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NOTES

Civil Procedure—Trial Court Discretion in Rule 54(b) Certification: Extension of the Panichella Requirement of an Infrequent, Harsh Case

Under the common law the jurisdiction of an appellate court was based on the final disposition of the entire action by the lower court from which the appeal was taken. Among the many devices that have been used to circumvent this general rule of finality is Federal Rule of Civil Procedure 54(b). The purpose of this rule was to avoid problems possibly developed under the Federal Rules of Civil Procedure by the new opportunities for liberal joinder of claims in multiple claims actions. By allowing judgment to be entered on fewer than all of the claims in a multiple claims action, rule 54(b) solves the dilemma of delay in entry of judgment on one claim while adjudication is pending on an unrelated claim that is part of the same action. This rule has evolved to operate in such a manner that entry of judgment under the rule is now granted at the discretion of the trial court. This evolution has created the interrelated problems of determining within what bounds the trial

3. Rule 54(b) presently reads:

Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, 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.
5. 351 U.S. at 432-33; Fed. R. Civ. P. 54(b), Notes of Advisory Comm. on 1946 Amendment.
court may grant 54(b) certification and by what standards the appellate court may police the exercise of this discretion.\textsuperscript{7} Both of these considerations were highlighted by \textit{Allis-Chalmers Corp. v. Philadelphia Electric Co.},\textsuperscript{8} a decision in which the Third Circuit Court of Appeals added a new limitation to the district court's power to grant 54(b) certification.\textsuperscript{9}

In \textit{Allis-Chalmers}, the trial court granted summary judgment on the original claim for the price of goods purchased by Philadelphia Electric Company (PECO) from Allis-Chalmers Corporation (A-C). Despite a pending counterclaim for damages based on a dispute concerning defective goods A-C had previously sold to PECO,\textsuperscript{10} 54(b) certification was granted on the original claim so that A-C could execute that judgment.\textsuperscript{11} The appellate court found, however, that the trial court abused its discretion in this certification.\textsuperscript{12} The Third Circuit established the rule that abuse of discretion exists when the district court gives no clear articulation of the reasons for the 54(b) certification.\textsuperscript{13} While the court of appeals recognized that the district court had given its reason for the certification by finding that there was no factual integration of the adjudicated and unadjudicated claims, it considered the

\textsuperscript{7} Cf. text accompanying notes 32-42 \textit{infra}. The district court has the discretion not to certify that which would otherwise be appealable. \textit{See} B.B. Adams Gen. Contractors, Inc. v. Department of HUD, 501 F.2d 176 (5th Cir. 1974) (per curiam).

\textsuperscript{8} 521 F.2d 360 (3d Cir. 1975).

\textsuperscript{9} Although in this opinion there is found the initial requirement that the district court articulate the reasons for 54(b) certification, 521 F.2d at 364-65; \textit{see} note 13 and accompanying text \textit{infra}, the unprecedented holding is that there is always a presumption against certification when there exists a pending claim that may be set off against the adjudicated claims. 521 F.2d at 366; \textit{cf.} notes 38 & 39 and accompanying text \textit{infra}.

\textsuperscript{10} The counterclaim was based on the allegation that a switch gear manufactured by A-C for PECO malfunctioned due to the improper construction of circuit breakers. The major dispute, however, centered on conflicting warranty provisions in the contract form submitted by A-C and a subsequent purchase order form submitted by PECO. The timing of confirmation of the contract and the applicable warranties were among the controverted issues. Defendant's Motion for Summary Judgment on the Counterclaim at 2-6; Plaintiff's Memorandum in Opposition to Summary Judgment on the Counterclaim at 1-4.

\textsuperscript{11} Summary judgment was also entered on a claim for repair services by A-C for PECO. These services were also unrelated to the counterclaim. \textit{Allis-Chalmers Corp. v. Philadelphia Elec. Co.}, 64 F.R.D. 135 (E.D. Pa. 1974).

\textsuperscript{12} 521 F.2d at 367. In a subsequent proceeding the trial court reinstated the 54(b) certification. \textit{See} note 59 \textit{infra}. There was no appeal of the new entry of judgment since the claims were settled one week after the order for 54(b) certification was reinstated. \textit{See} note 58 \textit{infra}.

