittitur order). The Stephens v. Naps court also held that the defendant’s misunderstanding of the law with respect to the timing of filing the notice of appeal after remittitur acceptance was not excusable neglect. See 876 N.E.2d at 459. In VIL Laser Systems, LLC v. Shiloh Industries, the Supreme Court of Ohio concurred with Massachusetts’s approach, though two judges issued a dissent stating that the order giving the plaintiff the choice of remittitur was final and appealable because it disposed of the case’s merits and left nothing further for the court to decide. See 894 N.E.2d 303, 307 (Ohio 2008) (Cupp, J., dissenting). The dissent further opined that the plaintiff’s consent to remittitur was merely “mechanical” and involved only a “ministerial task.” See id. (quoting State v. Threart, 843 N.E.2d 164, 168 (Ohio 2006)). Other courts have noted the importance of whether a court’s action is ministerial, holding finality may exist where an order contemplates only a court’s ministerial actions. See Star Ins. Co. v. Risk Mktg. Grp., 561 F.3d 656, 659 (7th Cir. 2009) (calling act of entering judgment ministerial); see also Thompson v. Gibson, 289 F.3d 1218, 1221 (10th Cir. 2002) (preparing and entering judgment ministerial task clerk of court easily and routinely performed). Compare City of Paducah v. E. Tenn. Tel. Co., 229 U.S. 476, 480 (1913) (dismissing premature appeal and requiring final order to appeal), with Barker v. Craig, 127 U.S. 213, 216 (1888) (remanding case to circuit court due to lack of final order to appeal).

56. See 12 MOORE ET AL., supra note 7, §§ 59.52-.53 (commenting new entry of judgment required after granting Rule 59 motion before final and appealable); Appealability—Conditional Denial, supra note 10, at 23 (counseling practitioners’ filing time commences from date amended judgment entered); Appealability—Remittitur or New Trial, supra note 10, at 186 (instructing practitioners against considering remittitur order final and appealable).

57. See 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2818 (3d ed. 2019) (defining order granting new trial “purely interlocutory” and not final, appealable judgment); see also 12 MOORE ET AL., supra note 7, § 59.12 (characterizing orders flowing from Rule 59 motion interlocutory). Moore’s Federal Practice postulates that an order conditionally denying a new trial unless plaintiff accepts remittitur “destroys the finality of the judgment” and requires a separate, amended judgment from which to appeal. See 12 MOORE ET AL., supra note 7, § 59.12[1].

58. See Hoffmann & Lampert, supra note 11, at 178 (noting importance of preserving appellate rights in posttrial practice and potential preclusion of appellate review).

59. See Gumbs v. Pueblo Int’l, Inc., 823 F.2d 768, 773 (3d Cir. 1987) (noting “increasingly outrageous amounts . . . awarded by juries[,]” and subsequent willingness of appellate courts to review); see also Williams v. Martir Marietta Alumina, Inc., 817 F.2d 1030, 1041 (3d Cir. 1987) (acknowledging increasing appellate trend to review damage award merits); Lester Brickman, Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees, 81 WASH. U. L.Q. 653, 709 (2003) (noting “very substantial” increases in medical malpractice and products liability verdicts). “Over the past forty years, the scope of liability assessed under the aegis of the tort system has greatly expanded.” Brickman, supra, at 654.
postjudgment interest in federal courts tend to be meager, when dealing with significant verdict amounts, even this low interest rate can add significant costs for the defendant.\textsuperscript{60} This issue is especially important in diversity jurisdiction cases, where prejudgment interest is based on state law.\textsuperscript{61} It may prejudice defendants if prejudgment or postjudgment interest accrues for longer than necessary or is delayed due to uncertainty in the rules.\textsuperscript{62} Further, defense counsel’s uncertainty about or misunderstanding of the Federal Rules of Procedure is generally not considered excusable neglect and may result in permanently missing an appellate deadline and forfeiting their client’s rights.\textsuperscript{63}

