Kelly v. Lee's Old Fashioned Hamburgers: A Step Back from Certainty under Rule 54(b)

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KELLY v. LEE'S OLD FASHIONED HAMBURGERS: A STEP BACK FROM CERTAINTY UNDER RULE 54(B)

INTRODUCTION

Federal Rule of Civil Procedure 54(b) is one of the most commonly used Rules in complex federal civil litigation. Generally, Rule 54(b) allows a litigant to immediately appeal a final judgment as to one or more, but less than all, claims or parties in an action without awaiting the disposition of the entire litigation. A partial final judgment under Rule 54(b), however, is appealable only if the district court certifies the order. Modern federal courts have struggled to interpret Rule 54(b) consistently. More specifically, courts are divided over whether a district court must include in its order the exact statutory language “no just reason for delay” to satisfy the Rule’s certification requirement. According to a literal reading of the Rule, a district court’s order must contain an “express determination that there is no just reason for delay” of appeal and an “express direction for entry of judgment” in order to be appealable. Nevertheless, some courts have liberally construed the Rule and have instead looked to the intent of the trial court to determine whether an order is appealable under Rule 54(b).

In Kelly v. Lee's Old Fashioned Hamburgers, the Fifth Circuit Court of Appeals sat en banc to resolve this controversial issue. The court adopted a substance-over-form approach to finality under Rule 54(b). It ruled that an order is appealable under Rule 54(b) so long as the reviewing court can determine that the district court “unmistakably intended” to issue a partial final judgment pursuant to the Rule. Accordingly, the court held that the district court need not include any precise language in its Rule 54(b) order.

2. FED. R. CIV. P. 54(b); see also Craig E. Stewart, Note, Multiple Claims Under Rule 54(b): A Time for Reexamination, 1985 B.Y.U. L. REV. 327 (discussing Rule 54(b) in depth).
3. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980). The district court's determination that there is “no just reason for delay” of appeal is generally referred to as “certifying” or a “certification of” a Rule 54(b) order. See Gerson, supra note 1, at 177.
4. See infra notes 163-95 and accompanying text (noting the current controversy among federal courts concerning proper Rule 54(b) certification).
5. See infra notes 174-248.
6. FED. R. CIV. P. 54(b).
7. See infra notes 190-95 and accompanying text (describing the liberal interpretation of Rule 54(b)).
8. 908 F.2d 1218 (5th Cir. 1990) (en banc).
9. Id. at 1220.
10. Id.
11. Id.
This decision greatly affects federal practice for several reasons. First, a broad application of Kelly may open the door for sanctions and malpractice actions against attorneys who incorrectly predict the district court judge's intent regarding finality. Second, the decision clearly illustrates the impracticability of a case-by-case approach to jurisdictional rules. Finally, it may signal a more relaxed approach toward interpreting appealability under Rule 54(b).

This Note begins with a Background section that reviews the history and development of Rule 54(b) and its certification requirement. The next section discusses the Fifth Circuit's decision in Kelly. The Analysis section then illustrates how the majority's liberal interpretation of Rule 54(b) misinterpreted the language and purpose of the Rule. Finally, the Impact section explains how the Kelly decision may lead to several unpalatable results: 1) confusion among attorneys concerning the appealability of orders; 2) more attorney sanctions and malpractice actions stemming from this confusion; and 3) the potential for an increased crowding of an already overburdened appellate docket.

I. BACKGROUND

The history and development of Rule 54(b) provide a background for the Fifth Circuit's decision in Kelly v. Lee's Old Fashioned Hamburgers. The Background section begins by examining the basic principles and purposes of the final judgment rule. Next, this section discusses the single judicial unit theory and its relationship to the final judgment rule. This section then illustrates how the original Rule 54(b) was promulgated to moderate the sometimes harsh effects of the single judicial unit theory. The Background section next describes how the problems that courts and litigants encountered with the original Rule led to the 1946 Amendment to Rule 54(b) that included the certification requirement. Finally, this section illustrates how modern federal courts have interpreted Rule 54(b) inconsistently with regard to the certification requirement.

A. The Final Judgment Rule

At early common law, a party to a suit did not have an absolute right to appellate review. The traditional view was instead that the United States

12. See infra notes 407-12 and accompanying text (discussing the possibility of an increase in attorney malpractice actions).
13. See infra notes 379-89 and accompanying text (explaining the difficulty of applying the "unmistakable intent" test for determining the appealability of an order).
14. See infra notes 163-73 and accompanying text (noting that many federal circuits now require a statement of reasons to accompany a Rule 54(b) order).
15. See infra notes 76-88.
16. 6 James W. Moore et al., Moore's Federal Practice ¶ 54.01[1] (2d ed. 1989) [hereinafter Moore's Federal Practice]. For example, there was no general right to appeal in criminal cases for over one hundred years. See Symposium, Federal Civil Appellate Jurisdiction: An Inter-
Constitution did not create such a right.\textsuperscript{17} The belief was that the Framers instead decided to leave that matter to Congress.\textsuperscript{18}

Congress, however, created an intermediate federal appellate court system.\textsuperscript{19} Congress granted jurisdiction to the court of appeals in 28 U.S.C. § 1291 ("section 1291"), which states in pertinent part: "[T]he courts of appeals . . . shall have original jurisdiction of appeals from all \textit{final} decisions of the district courts of the United States."\textsuperscript{20} Since the courts of appeals are inferior courts created by Congress, their jurisdiction is completely dependant on statutory authority.\textsuperscript{21} Accordingly, unless a party can bring an appeal under one of the alternative bases for jurisdiction,\textsuperscript{22} the courts of appeals have jurisdiction only over "final decisions" of the district courts.\textsuperscript{23} This is commonly referred to as locutory.

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21. See Carroll v. United States, 354 U.S. 394, 399 (1957) ("It is axiomatic . . . that the existence of appellate jurisdiction . . . is dependant upon authority expressly conferred by statute."); Wiscort, 3 U.S. at 327 ("If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction."); see also Gialde v. Time, Inc., 480 F.2d 1295, 1298 (8th Cir. 1973) (stating that courts of appeals have jurisdiction only as conferred by statute). Certain constitutional foundations, however, have been suggested as limits on congressional power over appellate jurisdiction. See Symposium, supra note 16, at 20 (suggesting that express prohibition of governmental action, separation of powers, and the nature of the judicial function in general operate as limits on congressional power); see also William W. Van Alstyne, In Gideon's Wake: Harsh Penalties and the "Successful" Criminal Appellant, 74 YALE L.J. 606, 613 n.25 (1965) (suggesting that congressional power may be constrained by due process); see generally Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV.,1362 (1953) (arguing that Congress' power to control appellate jurisdiction has eroded).
22. The most common alternative statutory basis for jurisdiction is 28 U.S.C. § 1292(b) (1988), which provides for review of interlocutory orders in various circumstances. See generally 15 WRIGHT & MILLER, supra note 19, § 3901 (1st ed., 1976) (listing all of the alternative jurisdiction federal statutes). For a discussion of why Federal Rule 54(b) is not an "alternative" jurisdictional statute, see infra notes 132-37 and accompanying text.
23. See, e.g., Bachowski v. Usery, 545 F.2d 363, 366 (3d Cir. 1976) (stating that "[t]he cases are clear in their command that only final decisions of the district court are appealable under [28 U.S.C. § 1291]"); Childs v. Kaplan, 467 F.2d 628, 629 (8th Cir. 1972) (stating that appellate jurisdiction arises exclusively from final judgments); see also Susan C. Robasca, Comment, The Finality of Partial Orders in Consolidated Cases Under Rule 54(b), 57 FORDHAM L. REV. 637, 637 (1989) ("[D]etermining when a judgment is final is critical because the right to appeal depends on it.").

