BYU Law Review

Volume 1985 | Issue 2 Article 6

5-1-1985

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Recommended Citation

Craig E. Stewart, *Multiple Claims Under Rule 54(b): A Time for Reexamination?*, 1985 BYU L. Rev. 327 (1985).
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CASE NOTES

Multiple Claims Under Rule 54(b): A Time for Reexamination?

I. Introduction

Since its adoption, Federal Rule of Civil Procedure 54(b) has posed definitional problems. The rule is designed to allow immediate appeal from an order disposing of part, but not all, of an action involving multiple claims or parties.[1] Unfortunately, it has never been clear when an action presents multiple claims. The Seventh Circuit recently attempted to resolve this lack of clarity by advancing a new approach for determining the existence of multiple claims in *Minority Police Officers Association v. City of South Bend.*[2] The court held that multiple claims do not exist when the facts underlying the putative claims are largely the same.

The Seventh Circuit's approach is flawed, however. The court's definition of a claim is so broad that it engulfs the discretionary aspects of the rule and allows the court of appeals to supplant the district court as the dispatcher for Rule 54(b) appeals. Moreover, this broad transactional approach to defining a claim is dangerously close to a test rejected by the Supreme

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1. The rule 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, 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.

2. 721 F.2d 197 (7th Cir. 1983).

Court. In practice, the Seventh Circuit's approach will unduly restrict the salutary availability of Rule 54(b) appeals.

II. Instant Case

In *Minority Police Officers*, eleven South Bend policemen alleged that the City of South Bend had discriminated against minorities in hiring and promotion.[3] Prior to trial, the district court ruled that the suit could not be certified as a class action, that certain discrimination claims were barred by the statute of limitations, and that the plaintiffs lacked standing to assert claims of hiring discrimination.[4] The district court made a Rule 54(b) determination and entry of judgment as to these three rulings, and the plaintiffs appealed. The Seventh Circuit, raising the issue on its own motion, held that multiple claims do not exist when the underlying facts on which they depend are "largely the same."[5] It then concluded that a Rule 54(b) determination was proper only as to the order denying standing; the 54(b) determinations of orders barring claims under the statute of limitations and denying class certification were improper.[6]

The court observed that some factual overlap does not preclude the existence of multiple claims.[7] However, multiple claims cannot be present if the plaintiff cannot, under res judicata principles, bring part of the action separately, or if the case presents mere variations of a single legal theory. Because these observations did not resolve whether multiple claims existed in the case before it, the court found it necessary to "delve deeper before deciding that this is a case of genuinely separate claims."[8]

3. *Id.* at 199. The Minority Police Officers Association of South Bend, composed entirely of South Bend policemen, was also a named plaintiff. *Id.*

4. Minority Police Officers Ass'n v. City of South Bend, 555 F. Supp. 921, 923-26, 929 (N.D. Ind. 1983). In denying class certification, the district court held that the putative class was not large enough to satisfy the numerosity requirement, that the named plaintiffs' claims did not share common issues of law or fact, and that the named plaintiffs would not fairly and adequately represent the class.

The court also ruled that the plaintiffs had no ninth amendment claim and that defendant's motion for summary judgment on claims not based on intentional discrimination was moot. *Id.* at 926-28, 930. These latter two rulings were not challenged on appeal. *Minority Police Officers*, 721 F.2d at 199.

5. *Minority Police Officers*, 721 F.2d at 201.

6. *Id.* at 201-02.

7. *Id.* at 200.

8. *Id.*

Delving deeper, the court found "grave practical objections" to reading Rule 54(b) broadly.[9] With the rule's "natural tendency" to generate multiple appeals in the same action, the rule has "tremendous potential" to increase an already burdened appellate caseload if read broadly. Multiple appeals from a single action would likely require the appellate court to "reacquaint itself again and again" with the basic facts of the case. The court noted especially that interlocutory appeals under 28 U.S.C. § 1292(b) are allowed only when the appellate court concludes that the appeal would enhance quick disposition of the action, while a Rule 54(b) appeal "requires only the district judge's certification."[10]

In light of its observations, the court asserted that the presumption should be against finding that an action presents multiple claims.[11] The court stated that if it had its "druthers" it would hold that multiple claims could never arise out of the same factual setting. However, because the Supreme Court had earlier rejected this approach,[12] the court adopted the view that "claims are not separate for Rule 54(b) purposes if the facts they depend on are largely the same, or, stated otherwise, if the only factual differences are minor."[13] The court also suggested that the Supreme Court reconsider its earlier holdings on Rule 54(b) in light of the increased federal appellate caseload.[14]

The court then applied its new approach to the district court's three orders. The court found the order dismissing time-barred claims not immediately appealable under Rule 54(b) because the factual overlap between the time-barred claims and the non-barred claims was complete. Since the facts surrounding the time-barred claims were relevant to the non-barred claims, the court would have to deal with the same facts on any appeal taken after disposition of the non-barred claims. Thus, Rule 54(b) determination was improper despite the court's concession that in a "purely verbal sense" it disposed of a claim for relief.[15]

In the court's view, "[t]he factual overlap is even more com-

9. *Id.*

10. *Id.*

11. *Id.*

12. The cases that rejected this broad transactional approach are discussed *infra* at notes 28-36 and accompanying text.

13. *Minority Police Officers*, 721 F.2d at 201.

14. *Id.* at 200-01.

15. *Id.* at 201.

plete with respect to the class-certification issue."[16] Nevertheless, the court found it unnecessary to rely on this factual overlap to deny the appeal since refusal to grant class certification is not a final order under 28 U.S.C. § 1291.[17] Thus, even if the order dealt with a claim for relief, it was nonetheless not appealable because it did not finally dispose of that claim.