This issue is not only of concern to defendants, but also to the courts. Courts have favored remittitur because of its efficiency—it saves the courts both the time and expense of conducting a new trial.\textsuperscript{64} In cases where the Federal Rules...
of Procedure do not clearly outline the appropriate process, a court may need to look to other circuits and undergo its own analysis, coming to its own conclusion regarding what should take place. In each case explored in this Section, the procedural devices bringing this issue before the courts were inconsistent. Certainty is of the utmost importance to the courts, and the purpose of the Federal Rules of Procedure is to both minimize uncertainty and encourage judicial efficiency so courts do not reinvent the wheel every time a particular issue comes to the bench.

See FED. R. APP. P. 4(a). Rule 59 dictates that the filing of a party’s Rule 59(a) motion suspends the trial court judgment’s finality, while Appellate Rule 4(a) contains the thirty-day notice of appeal filing deadline, and also provides that “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . for a new trial under Rule 59.” See id. at 4(a)(4)(A)(v); supra notes 23-24 (explaining remittitur practice and suspension of judgment finality under Rule 59); see also supra note 22 (discussing Appellate Rule 4(a)’s language). Because the Seventh Amendment prevents the trial court from issuing an executed, remitted judgment without the plaintiff’s consent, the conditional remittitur order cannot dispose of the Rule 59 motion until the plaintiff decides to either accept or reject the remittitur. See supra note 22 (articulating relationship between Seventh Amendment constitutionality and remittitur practice). Further, Appellate Rule 4(a)’s language is silent as to whether an amended judgment needs to be filed after a plaintiff has accepted remittitur, whether the trial court must issue another order finally disposing of the remittitur, or whether the plaintiff’s notice of acceptance of remittitur somehow stands in place procedurally as that order. See supra note 22 (addressing ambiguity in Appellate Rule 4(a)’s language). Despite the Advisory Committee’s 2002 notes addressing the finality of a judgment with respect to indefiniteness in the context of a Rule 59 motion, the issue of whether a conditional remittitur order is a final, appealable order at the plaintiff’s acceptance or whether a party must wait for the issuance of a separate judgment before filing an appeal has been left unaddressed. See FED. R. CIV. P. 58 advisory committee’s note to 2002 amendment (addressing issue of indefiniteness and finality in context of Rule 59 motion). Further confusing the issue in 2002, the Advisory Committee explained that the disposition of a Rule 59 motion resulting in an amended judgment must be set forth on a separate document. See id. (determining Rule 59 motion disposition resulting in amended judgment must set forth on separate document). In reiterating the separate document requirement, the Advisory Committee intended to encourage certainty in the rules and in their practice. See id. While intending to encourage certainty, the Advisory Committee did not directly address the confusion that may arise in the context of the finality of a plaintiff’s remittitur acceptance. See id. (failing to address finality issue in context of plaintiff’s remittitur acceptance); see also supra note 27 (articulating Advisory Committee’s intent).

66. See Been v. O.K. Indus., 398 F. App’x 382, 389 (10th Cir. 2010) (analyzing finality of remittitur and looking to other circuits’ analysis where procedure ambiguous).

67. See supra note 46 (comparing procedural holdings of various circuits).

68. See FED. R. CIV. P. 1 (explaining rules’ scope and purpose); see also 12 MOORE ET AL., supra note 7, § 59.51 (showing example of how Federal Rules of Procedure interact and function); Lena Husani Hughes, Note, Time Waits for No Man—But Is Tolled for Certain Post-Judgment Motions: Federal Rule of Appellate Procedure 4(a)(4) and the Fate of Withdrawn Post-Judgment Motions, 112 COLUM. L. REV. 319, 324 (2012) (stating appellate procedure initially “part and parcel” of civil procedure, but now separate). Similar to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure were designed and amended to provide clarity and remove obstacles to the appellate process. Compare Hughes, supra, at 324 & n.36 (discussing Federal Rules of Appellate Procedure and amendments’ goals to reduce “traps” for practitioners), with FED. R. CIV. P. 1 (stating purpose to secure “just, speedy, and inexpensive determination of every action”).
III. ANALYSIS AND SUGGESTED APPROACH