Furthermore, courts of appeals have a duty to determine sua sponte whether they have appellate jurisdiction before they reach the merits of a case. See Patten Sec. Corp. v. Diamond Greyhound & Genetics, 819 F.2d 400, 403 (3d Cir. 1987) (noting that even where the parties agree that the court has appellate jurisdiction, their agreement does not relieve the court of the responsibility to independently determine appealability); Borne v. A & P Boat Rentals No. 4, 755 F.2d 1131, 1133 (5th Cir. 1985) ("It is axiomatic that parties may not stipulate appellate jurisdiction, [and the appellate courts] are obligated, \textit{sua sponte} if necessary, to examine the basis of [their]
the final judgment rule.\textsuperscript{24}

The final judgment rule embodied in section 1291 serves several purposes.\textsuperscript{25} The most important purpose of the rule is to conserve judicial resources by avoiding piecemeal appeals.\textsuperscript{26} Courts consistently recognize that constant interruption of trial through piecemeal appeals would "consume trial court time, forestall the ultimate resolution of the case, and facilitate the harassment of one party by his opponent."\textsuperscript{27} Consequently, courts consistently express their abhorrence of piecemeal appeals, and express their approval of the efficiencies inherent in the final judgment rule.\textsuperscript{28}

The final judgment rule also serves other purposes. First, it promotes respect for the trial court's decisions.\textsuperscript{29} Second, the final judgment rule gives the trial court time to reconsider its rulings.\textsuperscript{30} Third, the rule preserves the possibility jurisdiction."); see also Preston T. Tawber, \textit{A Uniform Approach to Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)}, 29 S. TEXAS L. REV. 587, 592 (1988) (commenting that it "is the duty of the federal [appellate] court to examine, as a threshold issue prior to reaching the merits of a case, whether it has jurisdiction to hear or dispose of the particular litigation."). \textit{But see In re Bassak}, 705 F.2d 234, 234-35 (7th Cir. 1983) (arguing that the obligation to determine jurisdiction before reaching the merits of a case is becoming "unduly wasteful of judicial time").


25. \textit{Fort v. Roadway Express}, 746 F.2d 744, 748 (11th Cir. 1984) (noting that a number of policies are furthered by the final judgment rule).

26. \textit{See} Flanagan v. United States, 465 U.S. 259, 264 (1984) (emphasizing that the final judgment rule is "crucial to the efficient administration of justice."); \textit{In re Sambo's Rests.}, 754 F.2d 811, 815 (9th Cir. 1985) ("[O]ne of the most compelling reasons for the finality rule is the avoidance of unnecessary appeals and interruptions of trial, thereby saving judicial time and expense."); \textit{see also} United States v. Gurney, 558 F.2d 1202, 1207 (5th Cir. 1977) ("The desire for judicial economy and the avoidance of unnecessary piecemeal appeals underlie the final judgment rule.").

27. \textit{Note, Appealability in the Federal Courts}, 75 \textit{HARV. L. REV.} 351, 358 (1961); \textit{see also} Flanagan, 465 U.S. at 264 (expressing the notion that "[t]he final judgment rule reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time consuming appeals"); \textit{Catlin v. United States}, 324 U.S. 229, 234 (1945) (supporting the notion that the final judgment rule eliminates delays caused by interlocutory appeals); \textit{Cobbledick v. United States}, 309 U.S. 323, 325-26 (1940) (noting that "[t]o be effective, judicial administration must not be leaden-footed" with a succession of separate appeals); \textit{Newpark Shipbldg. \& Repair v. Roundtree}, 723 F.2d 399, 401 (5th Cir. 1984) ("The finality rule is designed to avoid piecemeal trials."); \textit{cert. denied}, 469 U.S. 818 (1984); \textit{Julie M. Hamlin, Comment, Entry of Judgment of the Federal Rules of Civil Procedure: The Third Circuit Imposes a Requirement of Reasons}, 56 B.U. L. REV. 579, 581 (1979) (noting that "[a] succession of separate appeals interrupts the trial, delays resolution of the controversy and interferes with the efficient use of judicial resources").


29. \textit{See} Richardson-Merrill, Inc. v. Koller, 472 U.S. 424, 436 (1985) (noting that the final judgment rule enhances the authority of district court judges); \textit{Flanagan}, 465 U.S. at 263 (acknowledging that the final judgment rule preserves the deference due trial judges).

30. \textit{In re Grand Jury Proceedings}, 827 F.2d 868, 871 (2d Cir. 1987); \textit{see also} \textit{In re Delta Servs. Indus.}, 782 F.2d 1267, 1271 (5th Cir. 1987) (dismissing an appeal because "review should not ordinarily occur before it is clear that the judge has no further intention of further considering
that the case may settle, thus making appeal unnecessary. Finally, the final judgment rule helps the appellate court to dispose of the appeal on its merits once the case is properly appealed.

The term "final decision," however, is not defined in the United States Code. The most commonly articulated definition of finality was espoused by the Supreme Court in Catlin v. United States. In Catlin, Justice Rutledge's majority opinion defined a final decision as "one which ends the litigation and leaves nothing for the court to do but execute the judgment." While some courts defined a final decision differently, most courts have accepted Justice Rutledge's definition of the term.

Despite its seemingly clear definition, courts struggle to apply the final judgment rule consistently. The difficulty in applying the rule exists primarily because courts are divided over whether to give the rule a practical or technical interpretation. The practical approach to finality rejects a technical and rigid interpretation of the final judgment rule. Instead, this approach commands the court to balance in each case the inconvenience of piecemeal review

the challenged ruling.

