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Federal Civil Procedure - Fed R. Civ. P. 54(b) - A Proposed Two-Part Analysis for the Exercise of a Trial Judge's Discretionary Certification of a Claim as Final under Rule 54(b) When a Counterclaim Remains Pending

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FEDERAL CIVIL PROCEDURE—FED. R. CIV. P. 54(b)—A PROPOSED TWO-PART ANALYSIS FOR THE EXERCISE OF A TRIAL JUDGE'S DISCRETIONARY CERTIFICATION OF A CLAIM AS FINAL UNDER RULE 54(b) WHEN A COUNTERCLAIM REMAINS PENDING.

I. INTRODUCTION

Rule 54(b) of the Federal Rules of Civil Procedure[1] empowers a district judge to enter final judgment "as to one or more but fewer than all of the claims or parties" in an action where more than one claim for relief is presented.[2] This procedure confers discretionary power upon the district judge to grant an exception to the federal policy that an entire lawsuit is the appropriate judicial unit for appellate review,[3] when such an exception is necessary to alleviate hardship in an "infrequent harsh case."[4] Recently, in *Curtiss-Wright Corp. v. General Electric Co.*,[5] the United States Court of Appeals for the Third Circuit held that the trial judge abused the discretion authorized by rule 54(b) when he certified as final a large, liquidated claim, while an unrelated, disputed counterclaim was left to be adjudicated.[6] Although the task of formulating the principles for applying rule 54(b) has long been left to the lower federal courts,[7] the United States Supreme Court has

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1. FED. R. CIV. P. 54(b). Rule 54(b) provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id.

2. *Id.*

3. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432-34 (1956). *See* notes 24-25 and accompanying text *infra*.

4. Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960). For a discussion of *Panichella*, see notes 48-50 and accompanying text *infra*.

It is important to note that the procedure provided under rule 54(b) is distinct from the power of the district court to certify single "issues" for interlocutory appeal under 28 U.S.C. § 1292(b) (1976). Section 1292(b) allows an interlocutory appeal on an issue or order which is not a final judgment under 28 U.S.C. § 1291 (1976). Rule 54(b) requires a final judgment and allows an appeal which is interlocutory only because it is part of a multiple claims litigation. *See* Bogosian v. Gulf Oil Co., 561 F.2d 434, 443 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

5. 597 F.2d 35 (3d Cir.) (per curiam), *rehearing denied*, 599 F.2d 1259 (3d Cir.), *cert. granted*, 100 S. Ct. 43 (1979).

6. 597 F.2d at 35-36.

7. *See* notes 46-47 and accompanying text *infra*.

agreed to review those standards by granting certiorari in the *Curtiss-Wright* case.[8]

This note will review the policies underlying rule 54(b),[9] discuss the jurisdictional limitations on its application as enunciated by the Supreme Court,[10] and analyze the judicial constructions of the rule while emphasizing the decisions of the Third Circuit.[11] Finally, this note will suggest that the recent Third Circuit decisions reviewing trial court applications of rule 54(b) have departed from the requirements of the rule and the Supreme Court's interpretation thereof.[12]

II. BACKGROUND, DEVELOPMENT, AND APPLICATION OF RULE 54(b)

A. *Historical Development, Policies, and Purposes of Rule 54(b)*

At common law, it was clearly established that a judgment was not final and appealable unless it completely resolved all of the issues raised in a lawsuit.[13] This practice was adopted and generally followed in the United States prior to the enactment of the Federal Rules of Civil Procedure in 1938.[14] Since the new rules allowed greater latitude in the joinder of parties and claims, hardship might result if a particular claim, which would be final and ripe for appeal if sued on alone, could be held in abeyance pending the adjudication of other, perhaps unrelated, claims.[15] As a result, it was clear that these liberalized joinder provisions would require adoption of a more flexible definition of the appropriate unit for judicial review.[16]

In order to meet this need for greater flexibility, the 1938 rules included rule 54(b) which authorized a trial court to enter "[j]udgment at various stages,"[17] and thereby allowed the district courts to conveniently dis-

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8. 100 S. Ct. at 43.

9. *See* notes 13-27 and accompanying text *infra*.

10. *See* notes 28-45 and accompanying text *infra*.

11. *See* notes 46-78 and accompanying text *infra*.

12. *See* notes 79-124 and accompanying text *infra*.

13. *See* Metcalfe's Case, 77 Eng. Rep. 1193, 11 Coke 38 (1615). There were, however, certain narrow exceptions to this rule not relevant for purposes of this discussion. *See* 6 MOORE'S FEDERAL PRACTICE ¶ 54.19, at 211 & n.4 (2d ed. 1976).

14. *See, e.g.*, Holcombe v. McKusick, 61 U.S. (20 How.) 552, 554 (1857); U.S. v. Girault, 52 U.S. (11 How.) 22, 31-32 (1850). *See also* 6 MOORE, *supra* note 13, ¶ 54.19, at 211-15.

15. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956). For example, continuation of the common law appealability theory could require a plaintiff's undisputed contract claim to remain in abeyance while the defendant's unrelated tort claim against the plaintiff, properly interposed as a permissive counterclaim under rule 13(a), is adjudicated.

16. *See id.*

17. Fed. R. Civ. P. 54(b), 308 U.S. 732 (1938), *reprinted in* 6 MOORE, *supra* note 13, ¶ 54.01[3], at 51. The original version of rule 54(b) read:

> (b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall

pose of separate claims—with one important distinction. Under the original language of rule 54(b), the judicial unit which was suitable for appeal was the "claim and all counterclaims arising out of the same transaction or occurrence which is the subject matter of the claim."[18] Thus, under the 1938 rule, an order which disposed of the claim, but not of a compulsory counterclaim, lacked finality since, under rule 13(a), compulsory counterclaims necessarily arise out of the same "transaction or occurrence" as the main claim.[19] This original form of the rule was upheld by the Supreme Court[20] and was implemented by the lower courts,[21] although not without recognition of the practical and procedural problems involved.[22]

The original language of rule 54(b) was substantially revised in 1946 to incorporate most of the provisions which are currently in effect.[23] The 1946

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proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Id.

18. *Id.*

19. 6 MOORE, *supra* note 13, ¶ 54.23[1], at 242-43. This result is clearly required by the language of rule 13(a) of the Federal Rules of Civil Procedure which defines a compulsory counterclaim as one which arises out of the "same transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a). This "same transaction or occurrence" language is used to define the judicial unit under the original rule 54(b). *See* note 17 *supra*.