In instances where a plaintiff accepts remittitur and a defendant intends to appeal, there is uncertainty concerning the timing to file a notice of appeal. This uncertainty jeopardizes appellate rights in two ways. First, if a defendant waits more than thirty days after the plaintiff accepts remittitur before filing a notice of appeal—perhaps because they interpreted Rule 58’s separate document requirement to mean the court must enter an amended judgment before their appellate rights are triggered—a majority of circuit courts would dismiss the appeal as untimely. Generally, barring a showing of excusable neglect, dismissal of an appeal due to untimeliness results in a permanent loss of appellate rights. Second, if a party were to file their notice of appeal after the plaintiff accepted remittitur but before the district court entered any subsequent amended judgment, and then the district court never enters any further order on the docket, other circuit courts may hold that the appeal is premature. Such a holding of prematurity leads to a wasteful remand process where the appeal must begin anew with the district court’s entry of a new judgment, all while postjudgment interest continues to accrue.

Because of these conflicting interpretations, confusion among practitioners, and the potential for unfair results, the Federal Rules of Procedure should be amended to promote certainty by clarifying that conditional orders under Rule 59 for remittitur become final and appealable when the plaintiff files a notice of acceptance of the remittitur, and that the defendant’s appellate rights are triggered without the trial court entering an amended judgment or additional order. In the meantime, when navigating the current Federal Rules of Procedure, both

69. See supra Sections II.A-B (expounding upon uncertainty Federal Rules of Procedure established with respect to remittitur practice).
70. See supra notes 42-44, 58-59 (outlining effects of uncertainty on defendants’ appellate rights).
71. See supra note 44 and accompanying text (articulating majority circuit view of plaintiff’s acceptance of remittitur deeming judgment final and appealable).
72. See Fed. R. App. P. 4(a)(5)(A)(i) (addressing excusable neglect). “The district court may extend the time to file a notice of appeal if . . . regardless of whether its motion is filed before or during the 30 days after the time prescribed by this [Appellate] Rule 4(a) expires, that party shows excusable neglect or good cause.” Id. See generally Fischer, supra note 7 (outlining circumstances characterizing excusable neglect in filing appellate court notice of appeal).
73. See supra note 45 and accompanying text (discussing minority view refusing jurisdiction over appeal of remittitur until separate, final judgment entered).
74. See supra notes 60-61 and accompanying text (outlining postjudgment interest rate accrual and bases for calculation); see also City of Paducah v. E. Tenn. Tel. Co., 229 U.S. 476, 480 (1913) (dismissing premature appeal and requiring finality of order to appeal); Barker v. Craig, 127 U.S. 213, 216 (1888) (remanding case to circuit court due to lack of final order to appeal).
75. See supra Sections II.A-B (explaining conflicting interpretations of remittitur practice and confusion among practitioners); see also Fed. R. Civ. P. 1 (explaining scope and purpose behind Federal Rules of Civil Procedure); 56 AM. JUR. Trials, supra note 46, § 3 (providing guide to navigate application of Federal Rules of Civil Procedure); supra note 68 (highlighting interaction of Federal Rules of Procedure).
counsel for defendants and trial courts alike should take action to promote certainty in cases where this issue may arise.\textsuperscript{76}