31. See 15 Wright & Miller, supra note 19, § 3907, at 431 (1st ed., 1976) (noting that the final judgment rule may provide interim time sufficient for the parties to compromise and settle).
32. Taylor v. Board of Educ., 288 F.2d 600, 602-03 (2d Cir.), later proceeding, 294 F.2d 36 (2d Cir.) (noting that the appellate court is in a better position to assess the wisdom of the trial court's rulings when it has the entire record to consider), cert. denied, 368 U.S. 940 (1961).
33. United States v. Agne, 161 F.2d 331, 332 (3d Cir. 1947) (noting that "the statute does not define what is a 'final decision'").
34. 324 U.S. 229 (1945).
35. Id. at 233.
36. Some earlier cases formulated a very similar definition of a final decision stating that a decision was final if "the rights of the parties have been fully and finally determined." Bebbe v. Russell, 60 U.S. 283, 284 (1856). For other definitions of the term, see Southern Ry. v. Postal Tel. Cable Co., 179 U.S. 641, 643 (1901) (holding a final order is one that "dispos[es] of the whole case and adjudicat[es] all the rights, whether of title or of damages, involved in the litigation"); Hatzenbuhler v. Talbot, 132 F.2d 192, 194 (7th Cir. 1942) (equating "final" with "conclusive"); 4 C.J.S. Appeal and Error § 94(a) (1989) (explaining that a final judgment concludes all rights of the parties).
38. See United States v. Garner, 632 F.2d 758, 761 (9th Cir. 1980) (noting that "the case with which the finality rule is stated . . . belies the difficulty of its application"); cert. denied, 450 U.S. 923 (1981); see also McDonald v. Schweiker, 726 F.2d 311, 315 (7th Cir. 1983) (explaining that the term "final judgment" does not have a fixed meaning); Parker v. United States, 153 F.2d 66, 69 (1st Cir. 1946) (emphasizing that the court has not "always understood what constitutes a 'final decision'.").
40. This approach has also been called the pragmatic approach to finality. See Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962).
41. See 15 Wright & Miller, supra note 19, § 3913, at 522 (1st ed., 1976) (stating that under the pragmatic approach, "the finality requirement should not be applied as a sterile formality").
on one hand against the danger of denying justice on the other.\textsuperscript{42}

The most prominent case to adopt the practical approach to finality was \textit{Gillespie v. United States Steel Corp.}\textsuperscript{42} In that case, Gillespie brought suit for the wrongful death of her son as the administrator of his estate under the Jones Act.\textsuperscript{44} Gillespie also sued under the Ohio wrongful death statute.\textsuperscript{46} The district court, however, entered an order that struck all references to the Ohio wrongful death statute.\textsuperscript{46} Gillespie appealed the part of the court's ruling that limited the scope of her complaint. The Sixth Circuit Court of Appeals, while noting that the question of finality was "close," accepted the appeal and affirmed the trial court's ruling.\textsuperscript{47}

The Supreme Court held that the trial court's decision was final under section 1291.\textsuperscript{48} The Court first noted that previous courts struggled to clearly define when a judgment is final for purposes of appeal.\textsuperscript{49} The Court then reasoned that "[b]ecause of this difficulty . . . the requirement of finality is to be given a 'practical rather than technical construction.'"\textsuperscript{50} The Court held that in interpreting the finality requirement practically, it is necessary to balance the inconvenience and cost of piecemeal review against the danger of denying justice.\textsuperscript{51} The Court concluded by holding that "we cannot say that the Court of Appeals chose wrongly [by accepting the appeal] under the circumstances."\textsuperscript{52}

While a few subsequent courts accepted this pragmatic approach to finality,\textsuperscript{53} most modern courts reject the doctrine\textsuperscript{54} and limit \textit{Gillespie} to its facts.\textsuperscript{55}

\begin{itemize}
\item 42. \textit{See} \textit{Gillespie v. United States Steel Corp.}, 379 U.S. 148 (1964).
\item 43. \textit{Id.}
\item 44. \textit{Id.} at 150. The Jones Act provided a recovery for seamen and their families for death or injury at sea. 46 U.S.C. § 688 (1982).
\item 45. \textit{Gillespie}, 379 U.S. at 150.
\item 46. \textit{Id.} The court also ruled that no reference could be made regarding recovery for the benefit of the decedent's brothers and sisters. \textit{Id.}
\item 47. \textit{Gillespie v. United States Steel Corp.}, 321 F.2d 518, 521-22 (6th Cir. 1963), \textit{aff'd}, 379 U.S. 148 (1964). Although the court of appeal's rationale for accepting the appeal is somewhat unclear, one possible reason is that the appeal had to be accepted "in the proper administration of justice." \textit{Id.} at 522.
\item 49. \textit{Id.} at 152. The Court acknowledged that its "cases have long recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." \textit{Id.}
\item 50. \textit{Id.} (quoting \textit{Cohen v. Beneficial Indus. Loan Corp.}, 337 U.S. 541, 546 (1949)).
\item 51. \textit{Id.} at 152-53 (citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).
\item 52. \textit{Id.} at 153. The Court also stated that "in light of the circumstances, . . . the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291." \textit{Id.} at 154.
\item 53. \textit{See}, \textit{e.g.}, \textit{American Export Lines v. Alvez}, 446 U.S. 274 (1980) (citing \textit{Gillespie} in support of its "pragmatic" approach to finality); \textit{Vaughn v. Mobil Oil Expl. & Prod. Southeast}, 891 F.2d 1195, 1197 (5th Cir. 1990) ("[T]he Supreme Court has consistently emphasized that . . . a 'practical rather than a technical construction' best serves the policies underlying the purposes of the finality requirement."); \textit{United States v. Mississippi Power & Light Co.}, 638 F.2d 899, 902-04
\end{itemize}
These courts reason that finality should be governed by "bright-line" rules in order to provide a relatively clear test of appealability. Some modern courts also emphasize that ad hoc decisions ascribing reviewable finality to technically non-final decisions disorganize practice by encouraging attempts to seek or oppose appeals. The Supreme Court most recently adopted this bright-line approach in *Budinich v. Becton Dickinson & Co.* In *Budinich*, the Court addressed the issue of whether a decision was final although the district court had not yet made a determination of attorney fees. Justice Scalia held that the district court order was final under section 1291. In adopting this absolute rule, Justice Scalia emphasized that "bright-line rule[s] preserve . . . operational consistency and predictability in the overall application of section 1291."

The tension, however, between the two doctrines still exists. In fact, the...
Fifth Circuit Court of Appeals recently sat en banc to decide this issue in *Newpark Shipbuilding & Repair v. Roundtree*. In that case, Roundtree was injured on his first day at work for Newpark. Roundtree filed a claim for worker's compensation, and Newpark appealed the Benefit Review Board's decision to remand the case to the administrative law judge to redetermine his appropriate weekly wage. The Fifth Circuit panel had noted that the circuit had adopted the pragmatic approach to finality in a previous case. Accordingly, the court determined the Board's order to be final after balancing the relevant considerations.