\textsuperscript{13} 521 F.2d at 364. It has, however, been twice suggested that the district court in granting 54(b) certification should facilitate better review of the proper exercise of discretion by giving a "brief reasoned statement in support of its determination." \textit{Gumer v. Shearson, Hammill & Co.}, 516 F.2d 283, 286 (2d Cir. 1974); \textit{Schwartz v. Compagnie Gen. Transatlantique}, 405 F.2d 270, 275 (2d Cir. 1968).
factual relationship between the claims to be only "one factor to be considered." 

By determining that this factor alone was insufficient for entry of judgment because of the existence of the counterclaim that might allow PECO to recover all it owed A-C, the Third Circuit placed a new restriction on the district court's power to grant 54(b) certification. A possibility of set-off required the party seeking certification to have proved economic or equitable harm by delay. The failure of the district court to consider those factors resulted in inadequate proof of the infrequent, harsh case that some courts have required for the proper exercise of discretion in 54(b) certification.

The Allis-Chalmers decision is the product of a rule that has developed from a problem-plagued statutory and case history. Rule 54(b) was designed to solve the problem of delay in the termination of parts of the new multiple claims actions, which were permitted by the liberal rules of joinder. As originally written, the rule directed that a determination of all issues material to one of the multiple claims would allow that claim to be treated as final and appealable. An order determining all such issues not only allowed appeal without delay; it also caused the time for appeal to run with regard to the settled claim.

14. 521 F.2d at 365.
15. The court decided that a possibility of set-off "weighs heavily against the grant of 54(b) certification." Id. at 366. The court recognized that this case was distinguishable from previous set-off situations in that it involved permissible rather than compulsory counterclaims. But it viewed the undesirability of an award that might later be reimbursed to be the dominant factor. Id. But see cases cited notes 38 & 39 infra.
16. 521 F.2d at 366. For a discussion of the development of the requirement of the infrequent, harsh case for 54(b) certification, see notes 43-53 and accompanying text infra.
17. See cases cited note 43 infra.
18. See authorities cited note 4 supra.
19. Rule 54(b) as promulgated in 1939 read as follows:

*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 proceed as to the remaining claims. . . .

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433 (1956). The circularity in the rule's requirement of a "judgment disposing of [a] claim" may be one of the problems in determining what was final. This problem is demonstrated by the definition of "judgment" in rule 54(a). "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). It seems clear, however, that the problems in determining what is final are many. Cf. cases cited note 41 infra; Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).
arose because of the difficulty of the concept of determination of all material issues. 21 Counsel who erroneously believed that an order did not resolve all issues with regard to one claim would not appeal until completion of the entire action, only to find that the statute of limitations barred the appeal as to the previously terminated claim. 22 The natural development of such a possibility was that the careful attorney would appeal many orders that did not completely dispose of a claim for fear that the time for appeal would run. With the appellate courts being bombarded with unnecessary, but properly cautious appeals, the first of two amendments 23 to rule 54(b) was adopted. To protect parties against loss of appellate rights, the amended rule provided that the district 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 judgment." 24 While the signal created by 54(b) certification gave clear notice of the termination of part of an action, 25 the new rule created additional questions about the undefined limits of the new powers that had been placed with the district court.

In Sears, Roebuck & Co. v. Mackey 26 the United States Supreme Court dealt with two issues created by the new rule: (1) whether the rule delegated an irrevocable power of certification to the district court, 27