20. Reeves v. Beardall, 316 U.S. 283 (1942). In *Reeves*, the Court observed that "[t]he Rules make it clear that it is differing occurrences or transactions, which form the basis of separate units of judicial action." *Id.* at 285, *citing* Atwater v. North Am. Coal Co., 111 F.2d 125, 126 (2d Cir. 1940).

21. *See, e.g.*, Toomey v. Toomey, 149 F.2d 19 (D.C. Cir. 1945); Audi Vision Inc. v. RCA Mfg. Co., 136 F.2d 621 (2d Cir. 1943). In *Audi Vision*, the Second Circuit held that a judgment on a contract claim, which did not dispose of a pending compulsory counterclaim, was not appealable under old rule 54(b). 136 F.2d at 624.

22. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433-36 (1956). The language of the original rule allowed the trial judge to enter a final judgment as to one claim, but did not require an explicit finding of "finality" or a finding of "no just reason for delay." *Compare* Fed. R. Civ. P. 54(b), 308 U.S. 732 (1938) *with* FED. R. CIV. P. 54(b). As a result, it was difficult for the parties to know when a final appealable order had been entered on a particular claim, since an appellate court might later find that the order was *not* final. *See* 351 U.S. at 434 & n.7. On the other hand, if the party who wished to appeal the first order waited until all the other claims had been resolved, that party ran the risk that the time for appeal on the first order might have expired in the interim. *Id.* at 434. Thus, it "became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased." *Id.* For examples of this problem, *see* Pabellon v. Grace Lines, Inc., 191 F.2d 169, 173-76 (2d Cir.), *cert. denied*, 342 U.S. 893 (1951); Audi Vision, Inc. v. RCA Mfg. Co., 136 F.2d 621, 623-25 (2d Cir. 1943).

23. Fed. R. Civ. P. 54(b), 329 U.S. 861-62 (1946), *reprinted in* 6 MOORE, *supra* note 13, ¶ 54.26[2], at 305. The 1946 version of the rule provided:

(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in any action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of final judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which

amendments, with an important limited exception, reinstated the pre-rules practice of designating the entire action as the unit for judicial review, making any order which did not dispose of all of the claims in a lawsuit interlocutory and nonappealable.[24] In order to invoke the exception to this rule, the trial judge is required to make 1) "an express direction for the entry of final judgment"; and 2) "an express determination that there is no just reason for delay."[25] Further, the 1946 amendments eliminated the "same transaction or occurrence" language of the original rule—which had precluded an appeal when a compulsory counterclaim was pending[26]—and thereby placed counterclaims on the same footing as other multiple claims for purposes of rule 54(b).[27]

B. *Judicial Interpretation and Application of Rule 54(b)*

While the Supreme Court had upheld the original language of rule 54(b),[28] the adoption of the 1946 amendments raised the issue of whether the new rule was consistent with the finality requirements of section 1291 of the Judiciary and Judicial Procedure Code which grants jurisdiction to the courts of appeals to review *final* decisions of the lower courts.[29] Specifi-

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adjudicates less than all claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Id. The rule was amended once again in 1961 to allow for judgment as to multiple parties as well as to multiple claims. *Compare* Fed. R. Civ. P. 54(b), 329 U.S. 861-62 (1946) *with* FED. R. CIV. P. 54(b). For a discussion of the problems that the 1961 amendment was intended to ameliorate, *see* Steiner v. Twentieth Century Fox Film Corp., 220 F.2d 105 (9th Cir. 1955); 6 MOORE, *supra*, ¶ 54.26[3], at 307-09.

24. Fed. R. Civ. P. 54(b), 329 U.S. 861-62 (1946). To remedy the uncertainty caused by the original rule, *see* note 22 *supra*, the Advisory Committee found that the entire lawsuit should be the judicial unit for review, but added an exception to allow "the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule." Fed. R. Civ. P. 54(b) (1946), Advisory Committee Report on Rules for Civil Procedure, 5 F.R.D. 433, 473 (1946).

25. Fed. R. Civ. P. 54(b), 329 U.S. 861-62 (1946) (current version at FED. R. CIV. P. 54(b)). *See* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 452-53 (1956); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435-36 (1956); TMA Fund, Inc. v. Biever, 520 F.2d 639, 641-42 (3d Cir. 1975). *See also* 6 MOORE, *supra* note 13, ¶ 54.04[3.—5], at 155-57.

26. *See* note 19 and accompanying text *supra*.

27. *See* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 452 (1956). *See also* Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952) (en banc); 6 MOORE, *supra* note 13, ¶ 54.35[1], at 581-86. The 1946 amendments also deleted the provision in the original rule 54(b) which authorized the district court to stay the execution of a judgment entered under the rule. *See* Fed. R. Civ. P. 54(b), 308 U.S. 732 (1938); note 17 *supra*. This language was then added to rule 62(h), which provides:

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

FED. R. CIV. P. 62(h). *See* 6 MOORE, *supra* note 13, ¶ 54.20, at 232 n.5.

28. *See* note 20 and accompanying text *supra*.

29. 28 U.S.C. § 1291 (1976). Section 1291 provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all *final* decisions of the district courts of the United

cally, the deletion of the "same transaction or occurrence" language sparked a controversy over whether a district judge could certify as final a judgment that did not dispose of a compulsory counterclaim.[30]

With respect to the finality issue raised by the 1946 amendments, the Supreme Court, in *Sears, Roebuck & Co. v. Mackey,*[31] held that the new rule fully satisfied the finality requirements of section 1291.[32] Structuring its analysis around the language of rule 54(b),[33] the *Sears* Court held that proper application of the rule 1) *requires* the trial judge to make an "express direction for the entry of final judgment";[34] and 2) *allows* the trial judge, by "an exercise of discretion in the interest of sound judicial administration," to

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States . . . , except where a direct review may be had in the Supreme Court." *Id.* (emphasis added). Justices Frankfurter and Harlan, concurring in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), and dissenting in Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956), pointed out that "28 U.S.C. § 1291 . . . is not a technical rule in a game. It expresses not only a deeply rooted but a wisely sanctioned principle against piecemeal appeals . . . ." 351 U.S. at 441 (Frankfurter and Harlan, JJ., concurring in *Sears,* dissenting in *Cold Metal*), *citing* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Cobbledick v. United States, 309 U.S. 323 (1940).

30. 6 MOORE, *supra* note 13, ¶ 54.28[3.—2], at 395-400. This controversy climaxed in Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952) (en banc). In *Bendix,* the district court dismissed plaintiff's claim for specific enforcement of a contract and certified it as final under rule 54(b), without adjudicating defendant's *compulsory* counterclaim for damages. *Id.* at 268. On appeal, a panel of the Third Circuit reversed, holding essentially that application of rule 54(b) had been *restricted* by the 1946 amendments to cases which were *both* final under the original rule *and* properly certified under the new language. 20 U.S.L.W. 2106 (unreported panel opinion withdrawn on rehearing). *See* 6 MOORE, *supra,* ¶ 54.28 [3.—2], at 396 & n. 9.