The court reached a different result on the order denying standing to challenge South Bend's hiring practices. Although there was "much factual overlap" between the claims of hiring discrimination and promotion discrimination, the court concluded that major factual differences were present.[18] For example, hiring discrimination did not necessarily follow from promotion discrimination. The court also noted that because the two types of discrimination created two distinct groups of victims, "one can almost say that the district judge entered judgment against separate parties, which is an independent basis for Rule 54(b) certification."[19] The court was reluctant to rely solely on this factor, however, because the same argument carried "too far" might lead to the conclusion that the district court's other two orders were also appealable as judgments dismissing separate parties. The court nonetheless concluded that presence of distinct parties and major factual differences between the matters made the order appealable.[20]

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16. The court stated that the "only reason" the district court denied class certification was that the numerosity requirement of FED. R. CIV. P. 23(a) was not satisfied. The claims of the class were "identical to those of the named plaintiffs." *Id.* The court's statement misconstrues the district court's order. The district judge had also found inadequate commonality of issues and inadequate representation by the named plaintiffs. *See supra* note 4; *cf.* General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (plaintiffs alleging discrimination in promotion not permitted to certify a class including persons allegedly discriminated against in hiring).

17. *Minority Police Officers*, 721 F.2d at 201. As the court stated, the Supreme Court, in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), held that an order denying class certification is not appealable under § 1291 as interpreted by the "collateral order doctrine."

18. *Minority Police Officers*, 721 F.2d at 201.

19. *Id.* at 201-02. For a discussion of multiple parties as constituting multiple claims, see *infra* note 46.

20. *Minority Police Officers*, 721 F.2d at 201. The Seventh Circuit elaborated its *Minority Police Officers* holding in two subsequent cases. In A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc., 725 F.2d 1140, 1141-42 (7th Cir. 1984), the court held that an action seeking damages and specific performance for breach of contract, estoppel, and misrepresentation presented only one claim supported by "mere variations of legal theory." The court emphasized the factual overlap of the various counts in the complaint and suggested that, in a different factual setting, the contract count and the estoppel and fraud counts might possibly constitute

III. Analysis

The Seventh Circuit applied its *Minority Police Officers* approach in a later case and asserted that "the meaning that the draftsmen intended 'claim for relief' to bear is not clear . . . and the Supreme Court has not yet attempted a compendious definition."[21] Because this assertion is fundamental to the court's willingness to adopt its novel approach, the first part of this section examines the assertion's validity by briefly reviewing Rule 54(b)'s history and its treatment in the Supreme Court. As will become evident, the Seventh Circuit's reading of history was fairly accurate. The court failed, however, to consider the impact of the Supreme Court's most recent Rule 54(b) ruling, and its suggested approach is seriously flawed as a result. The second part of this section discusses those flaws. The final part of this section suggests an approach consistent with the history and interpretation of Rule 54(b) that also addresses the concerns motivating the Seventh Circuit's approach.

A. *Adoption, Amendment, and Supreme Court Treatment of Rule 54(b)*

Rule 54(b) was designed to relieve the harshness of the historic federal court practice of allowing appeals only from judgments finally disposing of all claims and parties in a lawsuit.[22]

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multiple claims even though they all arose out of the same business negotiations. *Id.* at 1141, 1143.

In Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 702-03 (7th Cir.), *cert. denied,* 105 S. Ct. 432 (1984), the Seventh Circuit held that a complaint seeking recovery under federal antitrust laws presented multiple claims because the claims did not overlap "factually or legally" and the appeal would be "unencumbered by any facts bearing on the retained claim." The court stated that its "practical approach" to Rule 54(b) is based on "the most important purpose behind Rule 54(b)'s limitations—to spare the court of appeals from having to keep relearning the facts of a case on successive appeals." *Id.* at 702. This practical approach, stated in language broader than in *Minority Police Officers,* was that "if the facts underlying different claims are different, the claims are separate for Rule 54(b) purposes." *Id.*

21. Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 701-02 (7th Cir.), *cert. denied,* 105 S. Ct. 432 (1984); *cf.* Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1070 (7th Cir. 1981) ("It is . . . not surprising that courts have been completely unable to settle on a single test for determining when claims are 'separate.' ").

22. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 431-33 (1956); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511-12 (1950) ("The liberalization of our practice to allow more issues and parties to be joined in one action . . . has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had."); Fed. R. Civ.

The rule accomplishes this purpose by providing for immediate appeal from the disposition of one or more, but not all, of the claims in a multiple claim action. From the very beginning, however, courts have been confused as to when an action presented multiple claims.

As originally adopted in 1938, the rule allowed appeal of a claim only when all counterclaims arising out of the same transaction as the claim were also adjudicated.[23] In accordance with this limitation, some courts asserted that when claims—even those not in the relationship of claim and counterclaim—arose from the same transaction, they were not separately appealable.[24] The Supreme Court approved this approach by its 1942 holding in *Reeves v. Beardall* that only claims arising out of "wholly separate and distinct transactions" are separately appealable.[25] Despite *Reeves*, confusion continued as courts persisted in using their own formulations for determining the existence of multiple claims.[26]

P. 54(b) advisory committee note, *reprinted in* 5 F.R.D. 433, 472 (1946) ("Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created 'civil action' in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case.").

The difficulty under the historic practice was that appeal on a claim adjudicated early in the litigation of a complex lawsuit would have to wait several years for final disposition of the rest of the action. The rule requiring such treatment was referred to as the "single judicial unit" rule. *Cf.* Collins v. Miller, 252 U.S. 364, 370 (1920) ("[T]he judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved.").

23. The original text of the rule provided in part:

> 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.