23. The second amendment in 1961 is not relevant here. That amendment expanded rule 54(b) explicitly to allow certification in cases involving multiple parties and one or more claims. See note 3 supra.
24. 351 U.S. at 434-35 (emphasis omitted).
25. Id.
27. Although the Supreme Court's resolution of this issue seemed to assume the answer, id. at 436, there was considerable disagreement prior to the Sears decision. Some circuits felt that 54(b) certification could properly be granted only if the claim were separate and distinct (i.e., met the previous standards of finality). Gold Seal Co. v. Weeks, 209 F.2d 802, 810-11 (D.C. Cir. 1954); Flegenheimer v. General Mills, Inc., 191 F.2d 237, 241 (2d Cir. 1951) (Learned Hand saying that "nowhere in [amended rule 54(b)] can be found a suggestion that the [trial] judge can make that 'final' which was not 'final' before."). Others felt that the only limitation on the discretion of the trial court was that the judgment be entered on a claim, at which point the 54(b) certification was conclusive of appellate jurisdiction. Bendix Aviation Corp. v. Glass, 195 F.2d 267, 269-70 (3d Cir. 1952); Pabellon v. Grace Line, Inc., 191 F.2d 169, 173-74 (2d Cir. 1951) (the Flegenheimer opinion indicates that there was disagreement within the Second Circuit). The Bendix Aviation court found the fact that the trial court "may direct the entry of a final judgment" (emphasis added) to be persuasive evidence that amended rule 54(b) granted almost complete discretion to that court. Judge Hand in Flegenheimer was, however, convinced that the rule was one of limitation because of the
and (2) whether the rule modified the prior standard of finality required for the district court's discretionary certification. The Court established that the district court's power of certification is not absolute and that the appellate court should dismiss an appeal pursuant to rule 54(b) if it finds "(1) that the judgment . . . was not a decision upon a 'claim for relief,' (2) that the decision was not . . . an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order." With regard to the standard of finality under the amended rule, the Court held that the amended rule did "not relax the [28 U.S.C. section 1291] finality required of each decision." It did, however, recognize that a final order on a claim could be entered under the amended rule although it would not have been appealable under the original rule. Application of this modification was permissible only "[i]f the District Court certifies a final order . . . and the Court of Appeals is satisfied that there has been no abuse of discretion." The Supreme Court thus delegated to the district courts and courts of appeal the power of determining the specific fact situations that qualify for 54(b) certification.

The guidelines for this determination, however, had been fixed by the Supreme Court in its recommendation that, to determine whether 54(b) certification should be granted, the inconvenience and costs of piecemeal review should be balanced against the danger of denying

requirement of a "final judgment." Because of the circular definition of "final judgment" in rule 54(a), see note 19 supra, this reasoning does not appear sound. Judge Hand's understanding of the function of the rule in the judicial system is, however, demonstrated by the ability of the trial court to distort the function of the rule. Zangardi v. Tobriner, 330 F.2d 224 (D.C. Cir. 1964).

28. 351 U.S. at 436. The diminution of the trial judge's discretion was argued to be a poor decision for several reasons, including (1) the litigants will have to bear the expense of preparing their briefs and arguments with little or no idea that the court of appeals will hear their claim, Note, Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Rule 54(b), 62 YALE L.J. 263 (1953), and (2) since the district court judge is in the best position to understand the fairness to the parties, discretion, although open to abuse, is best delegated to that authority. Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1952); cf. Note, Federal Procedure—Judgment on Less Than All Multiple Claims is Appealable Under Amended Rule 54(b) Even if Claims Left Pending Arose from the Same Transaction, 42 VA. L. REV. 982 (1956).

29. 351 U.S. at 435. This result was also supported by Justice Frankfurter in his dissenting opinion, id. at 444.


31. Since the Sears opinion the Supreme Court has not reviewed a single 54(b) certification to determine its propriety.
justice to the parties. In the application of this balancing process, several factors have been suggested for the trial court to consider in the proper exercise of its discretion. Among these factors are the similarity of the adjudicated and unadjudicated claims and the possibility that the appellate review of the terminated claim might be mooted by subsequent developments in the trial court. Generally courts view either of the above situations as wasteful of appellate court time since, in the former, an early appeal is potentially duplicative of a later appeal on the unadjudicated claim, and, in the latter, an early appeal may be unnecessarily resolved. On the other hand, efficiency of the trial court proceedings has occasionally warranted 54(b) certification despite the possible existence of duplicative appellate court proceedings. An additional factor weighing against 54(b) certification is the existence of a counterclaim that may create a set-off against the adjudicated claim. It is considered unfair to the losing party to make an award that may be reduced by a subsequent judgment in favor of that party. When the