In support of this position, the panel relied upon the holding of the Second Circuit in Flegenheimer v. General Mills, Inc., 191 F.2d 237 (2d Cir. 1951). In *Flegenheimer,* Judge Learned Hand, writing for the majority, stated that the language of the 1946 amendments was restrictive, rather than expansive, and that it nowhere suggested that "the judge can make 'final' that which was not 'final' before 1946." *Id.* at 241. Having so concluded, the Second Circuit reversed the certification of the order dismissing an intervenor's claim, calling it one which would not be final under pre-1946 practice. *Id. See* 6 MOORE, *supra,* ¶ 54.28 [3.—2], at 398-99.

On rehearing, the *Bendix* panel opinion was withdrawn and the Third Circuit, sitting *en banc,* rejected the *Flegenheimer* analysis and upheld the appealability of a final judgment not disposing of a compulsory counterclaim. 195 F.2d at 269-73. The *Bendix* court found that the 1946 amendments caused two major changes: 1) the "same transaction or occurrence" language was eliminated; and 2) the requirement of an express entry of final judgment and an express determination of not just reason for delay were added. *Id.* at 269. The result of these changes, according to the *Bendix* court, was that, contrary to *Flegenheimer,* if the two express requirements of the rule were met, the judgment was final and appealable without regard to pre-1946 practice. *Id.* at 269-70. This decision was subsequently cited with approval by the United States Supreme Court in Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 452 (1956). *See* note 43 and accompanying text *infra.*

31. 351 U.S. 427 (1956). In *Sears,* the plaintiff sued on four counts of alleged unfair trade practices. *Id.* at 429-31. The district court dismissed two of the claims, certifying its dismissal as final under rule 54(b). *Id.* at 428. The court of appeals refused to dismiss the appeal and the Supreme Court affirmed. Mackey v. Sears, Roebuck & Co., 218 F.2d 295 (7th Cir. 1955), *aff'd,* 351 U.S. 427 (1956).

32. 351 U.S. at 433-36 & n.5. In upholding the validity of the rule, the *Sears* Court defined "finality" as "an ultimate disposition of an individual claim." *Id.* at 436.

33. *See* notes 1 & 24-25 and accompanying text *supra.*

34. 351 U.S. at 436-37.

release such a "final judgment" for appeal if "there is no just reason for delay."[35] The *Sears* Court thus provided a two-part test for the application of rule 54(b),[36] consisting of a *mandatory* determination of "finality"[37] as a prerequisite to the trial judge's *discretionary* consideration of the proper timing of the release of the final judgment for appeal.[38] The Court found that the two-step approach cured the uncertainty inherent in the 1937 rule,[39] and tailored the single judicial unit theory to the current needs of judicial administration.[40]

In *Cold Metal Process Co. v. United Engineering & Foundry Co.*,[41] the companion case to *Sears*, the Court turned to the specific issue raised by the 1946 amendments of whether a trial court could certify a claim as final when a compulsory counterclaim was pending.[42] Clarifying the effect of the deletion of the "same transaction or occurrence" language by the amendment, the Court held that the rule now treats counterclaims, whether compulsory or permissive, like any other multiple claims.[43] Having thus disposed of the

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35. *Id.* at 437.

36. *Id.* at 436. A close reading of the *Sears* opinion discloses that the test applied by the Court was actually a "three-prong" analysis, the additional criterion being a subissue under the mandatory "finality" prong—namely, whether or not the order appealed from was a decision upon a *claim for relief*. *Id.* For a discussion of the effect of this language on the validity of a two-part analysis, *see* note 80 and accompanying text *infra*.

37. 351 U.S. at 437. The *Sears* Court emphasized that "[t]he District Court *cannot* in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291." *Id.* (emphasis in original). For an example of "that which is not final" under § 1291, *see* Western Geophysical of America v. Bolt Assocs., 463 F.2d 101 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972) (trial court rendered judgment on liability and certified as final under 54(b) without ascertaining damages; Second Circuit ruled that this was not a final judgment under § 1291). The *Sears* Court suggested that the "finality" determination involves a question of whether the adjudicated and unadjudicated claims are sufficiently distinct factually. *See* note 32 and accompanying text *supra*.

38. 351 U.S. at 437.

39. *Id.* at 438. *See* note 22 and accompanying text *supra*.

40. 351 U.S. at 438.

41. 351 U.S. 445 (1956). *Cold Metal* involved a complex series of negotiations, agreements, and lawsuits between the parties which had lasted nearly thirty years. *Id.* at 447-50. The basis of the conflict was an alleged contract between the parties under which United Engineering & Foundry was to assist Cold Metal in obtaining a patent in return for an exclusive license under the patent. *Id.* at 447. The trial court accepted the findings of the special master, entered judgment both for and against Cold Metal on its claims—without disposing of United's compulsory counterclaim—and certified the order as final under 54(b). *Id.* at 449-50. Cold Metal moved for dismissal of United's appeal on the ground that the court of appeals lacked jurisdiction even after the trial judge's certification, but the court of appeals affirmed. *Id.* at 450.

42. *Id.* at 446.

43. *Id.* at 452. The Court stated:

> The amended rule, in contrast to the rule in its original form, treats counterclaims, whether compulsory or permissive, like other multiple claims. It provides that "When more than one claim for relief is presented *in an action, whether as a claim, counterclaim, cross-claim, or third-party claim*, the [district] court may direct the entry of a final judgment upon one or more but less than all of the claims . . . ." Counterclaims and cross-claims are thus equated with the others.

Id. (emphasis in original), citing Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952). It is, therefore, clear that the *Bendix* court's interpretation of rule 54(b) was accepted by the Supreme Court. *See* note 30 *supra*.

counterclaim distinction, the *Cold Metal* Court applied the *Sears* two-step test and found that 1) the judgment appealed from was, in fact, final;[44] and 2) the court of appeals had properly upheld the trial court's finding that there was no just reason for delay.[45]

Following the *Sears* and *Cold Metal* decisions, it was clear that rule 54(b) certification requires a "final judgment" and an exercise of discretion by the trial judge.[46] With respect to the latter requirement, however, the Court provided no standards to guide the trial court's discretionary determination of whether there was "no just reason for delay."[47] Shortly thereafter, in *Panichella v. Pennsylvania Railroad Co.*,[48] the Third Circuit took the first step toward developing appropriate certification criteria. The *Panichella* court held that the district judge should, in exercising his discretion under rule 54(b), weigh "the overall policy against piecemeal appeals against whatever exigencies the case at hand may present,"[49] in order to determine whether the situation at bar is the "infrequent harsh case" requiring certification.[50] This restriction of rule 54(b) to the "infrequent harsh case" has become the test of the trial court's discretion within the Third Circuit, as well as in the other federal courts.[51]

Relying upon this standard, the Second Circuit, in *Campbell v. Westmoreland Farm, Inc.*,[52] reiterated the warning of *Panichella* that certification "should not be entered routinely or as a courtesy or accommodation

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44. 351 U.S. at 452.