FED. R. CIV. P. 54(b), 308 U.S. 732 (1939).

24. *See, e.g.*, Atwater v. North Am. Coal Corp., 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring).

25. 316 U.S. 283, 286 (1942).

26. The tests used by courts included whether the claims involved a central fact, whether they could have been brought separately, or whether they simply represented different legal theories in support of one recovery. For a summary of these early approaches, see Note, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239, 244-49 (1948); Note, *Appealability in Federal Courts*, 75 HARV. L. REV. 351, 357-61 (1961); Comment, *Federal Courts—Appeals—Federal Rule 54(b) and the Final Judgment Rule*, 47 MICH. L. REV. 233, 234-35 (1947); *cf.* Hanney v. Franklin Fire Ins. Co., 142 F.2d 864 (9th Cir. 1944) (a claim for recovery on an insurance policy and reformation of that same policy held to be separate and distinct); Zarati S.S. Co. v. Park Bridge Corp., 154 F.2d 377, 379 (2d Cir. 1946) (appeal held proper where the claims are "predicated upon separate facts and separate theories, even though they all grow out of a single business venture").

The restrictive approach of *Reeves* was apparently rejected in 1946 when Rule 54(b) was amended. That amendment deleted the portion of the rule allowing appeal on a claim only when transactionally related counterclaims were also adjudicated. The amended rule provided for appeal from final disposition of any claim—whether a claim, counterclaim, cross-claim, or third party claim—presented in a multiple claim action.[27]

The Supreme Court considered amended Rule 54(b) in the 1956 companion cases of *Sears, Roebuck and Co. v. Mackey*[28] and *Cold Metal Process Co. v. United Engineering & Foundry Co.*[29] and confirmed that appeals were to be more freely granted than they had been prior to the amendment. However, because the Court was primarily concerned with answering the challenge that the rule impermissibly enlarged the jurisdiction of the appellate courts,[30] the two cases shed little light on how to determine the existence of multiple claims.

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27. The amended rule provided in part:

> When more than one claim for relief is presented in an 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 judgment.

FED. R. CIV. P. 54(b), 329 U.S. 861-62 (1946). The principal reason for the amendment was to overcome the problem of knowing when the judge had actually entered the judgment. If a party misinterpreted the judge's order and appealed immediately, the appeal was dismissed as premature. Yet if the party waited until final disposition of the entire action, the appellate court might find that the district judge had earlier entered judgment on the claim and that the appeal was barred as untimely. *See* Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 434 (1956); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950). By allowing appeal only when the judge made an express determination and entry of judgment, the amended rule gave needed certainty to the parties and met with uniform approval. *Sears*, 351 U.S. at 435.

Rule 54(b) was amended to its present form in 1961. *See* FED. R. CIV. P. 54(b), 368 U.S. 1015-16 (1961). That amendment explicitly provided for separate appeal from a final order adjudicating the rights of some, but not all, of the parties. In general the courts had found that Rule 54(b) applied equally to orders relating to parties as well as to claims, but a few courts had not applied the rule to orders dismissing some, but not all, of the parties in a case. *See, e.g.*, Steiner v. 20th Century-Fox Film Corp., 220 F.2d 105, 107 (9th Cir. 1955) ("Parties are not claims."). The 1961 amendment was designed to correct the holdings of those few cases. *See* FED. R. CIV. P. 54(b) advisory committee note (1961).

28. 351 U.S. 427 (1956).

29. 351 U.S. 445 (1956).

30. *See Sears*, 351 U.S. at 435. The requirement that the district judge make a determination and entry of judgment before appeal can be taken has been referred to as the negative effect of the rule. *Id.* As discussed *supra* note 27, this aspect of the rule was uniformly accepted. The affirmative effect of the rule allowing appeal from orders formerly considered not separately appealable was not uniformly approved. It was argued

In *Sears*, the complaint set forth four counts: the first count sought damages relating to all three of plaintiff's businesses under the federal antitrust statutes; the remaining counts, each relating to one business, realleged the conduct asserted in count one and sought common law damages.[31] The Court found that an order dismissing counts one and two could be appealed even though the facts in count one overlapped facts alleged under other pending counts. There is "no doubt," the Court held, "that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b)."[32]

In *Cold Metal*, the Court found that a finally adjudicated claim could be appealed even though a related counterclaim remained pending.[33] The Court noted that amended Rule 54(b) "treats counterclaims, whether compulsory or permissive, like other multiple claims," and that the relationship of the claim to the counterclaim was only one factor for the district court to consider when exercising its discretion in making a determination for appeal.[34] The Court did not discuss whether the action presented multiple claims, apparently concluding that a counterclaim, by definition, constitutes a separate claim for relief under amended Rule 54(b).

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that the rule impermissibly expanded appellate court jurisdiction if interpreted to give the district court power to allow appeals from orders formerly nonappealable. *See* Bendix Aviation Corp. v. Glass, 195 F.2d 267, 277-82 (3d Cir. 1952) (Hastie, J., concurring); Flegenheimer v. General Mills, Inc., 191 F.2d 237, 241 (2d Cir. 1951). The Supreme Court rejected these arguments in *Sears* when it found that amended Rule 54(b) permissibly "adapts the single judicial unit theory so that it better meets the current needs of judicial administration." 351 U.S. at 438. The Court found that the amended rule did not abridge the rule of finality because the district judge could not make a 54(b) determination of an order not finally adjudicating a claim. The rule merely allowed the district court to exercise its discretion and act as "dispatcher" in allowing appeal of an adjudicated claim without having to wait for final disposition of all the claims in the action. *Id.* at 435.

31. 351 U.S. at 429-30.