\textbf{A. Defense Counsel}

1. \textit{Certainty and the Risk of Inexcusable Neglect}

Uncertainty in the appellate timeline puts defense counsel at risk of missing the notice of appeal deadline, jeopardizing the preservation of clients' appellate rights, and compromising appropriate client advocacy.\textsuperscript{77} Because courts do not generally consider defense counsel's uncertainty or misunderstanding of the Federal Rules of Procedure excusable neglect, missing an appeal deadline due to counsel's misinterpretation of the rules may result in completely and permanently waiving appellate rights.\textsuperscript{78} Given the majority view among federal circuits that the time to file begins at the plaintiff's acceptance of remittitur, proactive defense counsel may seek to file a notice of appeal as soon as it is practicable after the plaintiff has filed remittitur acceptance, especially in cases where there is a significant jury award with accruing interest.\textsuperscript{79} While this approach may lead courts in minority jurisdictions to refuse to accept a notice of appeal until an amended judgment is entered on the docket, counsel may avoid the prematurity problem by filing a subsequent notice of appeal after any amended judgment is entered, ensuring preservation of the client's appellate rights.\textsuperscript{80}

2. \textit{Accruing Interest}

In addition to the issues of client advocacy and preservation of rights, another important consideration for defense counsel in the timing of filing a notice of appeal is the accrual of interest on the judgment.\textsuperscript{81} Despite a low postjudgment interest rate in federal courts, delay—particularly in cases involving large jury

\textsuperscript{76} See \textit{Fed. R. Civ. P. 1} (mandating courts and parties construe, administer, and employ rules in accord with judicial efficiency); \textit{56 AM. JUR. Trials, supra note 46, § 3} (articulating interest in achieving fair and desirable outcome); \textit{Hughes, supra note 68, at 324-25} (warning of traps for litigants navigating Appellate Rule 4(a) because of unsettled case law).

\textsuperscript{77} See \textit{supra} note 11 and accompanying text (articulating importance of preservation of rights in posttrial practice and relationship to appellate review).

\textsuperscript{78} See \textit{generally Fischer, supra note 7} (examining circumstances courts consider excusable neglect when filing appellate court notice of appeal). Courts require a showing of excusable neglect before considering extending the time for filing the notice of appeal under Appellate Rule 4(a). See \textit{Fed. R. App. P. 4(a)(5)(A)(ii)} (stating court “may” extend time for filing notice if excusable neglect or good cause exists); \textit{Hoffmann & Lampert, supra note 11, at 178} (explaining posttrial practice preclusion).

\textsuperscript{79} See \textit{supra} note 44 and accompanying text (articulating majority view where defendant’s time to file commences upon plaintiff accepting remittitur).

\textsuperscript{80} See \textit{supra} note 45 and accompanying text (articulating minority view of separate, amended judgment requirement in cases of plaintiff accepting remittitur).

\textsuperscript{81} See \textit{generally Woerner, supra note 11} (expressing accrual of interest issue arises in cases where plaintiff has accepted remittitur).
awards—results in significant costs for the defendant. Though the Advisory Committee enacted Rule 58’s separate document requirement and its subsequent amendments with the intent to promote certainty, the requirement that a party wait for the court to complete the ministerial task of entering an amended judgment on the docket can have very real cost consequences for civil defendants in cases where the accrual of interest is a concern.

B. Potential Ad Hoc Solutions for Courts

Because established federal practice allows for the use of remittitur within the discretion of the trial court, and because, under Gasperini, the appellate standard of review for remittitur is one of abuse of discretion, trial courts themselves could be a source of certainty as to the timing of the appeal period when they order remittitur. As a result of courts’ concern regarding the ramifications of the contemporary trend toward larger jury awards, trial court judges continue to use remittitur as a tool to temper inflating jury awards. Though federal circuits diverge in their approaches addressing the finality of a remittitur order upon plaintiff’s acceptance, a trial court judge might avoid any uncertainty on an individual basis by explicitly stating in the order granting remittitur that it will become final upon the plaintiff’s acceptance, leaving nothing but the “ministerial”