45. *Id.* at 452-53.

46. *See* notes 33-38 and accompanying text *supra*.

47. 351 U.S. at 439 (Frankfurter & Harlan, JJ., concurring in *Sears*, dissenting in *Cold Metal*). Criticizing the majority for granting standardless discretion to the trial court, Justices Frankfurter and Harlan stated that the result would be to "cast upon the courts of appeals a duty of independent judgment broader than is implied by the usual flavor of the phrase 'abuse of discretion.' " *Id.* at 440 (Frankfurter and Harlan, JJ., concurring in *Sears*, dissenting in *Cold Metal*).

48. 252 F.2d 452 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960). In *Panichella*, the Third Circuit reversed the trial court's entry of final judgment upon the dismissal of a third-party complaint, holding, *inter alia*, that "the third-party claim was so completely incidental to and dependent upon the principal claim," that certification would cause duplicative appeals. 252 F.2d at 455. The court further found that an appeal at that stage would only serve "to delay the trial of the principal claim without in any way either simplifying or facilitating its future litigation." *Id.*

49. 252 F.2d at 455.

50. *Id.* It should be noted that this "infrequent harsh case" standard is adopted directly from the language of the advisory committee note to the 1946 amendments. *See* note 24 *supra*.

51. *See* notes 52-78 and accompanying text *infra*. The argument has been made, however, that the "infrequent harsh case" test of *Panichella* should only be applied to judgments which would not have been final under the original rule 54(b). *See* Note, *Trial Court Discretion in Rule 54(b) Certification: Extension of the* Panichella *Requirement of an Infrequent Harsh Case*, 54 N.C. L. REV. 1265, 1271-73 (1976). For an example of such a judgment which would not have been final under the original rule 54(b), *see* note 19 and accompanying text *supra*.

52. 403 F.2d 939 (2d Cir. 1968). In *Campbell*, plaintiffs sought damages for wrongful death and emotional harm resulting from the death of their daughter. *Id.* at 940. Because the New York wrongful death statute precludes recovery for emotional harm, the trial judge dismissed those counts for failure to state a claim and certified the dismissal as final. *Id.* The trial court

to counsel."[53] The *Campbell* court further stated that the "no just reason for delay" language from the rule required "some danger of hardship or injustice through delay which would be alleviated by immediate appeal."[54] Similarly, the Tenth Circuit, in *Gas-a-Car, Inc. v. American Petrofina, Inc.*,[55] applied the *Panichella* standard[56] and upheld the grant of certification upon the express finding of the district judge that the potential hardships outweighed the inconvenience of delay, and that an immediate appeal would facilitate the adjudication of the remaining claims.[57]

While the aforementioned decisions, dealing with the second element of the *Sears* analysis, indicate a trend towards allowing the trial judge broad discretion based upon his firsthand knowledge of the case,[58] the Third Circuit, in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*,[59] stated that this discretion should be more limited when a counterclaim is pending.[60] The *Allis-Chalmers* court did not reach the merits of the district court's certification, holding only that the district court must, in all cases, provide a statement which "clearly articulate[s] the reasons and factors underlying its decision to grant 54(b) certification."[61] The court went on, however, to discuss

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did not, however, dismiss the wrongful death claims or the emotional harm claims as to certain defendants who had not yet been served. *Id.* The Second Circuit reversed the trial court's certification, holding that no "hardship or injustice would result if the plaintiffs were required to try the wrongful death claim before taking their appeal." *Id.*

53. *Id.* at 942, *quoting* Panichella v. Pennsylvania R.R., 252 F.2d at 455.

54. 403 F.2d at 942.

55. 484 F.2d 1102 (10th Cir. 1973). In this complicated antitrust suit, the trial court dismissed one of the counts of plaintiff's complaint for failure to state a claim, and certified the order as final under rule 54(b). *Id.* at 1104. The court of appeals upheld the 54(b) certification as a proper exercise of discretion. *Id.*

56. *Id.* at 1105.

57. *Id.*

58. *See* notes 46-57 and accompanying text *supra.*

59. 521 F.2d 360 (3d Cir. 1975), *noted in The Third Circuit Review,* 22 VILL. L. REV. 697 (1976). In *Allis-Chalmers,* the plaintiff supplied eight transformers to the defendant, who only paid for five of them. 521 F.2d at 362. Plaintiff then sued for the balance due on the sale and for various repair charges. *Id.* Defendant admitted the debts as to the goods sold but interposed an *unrelated* counterclaim styled as a "set-off." *Id.* The district court entered summary judgment for the plaintiff and certified the judgment as final under rule 54(b). *Id.* Defendant appealed, asking that the final judgment be vacated as an abuse of discretion. *Id.* at 361. The Third Circuit vacated and remanded. *Id.* at 367.

60. 521 F.2d at 366.

61. *Id.* at 364 (footnote omitted). In requiring a statement of reasons, the court endorsed the practice which the Second Circuit had suggested in Gumer v. Shearson, Hammill & Co., 516 F.2d 283 (2d Cir. 1974). 521 F.2d at 364. The *Allis-Chalmers* court stressed that "[n]otwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification. We have remanded *only* for a *statement of reasons* so that this Court may properly determine if this was the 'infrequent harsh case' warranting final certification . . . ." *Id.* at 367 n.16 (emphasis in original).

In a vigorous dissent to the *Allis-Chalmers* decision, Judge Gibbons took issue with the majority's insistence on a statement of reasons, maintaining that the imposition of such a requirement goes beyond the scope of the intent of the draftsmen of the rule. *Id.* at 367 (Gibbons, J., dissenting). Judge Gibbons felt that requiring a written opinion in every rule 54(b) case would "have the practical consequence of destroying the utility of [the] rule" which lies in

in dictum the specific criteria relied upon by other courts in 54(b) cases[62] and suggested an "illustrative" list of such factors.[63] The *Allis-Chalmers* court then concluded that "[i]n the absence of harsh circumstances, we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, *weighs heavily against the grant of 54(b) certification.*"[64]

In accord with this statement from *Allis-Chalmers* concerning the effect of a pending counterclaim, the Second Circuit, in *Brunswick Corp. v. Sheridan*,[65] strictly construed the scope of the trial judge's discretion under rule 54(b).[66] The *Brunswick* court held that while the judgment entered on the defendants' counterclaim was "final" under section 1291, the issues in-

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the prevention of delaying tactics and in the conservation of judicial time. *Id. See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

62. 521 F.2d at 364-66, *citing* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956); TPO Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, *aff'd on rehearing*, 487 F.2d 137 (3d Cir. 1973); Panichella v. Pennsylvania R.R., 252 F.2d 452 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960).