33. Dilatory activities by one of the parties may be a consideration in the propriety of 54(b) certification against that party. United States v. Kocher, 468 F.2d 503 (2d Cir. 1972). For other factors not discussed in the text following this note, see notes 42 & 45 infra.
34. Spencer, White & Prentis, Inc. v. Pfizer Inc., 498 F.2d 358, 364 (2d Cir. 1974); McNellis v. Merchants Nat'l Bank & Trust Co., 385 F.2d 916, 919 (2d Cir. 1967); Rabekoff v. Lazere & Co., 323 F.2d 865, 866 (2d Cir. 1963); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 243 F.2d 795, 796 (2d Cir. 1957) (per curiam); cf. Levin v. Baum, 513 F.2d 92, 96 (7th Cir. 1975).
35. Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 943 (2d Cir. 1968); Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 243 F.2d 795, 796 (2d Cir. 1957) (per curiam).
36. See cases cited notes 34 & 35 supra.
38. The set-off factor has been given controlling weight only in circumstances in which the set-off had its basis in transactions that were also the basis of the claim that the set-off may reduce. Spencer, White & Prentis, Inc. v. Pfizer Inc., 498 F.2d 358, 364 (2d Cir. 1974) (the amount owing on the contract might be set off by alleged damages suffered in the execution of that contract); TPO Inc. v. FDIC, 487 F.2d 131, 134 (3d Cir. 1973) (cashier's checks might be set off by an alleged fraudulent scheme in which the checks played a part); Curtis Publishing Co. v. Church, Rickards & Co., 58 F.R.D. 594, 596-99 (E.D. Pa. 1973) (in an action in which damages for breach of the contract might be set off for debts owing under that same contract, the court granted 54(b) certification but recognized the equitable stance of the set-off claim by staying execution under Fed. R. Civ. P. 62(h)); cf. Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114, 121 (3d Cir. 1965) (the recovery for alleged fraud in obtaining the contract might be greater than the amount owing on the contract; the case did not involve a 54(b) certification); Schroeter v. Ralph Wilson Plastics, Inc., 49 F.R.D. 323, 326 (S.D.N.Y. 1969).
set-off possibility has occurred in the context of unrelated claims, however, one court has found that the alleged claim of set-off for the purpose of delaying payment for goods bought in a separate transaction was an unjust reason to delay entry of judgment.89

The great number of cases, which, "it must be conceded, are not altogether harmonious,"40 demonstrate the difficulty of balancing the efficiency of the judicial process and justice for the parties in the determination of finality.41 This difficulty may in part be caused by the tendency of the courts to develop generalities in some cases only to find those generalities inapplicable when a case is presented in which application of that general rule would create inequities.42 Subsequent to the Sears decision, an influential generality was developed by the Third Circuit Court of Appeals in Panichella v. Pennsylvania Railroad Co.43

39. "The merits of the antitrust action [based on a refusal by defendant to sell its products to plaintiff] have no effect on plaintiff's duty to pay for goods he ordered and received prior to the alleged antitrust violations by defendant." Almar Supply Co. v. Weber-Stephen Products Co., 15 Fed. Rules Serv. 2d 54b.32 (E.D. Pa. 1971). This distinction on the basis of the relationship of the adjudicated and unadjudicated claims is further supported by a negative inference that may be drawn from TFO Inc. v. FDIC, 487 F.2d 131, 135 (3d Cir. 1973). In refusing 54(b) certification because of a set-off claim, that court said, "It is critical . . . that . . . [the party whose adjudicated claim is based on the checks is] the party which participated in the allegedly fraudulent transaction [the basis of the unadjudicated counterclaim] in which the checks played a part."


42. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). "[W]e believe that our disposition . . . will make possible a more expeditious and just result for all parties." Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974). This court thus showed an inclination to examine the decision of the substantive appeal prior to a decision as to its appealability. By first resolving the issue of dismissal of the third-party defendant, the appellate court knew that an initial trial in the absence of this party would be inefficient, see cases cited note 37 supra. The reversal on the substantive claim also mooted the possibility of a repeated appellate review. This inefficiency, dominant in other circumstances, see note 45 infra, was irrelevant because the principal party not participating in the appellate proceeding was not adversely affected. In rejecting this generality, the court laid a foundation for another generality, the Allis-Chalmers requirement for articulation of dominant factors. See note 13 and accompanying text supra. See generally text accompanying notes 61-63 infra.

The trial court had granted 54(b) certification on a summary judgment dismissing the third-party defendant, while the original claim on which the third-party claim was based remained unadjudicated. This certification had the potential of producing an unnecessary burden for the appellate court since the issue of third-party liability might be mooted by failure of the underlying claim. But the court of appeals in finding the certification to be an abuse of discretion created some inflammatory and misleading dicta. Searching through the notes of the committee that drafted the 1946 amendment, the Third Circuit discovered that the draftsmen had stated that the rule should be used only in the exercise of a discretionary power to afford a remedy in the infrequent, harsh case. The natural implication of this statement is that satisfaction of the standard of 28 U.S.C. section 1291 finality is but one of two criteria for proper discretion in certification. The second criterion is the necessity of injustice to the party if there is delay in entry of judgment. The subsequent judicial adoption of the infrequent, harsh case standard has the effect of placing a burden of proof on the party seeking 54(b) certification. And it is this burden of proof that led to misapplication of rule 54(b) in Allis-Chalmers.