82. See Garcia, supra note 2, at 127 (explaining American Bar Association advocates in favor of remittitur due to increasing jury verdicts); see also supra note 60 and accompanying text (discussing prejudgment and postjudgment interest rates in federal courts). Of particular concern are situations where a party files a notice of appeal following acceptance of remittitur; the district court does not enter an amended judgment on the docket; the parties brief the merits; and the court of appeals then remands or dismisses the appeal for proper application of the separate document requirement, resulting in a significant period of time when postjudgment interest unnecessarily accrues. See Barker v. Craig, 127 U.S. 213, 216 (1888) (holding no final order to appeal from and remanding case back to circuit court); see also City of Paducah v. E. Tenn. Tel. Co., 229 U.S. 476, 480 (1913) (deeming final order necessary to appeal and dismissing premature appeal). Further, where prejudgment interest is based on state law, such as in diversity jurisdiction cases, it may be prejudicial to defendants if prejudgment interest continues to accrue until the court enters a final judgment after a plaintiff accepts remittitur. See Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040, 1051-52 (8th Cir. 2010) (deeming prejudgment interest in diversity cases controlled by state law); 5 FEDERAL COMMERCIAL LITIGATION, supra note 2, § 55:50 (explaining state law’s role in governing prejudgment interest award in diversity action); see also 28 U.S.C. § 1961 (2018) (fixing postjudgment interest rate for interest paid to Treasury bill holders); Bender, supra note 60, at 940 (outlining federal court relationship between Treasury bill rate and prejudgment interest rate).


85. See supra note 59 and accompanying text (explaining trend toward increasing jury awards); see also supra note 21 and accompanying text (outlining common and widespread use of remittitur in federal trial court practice).
task of issuing the amended judgment and allowing the defendant to appeal from the now “final” order. 86

1. Looking to Federal Circuit Decisions for Guidance and Certainty

Currently, the majority of circuits hold that the thirty-day limit to file a notice of appeal begins when the plaintiff files an acceptance of remittitur, bridging the uncertainties in the Federal Rules of Procedure with their own analysis of judicial efficiency. 87 For example, commenting on the holdings of its sister circuits, the Tenth Circuit characterized the reasoning of the Third, Fifth, and Eleventh Circuits as “more persuasive” than the minority view, despite also acknowledging the black letter, separate document requirement of Rule 58. 88 The Sixth Circuit, however, has taken a stricter, more textual view of the Federal Rules of Procedure in light of Rule 58’s separate document requirement, requiring the entry of a separate, amended judgment before a defendant may appeal from remittitur. 89 This discrepancy among the circuits highlights the uncertainty surrounding remittitur, and exemplifies the courts’ attempts to promote judicial efficiency and fairness where the Federal Rules of Procedure have given no true guidance. 90 Notwithstanding the courts’ efforts to fill the gaps in remittitur practice, amending the Federal Rules of Procedure would avoid the need for further expenditure of judicial resources on these questions and provide counsel with a uniform approach for timely preservation of appellate rights following acceptance of remittitur. 91

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86. See supra note 10 and accompanying text (outlining divergence among circuits in approaching remittitur appeal issue); see also supra note 55 (explaining judgment final where only remaining action left ministerial).

87. See supra note 44 and accompanying text (articulating majority circuit approach and resolution to uncertainty in rules with respect to remittitur).

88. See Been v. O.K. Indus., 398 F. App’x 382, 389 (10th Cir. 2010) (analyzing reasoning behind decisions of sister circuits and agreeing “more persuasive”).

89. See supra note 45 and accompanying text (discussing Sixth Circuit’s minority, textual approach to separate document requirement under Rule 58).