63. 521 F.2d at 364. The factors mentioned by the court were:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Id. (footnotes ommited).

64. 521 F.2d at 366 (emphasis added). In considering "unusual or harsh circumstances," the *Allis-Chalmers* court referred to its "illustrative" list of factors considered by other federal courts in reviewing rule 54(b) certifications. *Id.* at 366 n.14. For a complete list of these factors, *see* note 63 *supra*.

In support of its view concerning the effect of counterclaims on rule 54(b) certification, the Third Circuit relied upon its holding in TPO Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, *aff'd on rehearing*, 487 F.2d 137 (3d Cir. 1973). In *TPO*, the court had considered the effect of a pending counterclaim on *the entry of summary judgment under rule 56*, both in terms of factual interrelatedness of the claims and the possibility of reducing recovery by set-off. 487 F.2d at 131. In reversing the trial court's entry of summary judgment, the *TPO* court discussed the counterclaim issue by stating that "[i]n our view the counterclaim is compulsory and its presence weighs the scales against the grant of summary judgment." *Id.* at 134. The court was concerned chiefly with the possibility that "the claim and counterclaim are so closely related that an issue of fact in one may prove to be important to both." *Id.* The *TPO* opinion also questioned "the advisability of the entry of judgment against one party if it appears that ultimately he may recover judgment against the moving party after trial." *Id.* (citation omitted).

65. 582 F.2d 175 (2d Cir. 1978). In *Brunswick*, plaintiffs sued to enforce a contractual covenant not to compete in the production and marketing of medical equipment. *Id.* at 176-77. Defendants answered, setting up plaintiffs' alleged violation of federal antitrust laws both as an affirmative defense and as the basis of a counterclaim for damages. *Id.* at 177. The trial judge dismissed the counterclaim and refused to charge the jury on the antitrust defense. *Id.* When the jury was unable to agree on a verdict with respect to the main claim, a mistrial was declared and a new trial ordered on the main claim. *Id.* The trial judge than granted rule 54(b) certification on the order dismissing the counterclaim, citing the judicial economy rationale of Gas-a-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102 (10th Cir. 1973). 582 F.2d at 177. For a discussion of *Gas-a-Car, Inc.*, *see* notes 55-57 and accompanying text *supra*.

66. 582 F.2d at 183-86.

volved were so "closely intertwined" with those of the pending claim as to render certification an abuse of discretion.[67]

This restrictive view of the trial judge's discretion to grant certification under rule 54(b) when counterclaims remain pending culminated in the Third Circuit's decision in *Curtiss-Wright Corp. v. General Electric Co.*[68] In this "paradigmatic example of a complex commercial litigation,"[69] defendant acknowledged a $19 million debt to plaintiff but refused payment until its $60 million counterclaim, which plaintiff vigorously disputed, was adjudicated.[70] Since there was no dispute over plaintiff's $19 million claim, the trial court granted plaintiff's motion for summary judgment and certified it as final under rule 54(b).[71] Turning to defendant's challenge to the trial court's certification, the Third Circuit first found that, as a matter of law, *Allis-Chalmers* prohibited certification in the face of a pending counterclaim absent harsh or unusual circumstances.[72] In considering whether harsh or unusual circumstances were shown, the court held that *Allis-Chalmers* had rejected the contention that depriving the plaintiff of the use of his recovery until the other claims are resolved is a sufficiently harsh circumstance to warrant certification.[73] In doing so, the court rejected the trial court's find-

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67. *Id.* at 185-86. The court reasoned that the primary claim and the dismissed counterclaim were so inextricably intertwined that an appellate court could not "pass intelligently on the propriety of the dismissal of the counterclaim . . . without considering [the] contract claim and the defenses to it . . . ." *Id.* at 184, *quoting* Western Geophysical Co. v. Bolt Assocs., 463 F.2d 101, 104 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). Continuing, the court maintained that it could not voice an opinion on the primary claim because "[t]he necessarily hypothetical nature of such an opinion is the clearest proof of the wisdom of the statement . . . that '[w]e cannot decide the issues intelligently piecemeal and, if we so attempt, are sure to find ourselves uttering pious generalities only which will come back to plague us later.' " 582 F.2d at 184, *quoting* Cott Beverage Corp. v. Canada Dry Ginger Ale, 243 F.2d 795, 796 (2d Cir. 1957).

The trial court in *Brunswick* had concluded that the delay which would be caused by an immediate appeal was outweighed by the hardship which would result if the dismissal of the counterclaim was reversed on appeal, thereby requiring a new trial of the counterclaim which would duplicate the factual issues of the main claim. 582 F.2d at 182. The Second Circuit disagreed with this analysis, maintaining that the hardship feared could be avoided if the trial court would simply take a verdict on the counterclaim and grant judgment n.o.v. if necessary, leaving the court of appeals to sustain the judgment n.o.v. or reinstate the verdict without the need for a new trial. 582 F.2d at 184.

68. 597 F.2d 35 (3d Cir.) (per curiam), *rehearing denied*, 599 F.2d 1259 (3d Cir.), *cert. granted*, 100 S. Ct. 43 (1979). The factual pattern of *Curtiss-Wright* was nearly identical to that in *Allis-Chalmers*. *See* note 59 *supra*. Curtiss-Wright was a subcontractor of defendant, General Electric, on a project for which the defendant was a prime contractor. 597 F.2d at 35. Disputes and cost overruns ensued and defendant withheld the final $19 million actually owed to the plaintiff for goods sold and delivered. *Id.* When plaintiff sued for the balance due and on other claims, defendant admitted owing the $19 million, but interposed a $60 million counterclaim. *Id.* at 36-37 (Rosenn, J., dissenting).

69. Curtiss-Wright Corp. v. General Elec. Co., 599 F.2d 1259, 1260 (3d Cir. 1979) (denial of rehearing) (Gibbons, J., dissenting).

70. 597 F.2d at 35-36.

71. *Id.* at 37-38 (Rosenn, J., dissenting). Defendant appealed the trial court's certification, seeking to have the final judgment vacated as an abuse of discretion. *Id.* at 35.