A rehearing was granted before the Fifth Circuit Court of Appeals en banc. The majority of the court reversed the panel decision. The court first noted that the *Gillespie* decision was limited to its unique facts by *Coopers & Lybrand*. It thus rejected the "case-by-case" methodology that the panel used to determine finality. In doing so, the court stated that the value of "occasionally permitting reviewable pragmatic finality to Board remand orders is outweighed by its erosion of the values of the finality rule mandated by Congress." Accordingly, the court applied the technical approach to finality and held that only Board decisions that "ended the litigation on the merits" were final.

The courts of appeals derive their power to hear appeals from section 1291. Section 1291 requires that only "final decisions" of the district courts may be reviewed by the courts of appeals. Section 1291, however, does not provide a definition of the term "final decisions." The appellate courts, left to...
define the content of a final decision, continually split on the issue of whether to apply a practical or a technical approach, despite the Supreme Court's decision to follow a technical approach in *Budinich*.

With this lack of consensus in mind, federal courts have turned to other judicial theories for clarity on the appealability of decisions.

**B. Single Judicial Unit Theory**

Although courts struggled to define the parameters of finality, the common law "single judicial unit theory" helped courts apply the final judgment rule. This theory basically states that a judgment is not final and appealable unless it resolves the entire action as to all of the parties and claims. In other words, even if a district court order completely disposes of separate claims or parties in a lawsuit, the order is not final until the entire litigation is complete. Under the single judicial unit theory, courts essentially view an entire action as a single "unit of disposition." The basic purpose of the single judicial unit theory, like that of the final judgment rule, is to further the policy against piecemeal review.

The single judicial unit theory was adequate when almost all of the litigation in the federal courts followed the "two-party-single-cause paradigm." Accordingly, most federal courts generally followed this theory. Some courts...

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76. See Marvin H. Lewis, Comment, *Review in the Federal Courts Under 54(b); The Effect of Multiple Parties*, 2 UCLA L. REV. 545, 546 (1955) (noting that at the same time the final judgment rule matured there developed a single judicial unit concept based on the idea that a record was entire and could not be severed).
77. Metcalfe's Case, 11 Coke Rep. 38, 77 Eng. Rep. 1193 (K.B. 1615); see also James A. Matthews, III, Recent Development, *Federal Civil Procedure—Fed. R. Civ. P. 54(b)—A Two-Part Analysis for the Exercise of a Trial Judge's Discretionary Certification as Final Under Rule 54(b) When a Counter Claim Remains Pending*, 25 VILL. L. REV. 179, 180 (1979) ("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 the lawsuit.").
78. See Collins v. Miller, 252 U.S. 364, 370 (1919) (holding that a "final decision requires the termination of lawsuit"); see also Robert J. Banta, Comment, *Appealability Problems in Nebraska: Advantages of Federal Rule 54(b)*, 53 NEB. L. REV. 73, 74 (1974) ("At the early common law an action was a single judicial unit even though it contained multiple claims or multiple parties . . . [and] could be appealed only as a single judicial unit.").
79. Gerson, supra note 1, at 174 ("Common law courts deemed an entire action to be an appropriate unit for appellate review."); Eldon E. Fallon, Note, *Federal Procedure—Multiple Claims—Federal Rule 54(b)*, 35 TUL. L. REV. 444 (1961) (commenting that an action at early common law had to be "adjudicated in its entirety before a judgment was final for purposes of appeal").
80. Hamlin, supra note 27, at 582.
81. 10 WRIGHT & MILLER, supra note 19, § 2653, at 20 (1st ed., 1971); see Fallon, supra note 79, at 444 (stating that application of the single judicial unit theory in the federal courts "presented relatively few problems so long as the action itself remained simple in construction"). An example of a two-party-single-cause paradigm is where one plaintiff sues one defendant under one cause of action.
82. Matthews, supra note 77, at 180.
did formulate a few well defined exceptions to the single judicial unit theory. Most courts, however, applied these exceptions only in rare situations where strict application of the judicial unit theory would result in irreparable hardship to the litigant. The single judicial unit theory was strained further, however, when the Federal Rules of Civil Procedure were promulgated in 1938. The new Federal Rules included several provisions for liberal joinder of parties and claims. This liberalization of federal practice greatly increased the "danger of hardship and denial of justice if each issue must await the determination of all issues." Consequently, some power to render split or separate final judgments became imperative to avoid this injustice that occurred in more complex litigation.

C. Original Rule 54(b)

In order to prevent the hardship resulting from an appeal being delayed, many experts began to feel that some final decisions on fewer than all of the claims should be appealable without awaiting a final decision on all of the claims. Accordingly, Congress and the Supreme Court promulgated the original Rule 54(b) in 1938, which stated in pertinent part:

83. Generally, the three exceptions to the single judicial unit theory that developed at common law were: 1) the "Forgay Exception"; 2) the "Collateral Matter Exception"; and 3) the "Procedural Incident Exception." See Note, Federal Rule 54(b) & the Final Judgment Rule, 28 N.Y.U. L. REV. 203, 204-07 (1953) (providing a more detailed discussion of the three exceptions to the single judicial unit theory).

84. See e.g., Bebbe v. Russell, 60 U.S. 283, 287 (1856) (limiting the "Forgay" doctrine to its facts); Hohorst v. Hamburg Am. Packet Co., 148 U.S. 262 (1893) (refusing to apply the "Collateral Matter" exception); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950) (narrowly construing the "Procedural Incidents" exception).


86. These provisions include Rule 18, which allowed joinder of claims and remedies, Fed. R. Civ. P. 18; Rule 20 on permissive joinder of parties, which authorized unlimited joinder of actions between a single plaintiff and defendant and the joinder of any number of claims and parties when there was a common question of law or fact, Fed. R. Civ. P. 20; Rule 13, which provided for compulsory and permissive counterclaims and also allowed a defendant to file a cross-claim against a co-defendant, Fed. R. Civ. P. 13; and Rule 24 which allowed extensive intervention, Fed. R. Civ. P. 24. See also Lewis, supra note 76, at 548 n.15 (discussing the interplay between Rules 13, 14, 18, 20 and 24).

87. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Matthews, supra note 77, at 180 ("Since the new Rules allowed greater latitude in the joinder of parties and claims, hardship might result if a partial claim, which would be final and ripe for appeal if sued on alone, could be held in abeyance pending the adjudication of the other, perhaps unrelated, claims.").

88. MOORE'S FEDERAL PRACTICE, supra note 16, ¶ 54.22 (noting that in complex litigation "if nothing could be decided with finality until everything was decided, the purpose of bringing it in and sorting it out for efficient disposition would largely be vitiated").