90. See supra note 22 and accompanying text (discussing ambiguity in Appellate Rule 4(a)(1)’s language); supra note 64 and accompanying text (positing Federal Rules of Civil Procedure demands same goals for every case); supra note 68 and accompanying text (highlighting importance of certainty in Federal Rules of Procedure); see also Been, 398 F. App’x at 389 (articulating divergent approaches taken by circuit courts in addressing issue). Compare Wright v. Preferred Research, Inc., 937 F.2d 1556, 1556 (11th Cir. 1991) (identifying final and appealable judgment at point plaintiff accepted remittitur), and Mauriello v. Univ. of Med. & Dentistry, 781 F.2d 46, 49 (3d Cir. 1986) (holding appeal time commences at plaintiff’s remittitur acceptance filing), and Howell v. Marmegaso Compania Naviera, S.A., 566 F.2d 992, 993 (5th Cir. 1978) (noting plaintiff’s remittitur acceptance filing triggers appeal timeline), with Anderson v. Roberson, 249 F.3d 539, 542-43 (6th Cir. 2001) (condemning parties’ understanding of separate document requirement and requiring entry of separate, amended judgment).

91. See supra note 64 (emphasizing need to secure inexpensive determinations of cases); supra note 68 and accompanying text (referencing importance of uniformity in Federal Rules of Procedure). Clarifying the Federal Rules of Appellate Procedure insofar as they relate to appeals following remittitur acceptance would also alleviate the need for expending judicial resources on determining precisely what facts and circumstances constitute “excusable neglect” when a party litigating in a majority circuit, having understood the separate document requirement to mandate an amended judgment, waits more than thirty days after acceptance of remittitur and faces
2. Looking to Treatises for Guidance and Certainty

While the majority of circuits have deemed the Sixth Circuit’s separate, amended judgment requirement unpersuasive in promoting judicial economy and fairness, leading commentators support the Sixth Circuit’s view. Prominent treatises, such as Moore’s Federal Practice and Wright & Miller, advocate that in instances of a plaintiff’s acceptance of remittitur, a separate document amending the judgment is required before a defendant may file the notice of appeal. Citing to Rule 58’s separate document requirement, these treatises advocate for the same certainty and uniformity that the Federal Rules of Civil Procedure intend to achieve. The treatises’ adoption of the minority circuit view that a separate, amended judgment is required further highlights the ambiguity surrounding remittitur and its appellate timeline.

3. Implementing Certainty in the Courts

Remittitur has been particularly popular with the courts because of its efficiency in saving the time and expense of conducting a new trial, specifically in circumstances where only the damages portion of a verdict is defective because it is disproportionately high. Individual trial courts might consider adding clarifying language in conditional remittitur orders to avoid uncertainty as to the finality of such orders. A district court used such an approach in Davis v. Advocate Health Center Patient Care Express, giving the plaintiff a certain period of time to act. When that time ran out, the Seventh Circuit held that the “suit ha[d] ended at the district court level,” and thus, the decision was final and

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dismissal of the appeal. See Fed. R. App. P. 4(a)(5)(A)(ii) (requiring excusable neglect for extending appeal period if notice of appeal not timely filed); supra note 44 and accompanying text (citing cases holding appeal period begins upon remittitur acceptance).

92. See supra note 57 and accompanying text (articulating treatise recommendations and views regarding procedure surrounding remittitur and appellate practice); see also supra note 10 and accompanying text (discussing deviating approaches among circuits in addressing remittitur issue).

93. See supra notes 56-57 and accompanying text (advocating requirement of separate, amended document before defendant files notice of appeal).

94. See supra note 57 and accompanying text (acknowledging leading civil procedure treatises support separate document requirement); see also supra note 64 (explaining Federal Rules of Civil Procedure should secure similar goals in every action).

95. See supra note 45 and accompanying text (discussing minority circuit approach); supra note 57 and accompanying text (articulating treatise recommendations and approach); supra note 64 (explaining purpose of Federal Rules of Civil Procedure); supra note 68 and accompanying text (referencing interplay between Federal Rules of Procedure).