The misapplication is clearly demonstrated by comparing the purpose of the amended rule and its interpretation in Sears with the holding in Allis-Chalmers. The history of the adoption of the amendment and all the comments of the advisory committee indicate that "[t]he obvious purpose [of the 1946 amendment to rule 54(b)] is to reduce as far as possible the uncertainty and hazard assumed by a litigant" who is unsure of the finality of a judgment. In fact, the historical context of the amendment seems to indicate that the reference to the necessity of an infrequent, harsh case was inadvertent and was intended to reduce the exorbitant flow of appeals of non-final adjudications that had developed case requirement as grounds for denying 54(b) certification in the context of adjudicated and unadjudicated claims that had no similarity of facts or issues. See note 38 supra.

44. 252 F.2d at 454.
45. The court recognized two additional reasons indicating that preliminary appeal was an inefficient use of the judicial process. Because plaintiff was not a party to his appeal, a decision as to the issue of a release (the basis of the dismissal of the third-party defendant) could not be binding as between the principal parties. Thus there might be a need for an additional, inefficient appeal on the same issue. Second, the trial on the main claim below was being delayed. Id. at 455.
46. Id.
47. This burden of proof coincides with the interpretation of the court in Allis-Chalmers. 521 F.2d at 365.
under the former rule.\textsuperscript{49} The advisory committee that drafted the 1946 amendment expressly "concluded that a retention of the older federal rule [which allowed termination and no delay in the appeal of a distinctly separate claim] was desirable . . . ."\textsuperscript{50} In addition, although the Court in \textit{Sears} allowed the court of appeals to review 54(b) certification for abuse of discretion, it clearly implied that adjudicated claims satisfying the requirements of rule 54(b) in its original form would also be appealable under the amended rule, provided the district court made the required certification.\textsuperscript{51} Although the \textit{Panichella} standard of infrequent, harsh case may be applicable in the case of judgments that would not have been final under the original rule 54(b), the extension to judgments that would have been final is unwarranted. \textit{Allis-Chalmers}, with factually unrelated claims, clearly falls in the latter category.\textsuperscript{62} Thus the "set-off which weighs heavily against 54(b) certification" might be properly limited to the context of a factually related, unadjudicated counterclaim.\textsuperscript{83}

In this context, the efficiency of the judicial process and the equities between the parties would normally justify delay of appeal until completion of the entire action. There may be further developments in the trial of the unadjudicated counterclaim relevant to the adjudicated claim. A possibility that the appellate court may not have all information relevant to the claim indicates the potential inefficiency of early appellate review.\textsuperscript{54} In cases in which the adjudicated and unadjudicated claims are not related and in which subsequent trial court proceedings will not moot the issues that are the subject of appeal, efficiency within the judicial process is not a factor since the issues before the

\textsuperscript{49} See text accompanying notes 18-24 \textit{supra}.
\textsuperscript{50} \textit{Fed. R. Civ. P. 54(b)}, Notes of Advisory Comm. on 1946 Amendment.
\textsuperscript{51} 351 U.S. at 436. In both \textit{Sears}, \textit{id.} at 428-29, and the companion case, \textit{Cold Metal}, 351 U.S. at 446, each court of appeals had affirmed its 54(b) jurisdiction. Therefore, the ability of the appellate court to find abuse of discretion when the certified claim would have been appealable under the former rule 54(b) was not addressed in either opinion. The generally narrow scope of review for abuse of discretion would seem to indicate that there should be minimal bounds within which the district courts should have absolute freedom. Since the intent of the framers of the original rule was substantively adopted by the drafters of the amended rule, see text accompanying note 50 \textit{supra}, a sensible boundary for absolute discretion might parallel the boundary of the original rule. Outside of that limitation the \textit{Cold Storage} opinion definitely allows certification to be granted, subject to appellate review for the proper exercise of discretion.
\textsuperscript{52} See notes 10 & 11 and accompanying text \textit{supra}.
\textsuperscript{53} See cases cited note 38 \textit{supra}.
\textsuperscript{54} See cases cited notes 34 & 35 \textit{supra}.
appellate court cannot be affected by subsequent developments at trial.\(^5\)