72. *Id.* at 36.

73. *Id.* It should be noted that the *Curtiss-Wright* court cited no particular language from *Allis-Chalmers* to support this aspect of its holding. *See id.*

ing that Curtiss-Wright's annual loss of $1 million, caused by the disparity between the pre-judgment and money market interest rates, was an adequate hardship to justify certification.[74] Thus, the Third Circuit reversed the trial court's certification as an abuse of the discretion afforded by rule 54(b).[75]

Judge Rosenn, dissenting in *Curtiss-Wright*, took issue with the court's reading of *Allis-Chalmers*[76] and maintained that the interest loss could clearly constitute a harsh circumstance under rule 54(b).[77] Judge Rosenn noted that such a loss had already been held to be a harsh circumstance by the Tenth Circuit.[78]

III. ANALYSIS

It is submitted that the structure of rule 54(b)[79] and the clear holding of the Supreme Court in *Sears*[80] require a two-prong test for the proper application of the rule. This test is comprised of a "finality" prong, evaluated by the requirements of section 1291,[81] and a "discretion" prong,[82] to be exercised in furtherance of "sound judicial administration"[83] to alleviate hardship

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74. *Id.* at 37 (Rosenn, J., dissenting).

75. *Id.* at 36.

76. *Id.* at 39 (Rosenn, J., dissenting). Judge Rosenn observed that the court's reading of *Allis-Chalmers* did not follow logically for "[o]therwise, the assertion of any counterclaim, even one contrived, would defeat the possibility of certifying an appeal under Rule 54(b), a situation hardly contemplated by the authors of the rule." *Id.* It should be noted, however, that the *Curtiss-Wright* majority did seem to limit its holding to "non-frivolous counterclaims," although this language does not appear in *Allis-Chalmers*. *Id.* at 36.

77. *Id.* at 37-38.

78. *Id.* at 38, *citing* United Bank of Pueblo v. Hartford Accident & Indem. Co., 529 F.2d 490 (10th Cir. 1976). For an example of how this interest rate disparity can adversely affect a judgment creditor, *see* note 108 *infra*. A petition for rehearing *en banc* in *Curtiss-Wright* was denied by a sharply divided court. 599 F.2d 1259 (3d Cir. 1979) (denial of rehearing). Judge Gibbons wrote a strong dissent to the order denying rehearing and concluded that "[t]hese extraordinary holdings find no support in the prior law of this circuit and run directly counter to the spirit and purpose of rule 54(b)." *Id.* at 1260 (Gibbons, J., dissenting).

79. For the text of rule 54(b), *see* note 1 *supra*.

80. 351 U.S. at 436. *See* notes 31-40 and accompanying text *supra*. It should be noted, however, that the *Sears* Court actually broke down the finality prong into two subissues: 1) whether the order appealed from was "final"; and 2) whether it is a decision upon a "claim for relief." 351 U.S. at 436. *See* note 36 *supra*. This more refined analysis was applied by Judge Friendly in his meticulous discussion concerning the factual interrelatedness of the claims in *Brunswick*. 582 F.2d at 183-85. It is submitted, however, that this analysis is fully encompassed by the "two-prong" approach, in that requiring the trial judge to ascertain that there is a "final judgment" clearly requires him to determine that the order involved is "final" and is a "judgment"—an action upon a claim for relief. While an explicit third prong is entirely consistent with a literal reading of the rule, it is submitted that it is encompassed in a finding of a "final judgment" and raises, when treated as a separate requirement, the possibility of additional confusion without guaranteeing a more faithful application of the rule.

81. *See* notes 34 & 37 and accompanying text *supra*.

82. *See* notes 35 & 38 and accompanying text *supra*.

83. Sears, Roebuck & Co. v. Mackey, 351 U.S. at 437. *See* text accompanying note 35 *supra*.

in the "infrequent harsh case."[84] Given the elimination of the "same transaction or occurrence" requirement from the rule[85] and the clear holding of the Court in *Cold Metal*,[86] it is further submitted that this test is applicable regardless of the form or identity of the multiple claims involved. Consequently, the validity of the Third Circuit's recent decisions dealing with rule 54(b), which have severely restricted the operation of the rule by affording special treatment when a counterclaim is presented,[87] should be determined by application of the two-prong test. It is thus suggested that the Third Circuit's reversal of the trial judge's certification in *Curtiss-Wright* is valid only if the trial court's action failed as a matter of law under one of the prongs explicitly mandated by *Sears*.[88]

A. *Application of the Finality Prong: Does a Pending Counterclaim Require a Presumption of Non-Finality?*

At the outset, it should be noted that the Third Circuit's reversal of the trial court's 54(b) certification in *Curtiss-Wright* cannot be justified under the finality prong for two reasons: 1) there was no dispute that the grant of summary judgment on Curtiss-Wright's $19 million claim was a "final judgment" under section 1291;[89] and 2) the Third Circuit did not hold that the presence of a counterclaim prevented the grant of summary judgment from being final.[90] Moreover, it is suggested that the presumption against 54(b) certification of a claim when a counterclaim is pending, which the Third Circuit employed to justify its reversal,[91] also fails to find support under the finality prong. While there is a *possibility* that the adjudicated claim, albeit final if sued upon alone, was so factually interrelated with the counterclaim that it could not be considered final until the counterclaim was resolved, it is submitted that this possibility simply raises a question of fact requiring a case-by-case analysis, rather than a presumption imposed by a court of appeals.[92]

Similarly, it is submitted that the *Curtiss-Wright* court's concern that a pending counterclaim "could result in a set-off against any amounts due and

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84. Panichella v. Pennsylvania R.R., 252 F.2d at 455. *See* notes 48-51 and accompanying text *supra*.

85. *See* notes 26-27 and accompanying text *supra*.

86. 351 U.S. at 452. *See* note 43 and accompanying text *supra*.

87. Curtiss-Wright Corp. v. General Elec. Co., 597 F.2d at 36; Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d at 366. *See* notes 64 & 72-75 and accompanying text *supra*.

88. *See* notes 32-38 and accompanying text *supra*.

89. 597 F.2d at 35. General Electric did not make a finality argument before the Third Circuit but rather contended that the entry of 54(b) certification was not a "sound exercise of discretion" and was clearly inconsistent with *Allis-Chalmers*. *Id.* at 35-36.

90. 597 F.2d at 35-36.

91. *Id.* at 36. *See* notes 72-73 and accompanying text *supra*.