89. Id. ¶ 54.20 (stating that it is "necessary that the Rules contain some directive relative to the disposition of separate units of litigation").
CERTAINTY UNDER RULE 54(B) JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court may at any stage, upon a determination of the issues material to a particular claim and all counterclaims... enter judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed to the remaining claims... 90

According to the drafters, the Rule's purpose was to avoid the injustice that occurred when a litigant had to delay his appeal of a distinctly separate claim until the entire action was completely litigated.91

Generally, the original Rule 54(b) allowed a party to appeal a final judgment on one or more, but less than all, claims in a multi-claim action.92 The Rule thus essentially altered the single judicial unit theory by changing the "unit of disposition" from an entire action to any distinctly separate claim or compulsory counterclaim.93 However, the original Rule 54(b) only affected multi-claim, not multi-party actions.94 Furthermore, the Rule still required the district court to render a "final judgment" on the separate claim or counterclaim.95 Thus, the original Rule 54(b) modified the single judicial unit theory but did not impede the use of the final judgment rule.96

Several problems arose, however, in interpreting the language of original Rule 54(b). One major problem was that neither of the terms marking the boundaries of the rule—a "claim for relief" and all "compulsory counter-

90. FED. R. CIV. P. 54(b) (1938).
91. See Advisory Committee on Rules for Civil Procedure in Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 472 (1946) [hereinafter 1946 Committee Notes]. The drafters adopted the Rule "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." Gerson, supra note 1, at 169. In addition, the drafters realized that some claims within an action would become ripe for review before resolution of the entire action and that the affected parties would endure hardship if they had to wait to appeal. Thus, the drafters decided that the dimensions of the action as filed would no longer determine the unit of disposition. Id.
93. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434 (1956); see also Wilber A. Brucker, Jr., Comment, No Appeal Allowed Under Rule 54(b) When Separate Claim Not Final, 51 MICH. L. REV. 300, 302 (1952) (noting that Rule 54(b) changed the old "judicial unit" in a way that allows a party to appeal from a claim, counter-claim, cross-claim or third-party claim); 10 WRIGHT & MILLER, supra note 19, § 2653, at 20 (1st ed., 1971) ("Rule 54(b) was included to alter the judicial unit theory and embrace the notion of the adjudication of a single 'claim' as a basis for the entry of a judgment.").
94. MOORE'S FEDERAL PRACTICE, supra note 16, ¶ 54.20 (noting that while the original version of Rule 54(b) continued to embrace the single judicial unit theory where multiple parties were involved it rejected that theory in cases involving separate and distinct multiple claims).
95. See Sears, 351 U.S. at 432 (holding that "sound judicial administration" required adherence to the standard of finality in the adjudication of individual claims for purposes of appealability).
96. Id. The validity of the amended Rule 54(b) was challenged. See Pabellion v. Grace, 191 F.2d 169, 174 (2d Cir. 1975) (noting the unquestioned validity of the original Rule); MOORE'S FEDERAL PRACTICE, supra note 16, ¶ 54.20 (same); infra notes 132-37 and accompanying text (same).
claims”—had fixed determinations. Courts often gave the scope of these terms widely varied interpretations without ever clarifying the distinctions. Consequently, it became apparent that separating multiple claims for purposes of appeal was inherently difficult.

In addition to this difficulty, another serious problem with the original Rule 54(b) was that the litigants had no reliable way of determining whether a district court had issued a final order. First, the district courts had no duty to expressly state that its judgment was final. Furthermore, even if they did make such determinations, the courts of appeals would often set them aside. The reviewing court would instead apply general principles of finality to decide whether a separate claim was appealable.

Because of this ambiguity litigants often had no idea of whether to appeal a district court order that did not dispose of the entire case in a complex action. A party would often face the following dilemma: immediately appeal an order where finality was possible and run the risk of having it dismissed; or proceed with the remaining action and risk losing the right of review because the time for the appeal may lapse. Most litigants protected themselves

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97. Moore's Federal Practice, supra note 16, ¶ 54.23; see also Matthews, supra note 77, at 445-46 (noting that the confusion surrounding the meaning of "claim" and "counter-claim" caused uncertainty in the application of Rule 54(b)).

98. Compare Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 87 (2d Cir. 1939) (taking a broad view of the term "claim" by holding that a claim for a copyright infringement was separate from an unfair competition claim) with Atwater v. North Am. Coal Corp., 111 F.2d 125, 127 (2d Cir. 1940) (holding that a district court order dismissing two of four counts based on alternative theories was not appealable). See generally Moore's Federal Practice, supra note 16, ¶ 54.24 (detailing the problems courts encountered while trying to define a counterclaim).

99. Sears, 321 U.S. at 434. In Sears, the Court stated that "it was soon found to be inherently difficult to determine by any axiomatic standard of unity which of several multiple claims were sufficiently separable from others to qualify this relaxation of the unitary principle in favor of appealability." Id.

100. Moore's Federal Practice, supra note 16, ¶ 54.23; 10 Wright & Miller, supra note 19, § 2653, at 21 (1st ed., 1971); Hamlin, supra note 27, at 583 (noting that the original Rule provided no guidance as to what constituted a final judgment).

101. Moore's Federal Practice, supra note 16, ¶ 54.25; see Gerson, supra note 1, at 175 (noting that "district courts simply issued the partial judgments without saying anything about finality").

102. Moore's Federal Practice, supra note 16, ¶ 54.23[1]; see also Audi Vision v. RCA Mfg. Co., 136 F.2d 621, 623 (2d Cir. 1943) (holding that finality "is a matter for the appellate court to decide, whatever may have been the view of the trial court").

103. Moore's Federal Practice, supra note 16, ¶ 54.23[1].

104. See Note, supra note 27, at 583 (commenting that it was not clear to the parties whether a judgment disposing of fewer than all the claims before the court was a final judgment appropriate for appeal).

105. 10 Wright & Miller, supra note 19, § 2653, at 21-22 (1st ed., 1971); see Moore's Federal Practice, supra note 16, ¶ 54.23[1]; Lewis, supra note 76, at 495.

A party could lose its right to appeal if it decided to risk that an order was not final under the original Rule because an appeal must be brought within thirty days of final judgment. 28 U.S.C. § 2107 (1988); see also infra notes 395-400 and accompanying text (discussing the risk of untimely appeal and the potential for dismissal of the appeal).
against losing their right of review by appealing any order that potentially could have been final under Rule 54(b).\(^{106}\) Consequently, many needless and fruitless appeals delayed litigation and crowded the appellate court dockets.\(^{107}\)

**D. Amended Rule 54(b)**

In order to rectify the difficulties experienced under the original Rule 54(b), the Supreme Court in 1946 organized a committee to amend the Rule.\(^{108}\) The purposes of the amendment were: 1) to reduce the number of needless appeals from partial disposition; 2) to reduce uncertainty in determining when a final judgment under Rule 54(b) had been entered; and 3) to eliminate the distinction between compulsory and permissive counterclaims.\(^{109}\) After the committee proposed several drafts,\(^{110}\) it finally adopted an amended Rule 54(b) in 1946.\(^{111}\) The amended Rule provided that a district court could issue a partial final judgment under Rule 54(b) "only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment."\(^{112}\) This is generally referred to as the "certification" requirement.\(^{113}\)

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106. See Moore’s Federal Practice, supra note 16, ¶ 54.23[1] (acknowledging that “[p]arties could be expected to err on the side of caution”); see also 1946 Committee Notes, supra note 91, at 47 (explaining that "situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment . . . [and] parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question"); Gerson, supra note 1, at 175 (commenting that “uncertain litigants almost always appealed partial judgments to make sure that they did not sleep on their appeal rights”); Glen A. Smith, Federal Rule 54(b) and Oregon’s Multiple Claim and Multiple Party Litigation, 54 OR. L. REV. 161, 167 (1975) (noting that “cautious litigants immediately appealed decisions on all claims to insure against unexpected expiration of the time for appeal”).