The only remaining question in this situation is thus the fairness to the parties in allowing the set-off to delay execution of the settled claim.\(^5\)

As in Allis-Chalmers,\(^5\) when one party asserting a contested claim has created the uncontested claim of the adverse party by failing to pay for goods received, it may be inferred that this is an attempt to collect on the contested claim prior to its adjudication.\(^8\)

Under such circumstances the equities favor entry of judgment on the uncontested claim. When the adjudicated claim involves unsettled issues making reversal a real possibility or when the party seeking \(54(b)\) certification is of questionable solvency so that satisfaction of the set-off claim may not be successful, fairness tends to favor delay of execution until completion of the entire action.\(^8\)


\(^{56}\) See text accompanying note 32 supra.

\(^{57}\) See text accompanying notes 10 & 11 supra.

\(^{58}\) Justice Gibbons, in his dissent to the Allis-Chalmers decision, clearly felt that resolution of \(54(b)\) certification in these circumstances was partially based on which party would finance the liquidated debts. 521 F.2d at 367. A settlement of the entire action one week after judgment was entered on the original claim for the second time, see Docket of Proceedings, Allis-Chalmers Corp. v. Philadelphia Elec. Co. (E.D. Pa. 1973-75), seemed to support the contention that a basis for the counterclaim was delay of payment. This was, however, clearly not the case in the Allis-Chalmers action. Although Judge Newcomer, in granting \(54(b)\) certification, noted the injustice of A-C financing the indebtedness, see note 59 infra, the party seeking certification felt that "recertification ... had no real bearing on the settlement." Letter from Stephen Cozen, attorney for Allis-Chalmers Corp., to William Dannelly, author, Feb. 10, 1976, on file at U.N.C. Law Library. The settlement, approximately 50% of the counterclaim and 100% of the main claim, shows that the counterclaim was not specious, and the settlement was therefore probably based on a recognition that the counterclaim was likely to be tied up in the courts for several years. \(\text{Id.}\)


The adjudicated and unadjudicated claims were found to have both unrelated facts and issues. For that reason an appeal from summary judgment on the debt would involve neither waste of time nor duplication of effort by the appellate court, \(\text{Id.}\) at 2-3. Although the issue of indebtedness would not be mooted by completion of trial on the counterclaim, PECO cleverly argued that another issue would not need to be resolved. That issue was the contention by PECO that Pennsylvania law controlled on the point that summary judgment could not be entered during the pendency of a counterclaim. The court recognized this argument as specious. To allow the mootness of this issue to prevent \(54(b)\) certification would permit a party to postpone execution simply by making the objection to summary judgment. Since this objection would always disappear upon adjudication of the counterclaim, the court of appeals would never have the opportunity to resolve the issue. Thus an issue that had the purpose of delaying execution could
Although the specific limits of permissible 54(b) certification are important, the effectiveness of its application is clearly dependent on the interaction of the district court and the court of appeals. Putting discretion in certification within the power of the district court is sensible because that court is familiar with the case.\textsuperscript{60} As the bounds of finality and the purposes of the rule have proved to be sufficiently vague to subject the rule to misuse,\textsuperscript{61} review of district court certification for proper discretion is clearly warranted.\textsuperscript{62} For this reason the \textit{Allis-Chalmers} requirement that the 54(b) certification be accompanied by articulation of the dominant factors is soundly premised. It is surely warranted that the affected parties be notified of the guidelines for the decision. Similarly, for the reviewing court to determine whether proper discretion was used, it must know the reasons for which judgment was entered.\textsuperscript{63} However, the danger remains, as demonstrated by \textit{Allis-Chalmers}, that the court of appeals in its review might stifle the effectiveness of rule 54(b) by imposing excessive restrictions on the district court's ability to issue certifications.\textsuperscript{64}

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\textsuperscript{60} See note 28 \textit{supra}.

\textsuperscript{61} Zangardi v. Tobriner, 330 F.2d 224 (D.C. Cir. 1964).

\textsuperscript{62} It should be noted, however, that the courts of appeals do not seem to be perfect in their review of proper discretion. See cases cited note 41 \textit{supra}.

\textsuperscript{63} See cases cited note 13 \textit{supra}.

\textsuperscript{64} See text accompanying notes 43-53 \textit{supra}.