92. *See* Brunswick Corp. v. Sheridan, 582 F.2d at 185-86. *See also* Sears, Roebuck & Co. v. Mackey, 351 U.S. at 435-36; Gas-a-Car, Inc. v. American Petrofina, Inc., 484 F.2d at 1104-05; Gottesman v. General Motors Corp., 401 F.2d 510, 512 (2d Cir. 1968). Since *Cold Metal* clearly

owing to the plaintiff,"[93] involves only interrelated *recoveries*—not interrelated facts—and, thus, cannot affect finality. As a result, this concern is simply an element to be balanced under the discretion prong, and any added weight a court chooses to give to it must be justified on grounds other than its effect on finality.

B. *Application of the Discretion Prong: Is* Curtiss-Wright *Consistent with* Sears?

Since neither the *Curtiss-Wright* court's reversal of the trial court's 54(b) certification, nor the presumption used to support this reversal, can be justified by a finality argument,[94] the only basis for the Third Circuit's holding must be that the trial judge abused the broad discretion authorized by the rule.[95] In determining whether such abuse was present, it is necessary to first consider the nature of the trial court's role in rule 54(b) proceedings.

It is well established after *Sears* that the determination that "there is no just reason for delay" required by the rule,[96] is a matter for the sound discretion of the trial judge based upon his firsthand knowledge of the case.[97] The framework for the exercise of this discretion was established by the Third Circuit in *Panichella* which requires the trial judge to balance *"whatever* exigencies the case at hand may present,"[98] to determine whether they are sufficient to overcome the presumption against certification inherent in the structure of the rule.[99] It is submitted that this clear authority vests broad discretionary power in the trial judge to evaluate the totality of the circumstances, and forbids any approach to rule 54(b) which holds a specific factor to be determinative or which rejects any criterion as a valid consideration in the balancing process.

Consequently, it is submitted that since the Third Circuit's decision in *Curtiss-Wright* utilized a presumption against certification due to the exis-

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held that counterclaims were to be treated as any other claims, it is submitted that a case-by-case analysis is required in the counterclaim context and a presumption against certification is inappropriate. 351 U.S. at 452. While it is clear that a claim arising out of the same set of facts as the main claim runs a risk of being inextricably related to it, *see* TPO Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, 134 (3d Cir. 1973), it is equally clear, however, that common facts may give rise to separate and distinct claims. *See* United States v. Kocher, 468 F.2d 503, 509-10 (2d Cir. 1972). *See also* Campbell v. Westmoreland Farm, Inc., 403 F.2d at 941; Reines Distrib. Inc. v. Admiral Corp., 31 F.R.D. 187 (S.D.N.Y. 1962).

93. 597 F.2d at 36.

94. *See* notes 89-93 and accompanying text *supra*.

95. *See* notes 36-38 & 79-88 and accompanying text *supra*.

96. FED. R. CIV. P. 54(b). *See* notes 1 & 25 and accompanying text *supra*.

97. Sears, Roebuck & Co. v. Mackey, 351 U.S. at 437. *See* notes 35-38 and accompanying text *supra*.

98. 252 F.2d at 455 (emphasis added). *See* note 49 and accompanying text *supra*.

99. *See* note 50 and accompanying text *supra*. Since the entire case is normally the appropriate judicial unit for review, and since the rule requires a finding of "no just reason for delay" to vary this standard, there is, in effect, a built-in presumption against certification based upon "the overall policy against piecemeal appeals." 252 F.2d at 455. *See* Note, *Entry of Final*

tence of a pending counterclaim,[100] and since the court refused to recognize the plaintiff's economic loss as a valid consideration in the balancing process,[101] the *Curtiss-Wright* decision unduly infringes upon the zone of discretion recognized by the Supreme Court in *Sears*, and by the widely accepted precedent embodied in *Panichella*.

It is further submitted that the *Curtiss-Wright* decision is clearly contrary to the principles expressed by the Supreme Court in *Cold Metal*.[102] The *Cold Metal* Court held that the effect of the 1946 amendments to rule 54(b) was to put counterclaims on the same footing as other multiple claims.[103] It is therefore suggested that the Third Circuit's view that the presence of a counterclaim "weighs heavily against the grant of 54(b) certification"[104] seeks to resurrect a distinction that the Supreme Court has explicitly interred.[105]

This conclusion, however, does not necessarily require routine certification, does not ignore the particular problems inherent in differing factual situations, and does not dismiss the concerns which influenced the Third Circuit in *Curtiss-Wright*. On the contrary, it is submitted that the recognition of these concerns is a task for which the balancing process is particularly well-suited. After balancing all of the "exigencies" of the case, a trial judge might agree with the Third Circuit's conclusion in *Curtiss-Wright* that the plaintiff's economic loss is not sufficiently harsh to warrant certification *in this case*.[106] On the other hand, a trial judge might determine that a different result would be called for where the adjudicated claim is large, liquidated, and undisputed,[107] or where the interest rate loss is extraordi-

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Judgment Under Rule 54(b) of the Federal Rules of Civil Procedure: The Third Circuit Imposes a Requirement of a Statement of Reasons, 56 B.U. L. REV. 579, 592-94 (1976).

100. 597 F.2d at 36. *See* notes 72-74 and accompanying text *supra*.

101. 597 F.2d at 36. *See* notes 73-74 and accompanying text *supra*.

102. *See* notes 41-45 and accompanying text *supra*.

103. 351 U.S. at 452. *See* notes 42-43 and accompanying text *supra*.

104. Curtiss-Wright Corp. v. General Elec. Co., 597 F.2d at 36, *quoting* Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d at 366.

105. *See* Curtiss-Wright Corp. v. General Elec. Co., 599 F.2d at 1262-64 (denial of rehearing) (Gibbons, J., dissenting). Judge Gibbons argued: "The *dictum* in *Allis-Chalmers* that the presence of a counterclaim in a case 'weighs heavily against the grant of 54(b) certification,' . . . sweeps too broadly and ought not to be followed." *Id.* at 1262 n.6 (emphasis in original). Judge Gibbons agreed that the presence of a counterclaim "increased [the] possibility that there will be some 'just reason' to delay," but argued that "the mere fact that a non-frivolous counterclaim had been filed" was not dispositive. *Id.* at 1262. *See* Note, *supra* note 99, at 592 n.105. Those critical of affording the presence of a counterclaim any added weight argue, in essence, that since *Cold Metal* equates a counterclaim to other multiple claims, and since *Panichella* creates a presumption against certification by restricting its application to the "infrequent harsh case," the presence of a counterclaim should not be given more weight than any other factor. *Id.* at 592-94. *See* notes 49-50 & 98-99 and accompanying text *supra*.

106. 597 F.2d at 36.