107. See Sears, Roebuck & Co. v. Mackey, 351 U.S. 426, 434 (1956). As the Sears court noted, the volume of appellate proceedings increased dramatically because lawyers thought it prudent to take immediate appeals in doubtful cases. Id.; see also Moore’s Federal Practice, supra note 16, ¶ 54.25 (recognizing that parties often made “fruitless appeals” causing considerable waste of time, effort and expense).

108. See Moore’s Federal Practice, supra note 16, ¶ 54.27.

109. Id. ¶ 54.27[2-2].

110. For the text of the proposed amendments, see id. ¶ 54.26[2].

111. The amended Rule 54(b) read as follows:

JUDGMENT UPON MULTIPLE CLAIMS. 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. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the 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.

Fed. R. Civ. P. 54(b) (emphasis added).

112. Id.

113. See Gerson, supra note 1, at 170 n.4.
According to the Supreme Court, the reason that the drafters included the certification requirement in the amended Rule was to provide litigants with certain criteria to determine whether an order was final for Rule 54(b) purposes. In fact, the Court in *Dickinson v. Petroleum Conversion Corp.* stated that the obvious purpose of the certification requirement was to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment. It provides an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly.

The amended Rule thus attempts to "strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants." In theory, requiring the district court to make an express determination that there is "no just reason for delay" before entering a Rule 54(b) order should completely eliminate any doubt as to whether the order is appealable. The amended Rule 54(b) explicitly commands that the time for appeal begins to run from the entry of an order that meets the requirements of the Rule. The Rule thus accomplishes the desired predictability because it makes clear when a litigant must pursue his or her appeal. Accordingly, until recently, the amended Rule 54(b) generally has worked well in practice.

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> The last sentence of the 1946 amended Rule, providing that absent an express determination that there is no just reason for delay and express direction for entry of judgment, all decisions adjudicating less than all claims remain interlocutory, was calculated to serve the Committee's first objective—reducing the number of appeals—but it was also directed at furthering the second objective of reducing the uncertainty in identifying an appealable judgment.

115. *Moore's Federal Practice, supra note 16, ¶ 54.27[2-2]; see also, Gerson, supra note 1, at 176 (stating that the committee added the certification requirement to provide certainty for litigants).*

116. *Id. at 512.

117. *FSLIC v. Tullos-Pierremont*, 894 F.2d 1469, 1475 (5th Cir. 1990) (quoting 9 WRIGHT & MILLER, supra note 19, § 2645 (1st ed. 1971)).

118. 10 WRIGHT & MILLER, supra note 19, § 2653, at 25-26 (1st ed., 1971); *see also Moore's Federal Practice, supra note 16, ¶ 54.27[2-2] (stating that the "requirement of the express determination and direction" gives the litigant protection against losing the right to appeal).*


120. *Id.*

121. *Id.* ("The 1948 Amendment did much to obviate the difficulties experienced under the Rule."). The only major revision since 1946 was the addition of multi-party actions to the Rule. *Id.* The text of Rule 54(b) as it reads today is:

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,
E. Practice Under Rule 54(b)

Two Supreme Court opinions outline Rule 54(b)'s application in modern practice. In *Mackey v. Sears, Roebuck & Co.*, Mackey filed a six-count complaint against Sears claiming interference with his business activities. The district court struck Counts one and two of the complaint without leave to amend. The court also found that there was no just reason for delaying appeal on these issues and thus directed judgment to be entered against the plaintiff. Mackey appealed the order dismissing Counts one and two of his complaint on the grounds that he could have stated a claim for relief had the court allowed him to amend his complaint. Sears moved to dismiss the appeal on the ground that the order and judgment appealed from was not final under 28 U.S.C. section 1291.

The Seventh Circuit Court of Appeals first determined that this case forced it to interpret the amended Federal Rule 54(b). It then noted that there was a split among the federal circuits as to whether a district court's certification of a Rule 54(b) order automatically conferred jurisdiction upon the court of appeals. The court decided that the opinions holding that a district court's

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2. The first count of the complaint alleged a violation of the Sherman and Robinson-Patman Acts; the second count alleged an intentional destruction of Mackey's lamp business; the third count alleged that Sears induced one of Mackey's customers to breach a contract; the fourth count alleged that Sears was participating in unfair competition; the fifth count alleged a Robinson-Patman action against Time Saver Tools, Inc., which was wholly owned by Mackey's; and the sixth count alleged that Sears' entire predatory program was actionable at common law. *Mackey v. Sears, Roebuck & Co.*, 218 F.2d 295, 296 (7th Cir. 1955), aff'd, 351 U.S. 427 (1956).

3. The court also struck the fourth count, but granted Mackey leave to amend. *Id.* Mackey abandoned the fifth count of the complaint on his own motion. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. The court noted that the First and Third Circuits held that the effect of a Rule 54(b) order rendered conclusive the issue of finality. *Id.* at 298 (citing *Bendix Aviation Corp. v. Glass*, 195 F.2d 267 (3d Cir. 1952), and *Boston Medical Supply Co. v. Lea & Febiger*, 195 F.2d 853 (1st Cir. 1952)). Conversely, the court noted that the Second and D.C. Circuits had adopted the view that the appellate court had its own duty to determine jurisdiction and that such jurisdiction could not be controlled by the findings of the district court judge. *Id.* (citing *Flegenheimer v. General Mills*, 191 F.2d 237 (2d Cir. 1951), and *Gold Seal Co. v. Weeks*, 209 F.2d 802 (D.C. 1952)).
entry of a final judgment under Rule 54(b) conclusively determined finality were the better reasoned decisions. The court rejected the argument that the Rule was invalid because the certification under Rule 54(b) "indirectly affected" appellate jurisdiction. Accordingly, the court dismissed Sears' motion to dismiss the appeal.

The Supreme Court granted certiorari to hear the case. After reviewing the history of Rule 54(b), the Court explicitly rejected Sears' argument that the amended Rule made an unauthorized extension of appellate jurisdiction under 28 U.S.C. § 1291. Instead, the Court stated that under the amended Rule 54(b), the district court may in its discretion "release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions." Accordingly, the Court in Sears concluded that the revised Rule 54(b) operates within the constraints of finality prescribed by section 1291.