32. *Id.* at 436. The Court noted that the basis of liability in count one was independent of the other counts, and that count two was "clearly independent" of counts three and four. *Id.* at 437 n.9. It is not clear, however, whether these observations were directed to whether multiple claims existed. The comments could be read as relating to whether the dismissed counts were sufficiently independent of the remaining counts so that allowing appeal was not an abuse of discretion. *But see* Tolson v. United States, 732 F.2d 998, 1001 n.7 (D.C. Cir. 1984) ("In *Sears* . . . the Supreme Court noted that a dismissed count of the complaint on which 54(b) judgment had been entered focused on the Sherman Act, while the counts that remained pending were of state common law origin, thus suggesting that the source of the governing law may be relevant in determining whether a single claim is presented.").

33. 351 U.S. at 452-53.

34. *Id.* at 452.

Sears and *Cold Metal* established that multiple claims can exist even when such claims arise out of the same transaction and involve considerable factual overlap. The Court thus rejected the earlier and more restrictive approaches to Rule 54(b) and expressed a policy favoring broad review. At the same time, the Court reaffirmed that Rule 54(b) allows appeal only from a final decision.[35] Therefore, Rule 54(b) is still limited to cases involving multiple claims. However, because the Court found multiple claims present in both cases, it neglected to define that limit.[36]

In two subsequent cases, the Court discussed when an action presents multiple claims but again did not conclusively resolve the question. In *Liberty Mutual Insurance Co. v. Wetzel*,[37] the complaint sought injunctive relief and damages for discrimination. The Court held that only one claim was presented and stated that it did not need to attempt a "definitive resolution" of the question when multiple claims are present. "It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief."[38]

In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*,[39] the complaint sought injunctive and declaratory relief from the secretary of commerce's waiver of restrictions on aid given to the defendant shipbuilder. The plaintiffs asserted that the secretary either had no power to waive the restrictions or that he abused the power he did have.[40] When the court entered a Rule 54(b) judgment, the defendants argued that the complaint merely asserted one claim supported by two theories for relief.[41] The Su-

35. *Sears*, 351 U.S. at 436 ("The grounds for [a motion to dismiss for lack of jurisdiction] might be (1) that the judgment of the District Court was not a decision upon a 'claim for relief,' (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action . . . .").

36. Indeed, the Court may have confused matters. Finding multiple claims in *Sears* seems to conflict with the widely cited rule espoused in Rieser v. Baltimore & O.R.R., 224 F.2d 198, 199 (2d Cir. 1955), *cert. denied*, 350 U.S. 1006 (1956), and supported by the Court's later dictum in Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 581 n.17 (1980), that multiple theories of recovery do not constitute multiple claims. In the first count the *Sears* plaintiff sought $570,000—including treble damages—and the combined relief based on the common law counts was $575,000. *Sears*, 351 U.S. at 430.

37. 424 U.S. 737 (1976).

38. *Id.* at 743 n.4.

39. 444 U.S. 572 (1980).

40. *Id.* at 578.

41. *Id.* at 579-80.

preme Court agreed that the presence of multiple theories would not necessarily create multiple claims.[42] However, the Court found a separate basis for finding multiple claims: the plaintiffs not only challenged the particular waiver in question but also sought relief against any future waivers the secretary might make to other ships.[43]

Liberty and *Seatrain* teach that a complaint seeking multiple remedies or presenting multiple legal theories in support of a single recovery does not necessarily present multiple claims for relief. This was hardly new law, however,[44] and the Court provided little guidance for resolving future cases. Indeed, after the Supreme Court's four decisions discussed above, one knows little more than that Rule 54(b) is valid and that factual transactions, legal theories, and remedies do not constitute claims.[45] In all four cases, the Court shut the door only slightly on approaches appellate courts may take to resolve the issue.[46]

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42. *Id.* at 581 n.17.

43. *Id.* at 580-81.

44. There has never been much dispute that mere legal theories do not constitute separate claims. *See, e.g.*, Sidis v. F-R Publishing Co., 113 F.2d 806, 811 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 311 U.S. 711 (1940); cases cited *infra* note 46; 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2657 (1983) ("[T]he decided cases do not go so far as to treat every variation in legal theory as a separate 'claim.' ") [hereinafter cited as WRIGHT].

45. For an attempt to develop a comprehensive test for determining the existence of multiple claims based on the holdings in *Sears* and *Cold Metal*, see Note, *Federal Rule 54(b): The Multiple Claims Requirement*, 43 VA. L. REV. 229 (1957). The author proposes that an action presents multiple claims whenever the plaintiff's possible recoveries are multiple in number and not mutually exclusive. Although this test is undoubtedly useful and has gained some acceptance, *see* WRIGHT, *supra* note 44, § 2657, it has its limits. *See infra* note 84.

46. That the door has been left open is demonstrated by continued wanderings of lower courts in Rule 54(b) cases. Several circuits have held that where a complaint presents alternative legal theories in support of only one recovery the action presents only one claim. *See, e.g.*, Allegheny County Sanitary Auth. v. United States Envtl. Protection Agency, 732 F.2d 1167, 1172 (3d Cir. 1984); Yorkville Nat'l Bank v. Bassak (*In re* Bassak), 705 F.2d 234, 237 (7th Cir. 1983); Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978); Schexnaydre v. Travelers Ins. Co., 527 F.2d 855, 856 (5th Cir. 1976); Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 941 (2d Cir. 1968). These cases and cases cited in the following paragraph often rely on Rieser v. Baltimore & O.R.R., 224 F.2d 198 (2d Cir. 1955), *cert. denied*, 350 U.S. 1006 (1956); *see supra* note 36.