96. See Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1507 (11th Cir. 1985) (holding remittitur “not only accomplishes justice but also promotes economy” for courts and parties); see also Friedenthal et al., supra note 18, § 12.4 n.219 (outlining remittitur’s efficiency); Garcia, supra note 2, at 126 (espousing rationale underlying remittitur flows from judicial economy).

97. See Davis v. Advocate Health Ctr. Patient Care Express, 523 F.3d 681, 683 (7th Cir. 2008) (holding case ended in district court after clarifying timing language in order ran).

98. See id. (upholding finality of order implementing clarifying language).
appealable. Alternatively, the court could also clarify that the order becomes final upon plaintiff’s acceptance of remittitur, and any amended judgment entered after the plaintiff accepts remittitur pursuant to the conditional order is merely a ministerial act. Relying on individual trial courts to draft conditional remittitur orders that ensure uniformity, however, is unlikely to result in the degree and breadth of certainty that the Federal Rules of Procedure were intended to achieve. Unless and until the Federal Rules of Procedure are amended—and the combined effect of Rule 58 and Appellate Rule 4(a) provides certainty for deadlines of notices of appeal—appellate courts must address the issue on an ad hoc, flexible basis to prevent wasting time and money while protecting defendants from unintentionally waiving their appellate rights.

C. Possible Amendments to the Federal Rules of Procedure

Some guidance for how to resolve this issue might be found in the reasoning underlying Bankers Trust Co. v. Mallis. Mallis held that where the district court intends a document to be a final judgment, the court enters the judgment in accordance with the Federal Rules of Civil Procedure, one party appeals despite the absence of a separate document, and the appellee does not object to the lack of a separate document, an appellate court may deem Rule 58’s separate document requirement waived, and thus take jurisdiction over the appeal. The Mallis Court reasoned that the “sole purpose” of the separate document requirement was to clarify when the time to file the notice of appeal begins to run and that the requirement was designed to encourage certainty, not to set traps for

99. See id. (holding decision final and appealable when plaintiff’s time ran out).
100. See Star Ins. Co. v. Risk Mktg. Grp., 561 F.3d 656, 659 (7th Cir. 2009) (holding act of entering judgment ministerial). The Star court explained that orders specifically contemplating further activity in the district court are generally not final, but where an order only contemplates the court’s ministerial actions, finality may exist. See id.; see also Thompson v. Gibson, 289 F.3d 1218, 1221 (10th Cir. 2002) (stating court clerk easily and routinely performs ministerial task of preparing and entering judgments).
103. See id. at 387-88 (listing criteria through which Rule 58 separate document requirement may be waived).
Following this logic, the Federal Rules of Civil Procedure—with appropriate integration into the Federal Rules of Appellate Procedure—should be amended to clarify that conditional orders under Rule 59 for remittitur are presumptively intended to become final and appealable at the time the plaintiff accepts the remitted sum, and Rule 58’s separate document requirement is inapplicable under these circumstances, triggering a defendant’s appellate rights under Appellate Rule 4(a) without needing the trial court to enter an amended judgment or additional order.106

IV. CONCLUSION

Despite early constitutional criticism, trial courts continue to utilize remittitur today. The Advisory Committees for the Federal Rules of Procedure should address the gap that exists in the rules with respect to the timing of filing a notice of appeal when a plaintiff has accepted remittitur. Any amendments to the Federal Rules of Procedure should follow the lead of Mallis, fall in line with the majority circuits, and explicitly state that “in cases of remittitur under Rule 59, Rule 58’s separate document requirement is waived, and the thirty-day timeline to file a notice of appeal for purposes of Appellate Rule 4(a) begins when the plaintiff’s acceptance of remittitur is entered.”

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105. See id. at 386 (postulating separate document requirement’s purpose under Rule 58); see also United States v. Indrehus, 411 U.S. 216, 220 (1973) (analyzing Advisory Committee’s intent in context of separate document requirement).

106. See supra Sections IIIA-B (arguing amending Federal Rules of Procedure necessary to promote certainty in remittitur context).