The Court in Sears also outlined the proper relationship between the district and appellate courts in the Rule 54(b) procedural framework. It held that under the revised Rule, the district court's role is that of a "dispatcher." In other words, the district court decides when each final decision upon each claim is ready for appeal in the interest of sound judicial administration.

Cir. 1954).

130. The court was especially persuaded by the fact that Judge Clark and Professor Moore, who had participated in the drafting of the amended Rule, adopted this position. Id.

131. Id. at 299.


134. Id. at 436.

135. Id. at 437; see also Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445, 453 (1956) (stating that the rule "applies only to a final decision of one or more claims for relief"). The Court also rejected Sears' argument because the claims that the district court dismissed were "sufficiently independent" of the other claims in the complaint to satisfy the original Rule 54(b). The Court thus concluded that "[i]t is nowhere contended today that a decision that would have been appealable under the original rule is not also appealable under the amended rule, provided the District Court makes the required certification." Sears, 351 U.S. at 436.

136. Sears, 351 U.S. at 437.

137. Id. at 438. As the concurring opinion pointed out, however, the Court did not really decide whether the district court's determination of finality is conclusive. Id. at 439 (Frankfurter & Harlan, J.J., concurring) ("The Court could have said that Rule 54(b)'s requirement of a certificate from a district judge means that the district judges alone determine the content of finality. The Court does not say that."). Justices Frankfurter and Harlan opined that it was the courts of appeals who must ultimately decide whether a decision as to a separate claim was final. Id. at 443-44; see also MOORE'S FEDERAL PRACTICE, supra note 16, ¶ 54.28 ("Where a judgment has been entered in compliance with the Rule, the court of appeals has jurisdiction under 28 U.S.C. § 1291 unless . . . the district court has treated as 'final' that which is not 'final' within the meaning of the statute.").


139. Id.

140. See id. (holding that the district court "is permitted to determine, in the first instance, the
The Court also decided that the courts of appeals should review trial court decisions to "dispatch" a Rule 54(b) judgment under an abuse of discretion standard.\textsuperscript{141} Finally, the Supreme Court in \textit{Sears} recognized that the "negative effect"\textsuperscript{142} of Rule 54(b) adequately limits the number of appeals in a multi-claim action and reaffirms the traditional federal policy against piecemeal appeals.\textsuperscript{143}

Despite this seemingly clear direction from the Court in \textit{Sears}, federal courts began to dispute the proper relationship between the district and appellate courts regarding whether a separate claim was "ripe" for appeal.\textsuperscript{144} The Supreme Court set out to resolve this difficulty in \textit{Curtiss-Wright Corp. v. General Electric Co.}\textsuperscript{145} In that case, Curtiss-Wright, a subcontractor, brought an action containing several claims against the general contractor, General Electric.\textsuperscript{146} Although most of the claims were based on fraud and misrepresentation, three of the claims sought payment from General Electric on the outstanding balances due on the subcontracts.\textsuperscript{147} The district court granted summary judgment in favor of Curtiss-Wright on the contract claims.\textsuperscript{148} The district court also directed that the judgments were final under Rule 54(b) and stated its reasons for holding that there was "no just reason for delay of appeal."\textsuperscript{149}

The Third Circuit Court of Appeals dismissed General Electric's appeal on the ground that in its view, there was no just reason for delay. The court stated that "certification should be the exception rather than the rule."\textsuperscript{150} It further stated that "in the absence of unusual or harsh circumstances, we believe that the presence of a counterclaim . . . weighs heavily against the grant appropriate time when each 'final decision' upon 'one or more but less that all' of the claims in a multiple claims action is ready for appeal").

\textsuperscript{141.} \textit{Id.} at 437.
\textsuperscript{142.} \textit{Id.} at 438. As the Court stated: "By its negative effect, [the Rule] operates to restrict in a valid manner the number of multiple claims actions." \textit{Id.} The "negative effect" of Rule 54(b) is the manner in which the Rule operates to allow an appeal from an order only where the district court certifies the order under Rule 54(b). \textit{See Moore's Federal Practice, supra note 16, ¶ 54.30[1].}
\textsuperscript{143.} \textit{Sears}, 351 U.S. at 438.
\textsuperscript{144.} \textit{See, e.g., United Bank of Pueblo v. Hartford Accident & Indem., 529 F.2d 490 (10th Cir. 1976) (misapplying the abuse of discretion standard).}
\textsuperscript{145.} 446 U.S. 1 (1980).
\textsuperscript{147.} \textit{Id.} The parties entered into 21 subcontracting agreements to build component parts for propulsion systems on nuclear vessels for about $215 million dollars. \textit{Id.}
\textsuperscript{148.} \textit{Id.} at 36.
\textsuperscript{149.} \textit{Id.} The district court's rationale for deciding that there was "no just reason for delay" of appeal were: 1) the certification would not result in duplicative appeals because the contract claims were totally distinct from the other claims; 2) none of the proceedings in the district court would moot the appeal of the contract claims; and 3) Curtiss-Wright would suffer daily financial losses from its inability to achieve a greater return on the $19 million dollar judgment than the six percent interest authorized by law. \textit{Id.}
\textsuperscript{150.} \textit{Id.}
of 54(b) certification." The court thus held that Rule 54(b) certification was improper because there were no "harsh circumstances" that warranted Rule 54(b) certification.

The Supreme Court vacated the court of appeals' decision. The Court first reaffirmed the Rule 54(b) framework set forth in Sears. It held that a district court "must first determine that it is dealing with a final judgment" with regard to a separate party or claim. The Court also stated that the district court is to act as a dispatcher and determine whether there is any just reason for delaying the appeal of the final decision.

The Court then rejected General Electric's argument that a district court may only issue a Rule 54(b) judgment in an "infrequent harsh case." Instead, the Court reiterated the Sears approach and stated that the decision to order a Rule 54(b) judgment rests in the sound discretion of the trial court. The Court reasoned that this standard best furthered the purpose of the Rule because the trial court is in the best position to evaluate the factors relevant to a decision that there is "no just reason for delay." The Court also held, however, that an appellate court has a duty to review the district court's evaluation of the factors relevant to certifying a Rule 54(b) order. Nevertheless, the Court held that the reviewing court should disturb the district court's decision only if it was clearly unreasonable. Accordingly, the Supreme Court vacated the court of appeals decision and remanded the case for proceedings consistent with its standards for appellate review.