A variant of the above approach holds that multiple claims are present when the plaintiff is barred by res judicata from bringing part of the action in a later suit. *See, e.g.*, Tolson v. United States, 732 F.2d 998, 1001-02 (D.C. Cir. 1984); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1369 n.8 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); Gold Seal Co. v. Weeks, 209 F.2d 802, 809-10 (D.C. Cir. 1954); Sidis v. F-R Publishing Corp., 113 F.2d 806, 811 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 311 U.S. 711 (1940).

Other courts determine the existence of multiple claims for relief by examining the

In light of this history, the Seventh Circuit's desire to state a definitive ruling is understandable, as was its belief that the way was "open" for adopting a new definition of a claim.[47] Although the field is fairly "open," it is not as wide open as the Seventh Circuit imagined. A proper understanding of the Court's most recent encounter with Rule 54(b) in *Curtiss-Wright Corp. v. General Electric Co.*[48] demonstrates the disparity between the Seventh Circuit's approach and that of the Supreme Court.

The plaintiff in *Curtiss-Wright* sought to collect the balance due on performed contracts, and the defendant counterclaimed for damages arising under those contracts. Under *Cold Metal,* the counterclaim was clearly a claim for relief,[49] and the Court was not required to address how to determine when multiple claims exist. However, the Court was required to review the discretionary aspect of a Rule 54(b) appeal. This discretionary aspect arises because the rule does not mandate appeal from every disposition of a single claim in a multiple claim action.[50] The rule merely empowers the district court to enter judgment on a claim to allow immediate appeal if it determines that there is "no just reason for delay."

In finding no abuse of discretion, the Court outlined steps

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facts to see if the adjudicated matter involves facts additional to the rest of the action. *See* Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313, 1316 (9th Cir. 1979); Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973).

A number of opinions simply avoid the question of whether there are multiple claims by finding that the district court abused its discretion in finding "no just reason for delay." *See, e.g.,* Morrison-Knudsen Co. v. Archer, 655 F.2d 962, 965-66 (9th Cir. 1981); Cullen v. Margiotta, 618 F.2d 226, 227-28 (2d Cir. 1980). At least one court seemed willing to let the district court's determination be conclusive on the issue. Bushie v. Stenocord Corp., 460 F.2d 116, 118 n.2 (9th Cir. 1972). This last approach was suggested by an early law review author. Note, *Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Federal Rule 54(b),* 62 YALE L.J. 263, 271 (1953).

Courts have agreed that final adjudication of all rights of a party to an action may be appealed under Rule 54(b). *See, e.g.,* Alcan Aluminum Corp. v. Carlsberg Fin. Corp., 689 F.2d 815 (9th Cir. 1982); Skinner v. W.T. Grant Co., 642 F.2d 981 (5th Cir. 1981); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978); *see also* WRIGHT, *supra* note 44, § 2656.

47. Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983) ("[W]e think it is open for us to hold that claims are not separate . . . if the facts they depend on are largely the same . . . .").

48. 446 U.S. 1 (1980).

49. *See supra* notes 33-34 and accompanying text.

50. *Curtiss-Wright,* 446 U.S. at 8.

for proper review of Rule 54(b) determinations. An appellate court must first determine that there has been a final judgment on a cognizable claim for relief.[51] Inasmuch as this requirement stems from the final judgment rule of 28 U.S.C. § 1291 and does not involve the district court's discretion, the appellate court may exercise broad review.[52] Having found finality, the appellate court must then apply an abuse of discretion standard of review to the district court's determination that there is no just reason for delay.[53] Significantly, one of the factors the Court specifically mentioned as appropriately considered under the second part of review was the separability of the claims.[54] Even though the Court did not explicitly deal with the question of when multiple claims exist, *Curtiss-Wright*'s statement of the reviewing process and the factors properly considered in that process offers considerable guidance in evaluating the Seventh Circuit's approach.

B. The Seventh Circuit's Approach

The primary defects of the Seventh Circuit's approach result from its disregard of the teachings of *Curtiss-Wright*. An analysis of those defects shows that the Seventh Circuit's approach is not necessary even to achieve the goal of preventing needless and repetitious appeals.

1. Emasculation of the two-step review process

Under the Seventh Circuit's test, more than one claim is present only if significantly differing facts are involved. This standard requires adjudicated matter to be factually separable from the rest of the action. As indicated above, however, the

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51. *Id.* at 7.

52. *See* Stearns v. Consolidated Management, Inc., 747 F.2d 1105, 1108 (7th Cir. 1984) ("The existence of [a final judgment on a claim for relief] is open to our de novo review, but the determination of 'just reason for delay' is addressed to the sound discretion of the district court."); *see also* WRIGHT, *supra* note 44, §§ 2655-2656.

53. *Curtiss-Wright*, 446 U.S. at 8-10; *see also* Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 435-37 (1956); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1369 (11th Cir.) (court found a final judgment on a claim and then applied an abuse of discretion review to determine if the appeal was proper), *cert. denied*, 464 U.S. 893 (1983); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 441 (3d Cir. 1977) ("Once it is determined that the district court was empowered to enter final judgment under Rule 54(b), its decision to do so can be set aside only for an abuse of discretion."), *cert. denied*, 434 U.S. 1086 (1978); Arlinghaus v. Ritenour, 543 F.2d 461, 463-64 (2d Cir. 1976) (order dismissed some of the parties, but Rule 54(b) determination was an abuse of discretion).

54. *Curtiss-Wright*, 446 U.S. at 8.