107. The *Curtiss-Wright* majority ruled that the case should remain in status quo until *all* claims are settled because of the possible hardships the defendant would sustain if it were deprived of the use of that portion of the plaintiff's recovery that might be returned to the defendant when the counterclaim is adjudicated. 597 F.2d at 36. It is submitted, however, that this is a strong argument only when there are conflicting, contested claims; the argument loses

nary.[108] Similarly, if the trial judge suspects delaying tactics,[109] an underlying weakness in the counterclaim,[110] or any number of other relevant considerations,[111] it might be concluded that the balance of factors weighs in favor of certification. It is submitted that this need to resolve questions of fact on a case-by-case basis is central to the effective operation of rule 54(b), and the practical effect of the *Curtiss-Wright* decision is to foreclose this balancing when a counterclaim is pending.

The need for a fact-sensitive approach to rule 54(b) raises the question of what is the proper standard to be exercised by an appellate court in reviewing a trial judge's action under the discretion prong. On this issue, it is again submitted that the Third Circuit's decision in *Curtiss-Wright* is contrary to the clear weight of authority. The *Sears* Court mandated that the trial judge's discretion be guided by the principles of "sound judicial administration"[112] and be based upon his firsthand knowledge of the facts of the case.[113] Immediately following this broad grant of discretion to the trial judge, the *Sears* Court went on to provide that the courts of appeals shall review for "abuse" of discretion.[114] It is submitted that the implication of this portion of the *Sears* opinion is that a trial judge's action constitutes a reversible abuse of discretion *only* when it is inconsistent as a matter of law with "the interest of sound judicial administration." It is suggested that the *Curtiss-Wright* court failed to confine itself to a consideration of whether the trial judge was acting in the interest of sound judicial administration; rather, it appears that the Third Circuit sought to strike its own balance by utilizing its presumption against certification when faced with a pending coun-

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force when one claim is large, liquidated, and undisputed, because "[c]ommon sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims." Curtiss-Wright Corp. v. General Elec. Co., 599 F.2d at 1262 (denial of rehearing) (Gibbons, J., dissenting). *See* Note, *supra* note 99, at 592-93.

108. Since *Curtiss-Wright* was a diversity action, New York state law controlled on the issue of pre-judgment interest. 597 F.2d at 37 (Rosenn, J., dissenting). The disparity between the 6% New York interest and the 12.5% money market interest rate meant, as General Electric conceded at oral argument, that Curtiss-Wright would lose approximately $1 million each year until the litigation was finally settled. *Id.* Judge Rosenn argued that the consideration of this interest loss was both consistent with *Allis-Chalmers* and expressly approved of by the Tenth Circuit in United Bank of Pueblo v. Hartford Accident & Indem. Co., 529 F.2d 490 (10th Cir. 1976). 597 F.2d at 37 (Rosenn, J., dissenting). *See* notes 76-78 and accompanying text *supra*.

109. Curtiss-Wright Corp. v. General Elec. Co., 599 F.2d at 1263 (denial of rehearing) (Gibbons, J., dissenting).

110. *Id. See* note 76 *supra*.

111. *See* Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d at 364. For an "illustrative" list of the factors which the *Allis-Chalmers* court considered to be significant in reviewing rule 54(b) certifications, *see* note 63 *supra*. It is submitted that these considerations are clearly relevant, even when a counterclaim is pending, since the *Allis-Chalmers* court did recognize the applicability of the balancing process in that situation. *See* 521 F.2d at 366; notes 61-64 and accompanying text *supra*.

112. 351 U.S. at 437. *See* notes 35 & 38 and accompanying text *supra*.

113. 351 U.S. at 437. *See* notes 35-38 and accompanying text *supra*.

114. 351 U.S. at 437.

terclaim.[115] Finally, it is submitted that the demonstrated practical necessity for a fact-sensitive approach to the application of rule 54(b)[116] militates strongly for a broad interpretation of "the interest of sound judicial administration," and for the utmost deference to the factual conclusions of the trial judge.[117]

IV. CONCLUSION

A prior discussion of the Third Circuit's decision in *Allis-Chalmers*[118] observed that the impact of that decision could lead either to the establishment of meaningful guidelines for the district courts, or to further limitation on the use of rule 54(b) as a means of avoiding hardship.[119] It is submitted that the most recent holding of the Third Circuit concerning rule 54(b) in *Curtiss-Wright Corp. v. General Electric Co.*, clearly reveals that the latter result has occurred, since the *Curtiss-Wright* court further limited the flexibility thought to be necessary under the rule.[120]

The Supreme Court's grant of certiorari in *Curtiss-Wright* provides an opportunity for the first comprehensive review of this area of the law since *Sears* and *Cold Metal*, and will allow the Court to resolve the questions which these cases left unanswered with respect to the scope of the trial judge's discretion under rule 54(b).[121] It is submitted that the purposes of the rule and the judicial interest in providing a fair and effective resolution of complex litigation would best be served by 1) an explicit recognition that the effective implementation of rule 54(b) depends upon findings of fact and the exercise of judgment uniquely within the knowledge of the trial judge;[122] and 2) clear restriction of the scope of appellate review to a determination of whether the action of the district judge is clearly contrary, as a matter of law, to the "principles of sound judicial administration."[123] To hold otherwise, it is submitted, would approve and accelerate a decisional trend which could ultimately narrow the scope of rule 54(b) to the point where it will no longer ameliorate the hardship it was intended to relieve.[124]

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115. 597 F.2d at 36. *See* notes 72-74 and accompanying text *supra*.

116. *See* notes 106-11 and accompanying text *supra*.

117. *See* Brunswick Corp. v. Sheridan, 582 F.2d 175 (2d Cir. 1978). It is submitted that Judge Friendly's carefully reasoned opinion in *Brunswick* discloses a sounder and more consistent application of these principles than do the decisions of the Third Circuit in *Allis-Chalmers* and *Curtiss-Wright*. In *Brunswick*, Judge Friendly did not reexamine the trial court's factual conclusions, but, instead, confined himself to a determination of whether the trial court's interrelatedness finding and the judicial economy rationale could stand as a matter of law. *See* notes 65-67 and accompanying text *supra*.

118. Note, *Fed. R. Civ. P. 54(b)—Certification of Judgment as Final Under Rule 54(b) Held Abuse of District Court's Discretion Unless Accompanied by Enumeration of Factors Upon Which It Relied*, 22 VILL. L. REV. 697 (1976).

119. *Id.* at 708.

120. *See* notes 15-17 & 39-40 and accompanying text *supra*.

121. *See* notes 17 & 112-17 and accompanying text *supra*.

122. *See* notes 106-11 and accompanying text *supra*.

123. *See* notes 112-17 and accompanying text *supra*.

124. *See* notes 15-16 and accompanying text *supra*.