Court in *Curtiss-Wright* discussed separability only as a question for the district court to address once it finds multiple claims and decides whether to exercise discretion to allow the appeal.[55] Indeed, the Court stated that lack of separability would not preclude a Rule 54(b) appeal as long as other factors weighed in favor of appeal.[56] Because the district court has no discretion to allow an appeal when only one claim is present, separability cannot be a prerequisite to finding multiple claims. Separability of facts and legal issues may be related to the existence of multiple claims, but the Supreme Court has established that the two issues are not coextensive; separability is a question relating primarily to the district court's discretion.[57]

Making separability a prerequisite to finding multiple claims usurps the discretion given to the trial court by *Curtiss-Wright.* Under *Curtiss-Wright,* a court of appeals has broad reviewing power to determine whether multiple claims are present, but only limited power to review the district court's discretion.[58] By making the discretionary question of separability the primary component of the definition of a claim, the Seventh Circuit takes advantage of the greater reviewing power available under the first step of the reviewing process. Consequently, the reviewing court gives little deference to the district court's discretionary determination that there is no just reason for delay.

The Seventh Circuit's consistent reference to "separate claims"[59] illustrates its confusion of the two steps in the reviewing process. This phrase suggests that existence of multiple claims depends upon separability. Rule 54(b), however, requires only that multiple claims for relief be present and that there be

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55. *Id.*

56. The Court did not suggest that lack of separability of the claims under review from the others remaining to be adjudicated or the possibility of the appellate court facing the same issues on subsequent appeals "would necessarily mean that Rule 54(b) certification would be improper. It would, however, require the district court to find a sufficiently important reason for nonetheless granting certification." *Id.* at 8 n.2.

57. *Cf.* Pahlavi v. Palandjian, 744 F.2d 902, 904-05 (1st Cir. 1984) (the court found that "the overlap between factual issues in the plaintiff's claim and in the defendant's counterclaims appears to be extensive"; the appeal was dismissed for abuse of discretion rather than for lack of multiple claims).

58. *See supra* notes 51-53 and accompanying text.

59. *Minority Police Officers,* 721 F.2d at 200-02. In Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 701 (7th Cir.), *cert. denied,* 105 S. Ct. 432 (1984), the court stated that the "rule itself makes clear that a district judge may enter an appealable judgment only if it disposes of a 'claim for relief' that is 'separate' from the claims not disposed of."

no just reason for delay. As discussed above, separability is merely a factor for the district court to consider in exercising its discretion. Strictly speaking, the phrase "separate claims" encompasses both steps involved in a Rule 54(b) determination: first, there must be multiple claims; and second, the claims must be sufficiently separate so that allowing an appeal as to only some of those claims is not an abuse of discretion.

The opinion in *Minority Police Officers* amply demonstrates the free hand the Seventh Circuit's approach gives to appellate courts. The court acknowledged that "in a purely verbal sense" the order dismissing time-barred allegations disposed of separate claims.[60] Yet, under its new theory, the court was able to "delve deeper" and dismiss the appeal without any consideration of, or deference to, the district court's determination. Furthermore, the court decided to hear the appeal from the order barring some allegations on standing grounds—again while acknowledging that the order could be considered as dismissing a claim under Rule 54(b).[61] The court's distinction between the two orders was not that one disposed of a claim for relief while the other did not. Rather, appeal of one may entangle the court in multiple appeals involving the same facts while appeal of the other would not.

The court may have properly distinguished the two orders on the ground that the first order was more likely to involve the court in multiple appeals. This distinction, however, was to be made by the district court at its discretion. In *Sears*, the Supreme Court noted that discretion is vested in the district court "with good reason" because the district court is "most likely to be familiar with the case and with any justifiable reasons for delay."[62] The Seventh Circuit's approach disregards this principle and leaves little room for the district court to exercise its discretion.[63]

The Seventh Circuit's approach is also inflexible. The breadth of the definition of a claim excludes a substantial number of appeals and ignores consideration of additional factors

60. *Minority Police Officers*, 721 F.2d at 201.

61. *Id.* at 202.

62. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 437 (1956). This holding was reaffirmed in *Curtiss-Wright*, 446 U.S. at 10.

63. The court's favorable reference to interlocutory appeals suggests that this result perhaps was intended under 28 U.S.C. § 1292(b), in which the court of appeals is granted wider discretion in allowing the appeal. *See supra* note 10 and accompanying text.

traditionally within the district court's discretion. Thus the questions of whether the appeal of one claim might aid in the disposition of the action,[64] whether further proceedings in the trial court may moot the appeal,[65] and whether requiring the plaintiff to wait for recovery on an adjudicated claim would be unjust,[66] would never be answered. Indeed, in *Minority Police Officers* the appeals were allowed or denied solely on the question of multiple claims: discretionary questions were not reached.[67] This result conflicts with the *Curtiss-Wright* approach, which contemplates that appeals will not be excluded merely because claims lack separability and that additional discretionary questions should be reached when the court finds multiple claims.

2. A time for reexamination?

The Seventh Circuit's inflexible approach indicates a disregard for the Supreme Court's liberal approach toward allowing appeals.[68] The significantly differing facts test articulated by the Seventh Circuit does not necessarily mandate a result as begrudging as the entirely factually distinct test rejected in *Sears*. However, given the breadth of the significantly differing facts test and its stated purpose of easing the overburdened federal appellate caseload,[69] there can be little doubt that the Seventh Circuit's approach will substantially restrict the availability of Rule 54(b) appeals.

This conclusion finds additional support in the court's suggestion that the Supreme Court reexamine its holdings in *Sears* and *Cold Metal* in light of the increased burden on federal appellate courts.[70] While a definitive approach to determining the

64. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1370 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); Alcan Aluminum Corp. v. Carlsberg Fin. Corp., 689 F. 2d 815, 817 (9th Cir. 1982).

65. Cullen v. Margiotta, 618 F.2d 226, 228 (2d Cir. 1980); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 441 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

66. *Curtiss-Wright*, 446 U.S. at 11-12; Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d 944, 949 (7th Cir. 1980). For a discussion of these and other factors relevant to exercising discretion to allow a Rule 54(b) appeal, see WRIGHT, *supra* note 44, § 2659; *cf.* Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) (catalog of the various factors).

67. *Minority Police Officers*, 721 F.2d at 201-02.

68. *See supra* text accompanying note 35; *see also infra* notes 71-74 and accompanying text.

69. *Minority Police Officers*, 721 F.2d at 200-01.

70. *Id.*

existence of multiple claims would be helpful, the Seventh Circuit's suggestion is ill conceived. As recently as 1980 in *Curtiss-Wright,* the Supreme Court rejected a lower court's holding that Rule 54(b) appeals should only be allowed in an "infrequent harsh case."[71] Though the Court acknowledged that Rule 54(b) appeals should not be granted routinely,[72] its holding in *Curtiss-Wright* demonstrates that Rule 54(b) appeals should not be unduly restricted. Of five Rule 54(b) cases it has decided, the Supreme Court has disallowed an appeal only in *Liberty.*[73] None of these appeals would likely have survived the Seventh Circuit's approach.[74]

Moreover, the Seventh Circuit's concerns are largely already addressed by Rule 54(b). Since 1946, Rule 54(b) appeals have been expressly limited to cases in which the district court determines that no just reason for delay exists. The Supreme Court has emphasized that the district court is to exercise its discretion in the interests of "sound judicial administration."[75] Given this standard, the district court will have to consider the increasing appellate caseload in every case seeking a Rule 54(b) appeal.[76] As the appellate caseload increases, district courts will likely grant fewer Rule 54(b) appeals. This built-in regulator makes continual adjustment by the Supreme Court unnecessary.

The Seventh Circuit's concern with repetitious consideration of the same facts and issues on subsequent appeals is similarly addressed by Rule 54(b). *Curtiss-Wright* explicitly recognized that this problem is a factor for district court consideration under the discretionary aspects of the rule.[77] Thus appellate courts are not powerless to deny appeals on grounds of excessive factual overlap.

If a district court improperly allows Rule 54(b) appeals contrary to sound judicial administrative practice, the appellate

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71. 446 U.S. 1, 10 (1980). The phrase "infrequent harsh case" comes from the advisory committee's note to the 1946 amendment to Rule 54(b). *See supra* note 22.

72. *Curtiss-Wright,* 446 U.S. at 10.

73. *See supra* notes 28-43, 48-54 and accompanying text.

74. In every one of the cases, the claims arose out of the same transaction and differences in the facts necessary to support the claims were not significant. This was especially true in *Sears,* where counts two, three, and four of the complaint simply realleged the same facts supporting count one. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 429-30 (1956).

75. *Curtiss-Wright,* 446 U.S. at 10; *see also Sears,* 351 U.S. at 437.

76. *See Curtiss-Wright,* 446 U.S. at 10 ("Plainly, sound judicial administration does not require that Rule 54(b) appeals be granted routinely.").

77. *Id.* at 8 n.2.

court is free to dismiss the appeal. Such a dismissal, however, is for abuse of discretion and not for lack of multiple claims. The court is not allowed the broad reviewing power it would have if that were the issue. The Seventh Circuit failed to recognize this fundamental requirement of the rule.

C. *The Narrow Purpose of Requiring Multiple Claims*

The weakness of the Seventh Circuit's approach rests in its expectation of too much from the definition of a claim. This expectation sharply contrasts with the Seventh Circuit's approach to Rule 54(b) claims in *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*,[78] a case decided almost three years before *Minority Police Officers*. The court in *Local P-171* noted the difficulty of precisely defining a claim and asserted that, given the discretionary nature of a Rule 54(b) determination, little would be gained by attempting to do so.[79] Instead, the courts should follow certain "rules of thumb" to identify cases clearly presenting only one claim and in unclear cases leave the matter to the sound discretion of the trial court. The court's suggested rules of thumb are simply an amalgamation of various approaches taken by appellate courts over the years. If the action presents mere variations of legal theory, if separate recoveries are not impossible, or if splitting the action would run afoul of the rule against splitting claims, then the action does not present multiple claims.[80]

Much recommends this earlier approach. The presence of

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78. 642 F.2d 1065 (7th Cir. 1981).

79. *Id.* at 1070.

80. *Id.* at 1070-71; *see also supra* note 46. *Local P-171* was followed in Tolson v. United States, 732 F.2d 998, 1001 (D.C. Cir. 1984) ("We offer no universal formulas, but the matter before us affords an opportunity to state one 'rule of thumb' for identifying a genre of 'claims that clearly cannot be separate.' . . . When alleged 'claims [are] so closely related that they would fall afoul of the rule against splitting claims if brought separately,' . . . they do not qualify as 'separate claims' within the meaning of Rule 54(b).").

Perhaps more significantly, a Seventh Circuit case decided since *Minority Police Officers* but by a different panel followed the *Local P-171* approach without mentioning *Minority Police Officers*. *See* Stearns v. Consolidated Management, Inc., 747 F.2d 1105 (7th Cir. 1984). The complaint in *Stearns* was brought by a woman claiming employment discharge based on sex and age. She asserted claims under two different anti-discrimination statutes. When one claim was dismissed, she appealed. The court held the appeal proper under the *Local P-171* approach to Rule 54(b). Given the extensive factual overlap of the two claims, the appeal almost certainly would have been dismissed had *Minority Police Officers* been followed.

multiple claims prevents emasculation of the final judgment rule and prevents impermissible enlargement of appellate jurisdiction. The definition of a claim need not be designed to exclude every appeal that, as a matter of judicial policy, should wait until final disposition of the whole action. This purpose is served by the district court's discretionary power to not allow an immediate appeal under Rule 54(b). The multiple claims requirement need only serve the narrow purpose of ensuring an "ultimate disposition of an individual claim entered in . . . a multiple claims action."[81] The heneficial purpose of the rule will be served best by leaving as much as possible to the district court's discretion—subject, of course, to proper appellate review.

The court in *Local P-171* recognized this limited purpose of requiring multiple claims. Moreover, its rules of thumb prevent the multiple claim requirement from being completely read out of the rule. Though these rules of thumb are perhaps not comprehensive, they exclude Rule 54(b) appeals in cases where damage to the final judgment rule is most likely. Furthermore, the existence of close cases will not likely do significant damage to the final judgment rule. The *Local P-171* court recognized that in close cases the combination of district court discretion and appellate court review of that discretion result in the same balancing of the value of accelerated appeals against the danger of piecemeal litigation underlying the final judgment rule itself.[82]

Finally, this limited approach to the definition of a claim is justified by the apparent impossibility of absolutely defining a claim. As early as 1940 it was recognized that the "extent of a single cause or claim cannot be a matter of precise rule and must depend to a considerahle extent upon ad hoc circumstances."[83] This statement has retained its accuracy since 1940 as evidenced by the continued existence of numerous approaches to Rule 54(b) claims.[84] As the court recognized in *Local P-171*, perhaps

81. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 436 (1956).

82. *Local P-171*, 642 F.2d at 1070.

83. Sidis v. F-R Publishing Corp., 113 F.2d 806, 811 (2d Cir. 1940) (Clark, J., dissenting).

84. None of the approaches suggested thus far appear to completely and adequately resolve the issue of when multiple claims are present. A test looking at whether separate recoveries are possihle, for example, often proves little. A plaintiff may set out a continuing course of conduct in three counts with each count praying for $10,000 damages. The recoveries are not mutually exclusive, yet it is not clear whether the complaint seeks three recoveries of $10,000 or one recovery of $30,000. This problem, of course, is precisely that encountered in *Minority Police Officers* as to the order dismissing the time-

the only approach that can be applied systematically is a broad transactional approach requiring separate claims to arise out of distinctly separate transactions.[85] The Supreme Court has rightly rejected this mechanical and unduly restrictive approach.[86]

Had the court in *Minority Police Officers* followed its earlier approach in *Local P-171*, it could have stayed within the boundaries of the review process articulated in *Curtiss-Wright* and still preserved concern over a burdened appellate docket. In *Minority Police Officers*, the court applied *Local P-171*'s rules of thumb and concluded that the action presented multiple claims.[87] This conclusion should have been enough to resolve the multiple claims issue. When the court said it was "delving deeper" to see if the appeal should indeed be allowed, it was reviewing the discretionary aspect of the district court's order. The court should have acknowledged the district court's discretion and applied an abuse of discretion standard of review. At this point, the court could have "scrutinize[d] the district court's

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barred claims.

The res judicata approach is perhaps more promising, since Rule 54(b) was apparently not adopted to relieve hardship resulting from joinder under res judicata rules. *See* Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978) (Rule 54(b) did not "purport to amend or dilute the fundamental rule against splitting a cause of action"). The difficulty with a strict res judicata approach is that policies underlying res judicata do not necessarily underlie Rule 54(b). For example, the modern approach to claim preclusion defines a claim as encompassing all rights of the plaintiff to remedies arising out of the same transaction. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). This broad transactional approach was rejected in *Sears*. *See supra* notes 31-32 and accompanying text. *But see* Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978) ("[I]t is now generally accepted that a claim asserting only one legal right growing out of a single transaction or series of related transactions states a single claim for relief.").

Some conflict may appear to exist between the assertion that the Supreme Court has rejected the res judicata approach to defining a Rule 54(b) claim and this paper's approval of the rules of thumb listed in *Local P-171*. Although one of the rules of thumb asks whether the claims could have been brought separately under res judicata principles, the courts using that rule do not appear to be referring to the modern restatement approach to claim preclusion. For example, the *Tolson* court, *see supra* note 80, referred to its earlier opinion in *Gold Seal Co. v. Weeks*, 209 F.2d 802 (D.C. Cir. 1954), for the idea that res judicata principles are a guide to determining Rule 54(b) claims. The court in *Gold Seal* clearly was referring to the more traditional primary right/legal injury approach to determining claim preclusion. *Id.* at 809-10. This older approach is not as broad and inflexible as the modern transactional approach and would appear to be an appropriate guide for determining the existence of multiple claims. The difficulty with its exclusivity is that concepts of legal injury and primary right are often no more clear than the concept of a Rule 54(b) claim itself.

85. *Local P-171*, 642 F.2d at 1070.

86. *See supra* notes 31-32 and accompanying text; *see also supra* note 84.

87. Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 200 (1983).

evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units."[88] This scrutiny would necessarily involve consideration of the appellate caseload and could result in denying the appeal. The denial, however, would not be for lack of multiple claims and could not be made on de novo review. The denial would be for abuse of discretion and could be made only after giving proper deference to the district court's initial determination.

IV. Conclusion

Rule 54(b) is designed to avoid hardship and injustice to litigants in multiple claims actions. To achieve that purpose, it wisely gives the district courts discretion to allow appeals without waiting for disposition of an entire action. The Seventh Circuit should have followed its prior holdings, respected the procedure adopted by Rule 54(b), and allowed the rule to accomplish its beneficial purpose.

Craig E. Stewart

88. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980).