152. Curtiss-Wright, 597 F.2d at 36. The court held that Allis-Chalmers precluded the court from holding that Curtiss-Wright's potential use of the money was a "harsh circumstance." Id.
154. Id. at 7.
155. Id. (stating that the judgment "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'").
156. Id. at 8.
157. Id. at 10. General Electric relied on the following statement in the 1946 Committee notes: "[T]his rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule." Id. at 9 (quoting 5 F.R.D. 433, 473 (1946) (emphasis added)). The Court stated:

However accurate it [the statement in the Committee Notes] may be as a description of cases qualifying for Rule 54(b) treatment, the phrase "infrequent harsh case" in isolation is neither workable nor entirely reliable as a benchmark for appellate review.

There is no such indication it was ever intended by the drafters to function as such.

Id. at 10.
158. Id.
159. Id.
160. Id. (stating that the Sears Court indicated "that the standard against which a district court's exercise of discretion is to be judged is the 'interest of sound judicial administration'" (quoting Sears, 351 U.S. at 437)).
161. Id.
162. Id. at 13.
Modern federal practice concerning Rule 54(b), as displayed in *Sears* and *Curtiss-Wright*, consists of two distinct stages. First, the district court "dispatches" the claims that are final judgments to the appellate court. The accompanying order is then reviewed by the court of appeals under a "clearly unreasonable" standard. Under this standard, only those Rule 54(b) orders that must clearly await further proceedings of the district court are rejected for appeal. Unclear from these decisions, however, is what substantive matter the reviewing court must consider under this standard.

F. The Statement of Reasons

Although the Supreme Court effectively illustrated the roles of the district and appellate courts under Rule 54(b), one issue it did not resolve is whether a district court must include a statement of its reasons why there "is no just reason for delay." The first major case that directly addressed this question was *Allis-Chalmers Corp. v. Philadelphia Electric Co.* In *Allis-Chalmers*, the district court granted summary judgment in favor of Allis-Chalmers' complaint, before it adjudicated Philadelphia Electric's counterclaim. The court certified its judgment under Rule 54(b), but it did not include any reasons in the order that may have formed a basis for this conclusion.

The Third Circuit Court of Appeals stated that it must first determine whether it had jurisdiction to hear the Rule 54(b) order. In making that determination, the court stated that "a proper exercise of discretion requires a trial court to do more than just recite the 54(b) formula of 'no just reason for delay.'" It thus determined that the district court should "clearly articulate" the reasons underlying its decision to grant Rule 54(b) certification. The court reasoned that the statement of reasons was essential because it would give the appellate court some basis for determining whether the district court's decision was proper.

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163. *See supra* notes 122-62 and accompanying text.
164. 521 F.2d 360 (3d Cir. 1975).
165. *Id.* Allis-Chalmers sued to recover payment due for three of the eight transformers that it sold to Philadelphia Electric. Philadelphia Electric admitted the amounts claimed by Allis-Chalmers, but it asserted a set-off and a counterclaim that, if established, would exceed the amounts claimed by Allis-Chalmers. *Id.* at 362.
166. *Id.*
167. *Id.* at 363.
168. *Id.* at 364.
169. *Id.* The court also set forth several factors that district courts should use to determine whether there is "no just reason for delay" of appeal: 1) the relationship between the adjudicated claims and the 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 that could result in set-off against the judgment sought to be made final; and 5) miscellaneous factors such as delay, economic and solvency considerations, shortening of the time of trial, frivolity of competing claims, expense, and the like. *Id.; see generally* 10 *WRIGHT & MILLER, supra* note 19, § 2659 (2d ed., 1983) (discussing in detail the factors that trial courts should apply when determining that there is no just reason for delay).
court abused its discretion in granting a partial final judgment. Therefore, after Allis-Chalmers, a district court in the Third Circuit was required to set forth the reasons for its conclusion that there was "no just reason for delay"; those five words alone would be insufficient to effectuate proper Rule 54(b) certification.

Other federal circuits struggled for a period of time in deciding whether to make the statement of reasons mandatory or optional. Today, an increasing number of circuits require their district courts to include a statement of reasons with their Rule 54(b) certification.

G. Proper Language of Certificate

In addition to the debate over whether district courts should be required to include a statement of reasons in their Rule 54(b) certification, modern federal courts are divided over whether a proper certified Rule 54(b) order must include the phrase "no just reason for delay." Courts were nearly unanimous in their belief that absent proper certification, any order in a multiparty or multiple-claim action was not final under Rule 54(b). Very few cases, however, addressed the question of whether the district court was required to give reasons for their determinations; Solomon v. Actna Life Ins. Co., 782 F.2d 586 (6th Cir. 1986) (stating that the "district court must do more than just recite the Rule 54(b) formula of 'no just reason for delay'"); Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414, 1416 (9th Cir. 1985) ("The trial court should not direct for entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order."). Contra Mooney v. Friedich, 784 F.2d 875, 876 (8th Cir. 1986) (declining to make a statement of reasons mandatory); Pahlavi v. Palandjian, 744 F.2d 902, 905 (1st Cir. 1984) (not imposing "a rigid requirement on the district court to prepare a written statement in every case to justify its Rule 54(b) actions"). For further support for the statement of reasons requirement, see Hamlin, supra note 27, at 591-92.

The Fifth Circuit held in Rothenberg v. Security Management Co., 617 F.2d 1149 (5th Cir.), cert. denied, 449 U.S. 954 (1980), that it does not require a statement of reasons. The court reasoned that the statement of reasons is left to the discretion of the trial court because "Rule 54(b) contains no specific requirement that a district court include a statement explaining its reasoning for applying the rule." Id.

170. Allis-Chalmers, 521 F.2d at 364.

171. See, e.g., Cemar, Inc. v. Nissan Motor Corp., 897 F.2d 120, 123 (3d Cir. 1990) (dismissing Rule 54(b) appeal because the district court certification lacked a statement of reasons).


173. See Auriemma v. City of Chicago, 906 F.2d 312, 314 (7th Cir. 1990) (requiring district court judges to give reasons for their determinations); Solomon v. Actna Life Ins. Co., 782 F.2d 586 (6th Cir. 1986) (stating that the "district court must do more than just recite the Rule 54(b) formula of 'no just reason for delay'"); Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414, 1416 (9th Cir. 1985) ("The trial court should not direct for entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order."). Contra Mooney v. Friedich, 784 F.2d 875, 876 (8th Cir. 1986) (declining to make a statement of reasons mandatory); Pahlavi v. Palandjian, 744 F.2d 902, 905 (1st Cir. 1984) (not imposing "a rigid requirement on the district court to prepare a written statement in every case to justify its Rule 54(b) actions"). For further support for the statement of reasons requirement, see Hamlin, supra note 27, at 591-92.

174. This, of course, is a classic form versus substance controversy. See Crowley Maritime Corp. v. Panama Canal Comm'n, 849 F.2d 951, 953 (5th Cir. 1988) (declining to adopt a form-over-substance approach). Most of the debate on this subject has taken place in the Fifth and Seventh Circuits.

175. See, e.g., Mooney v. Friedich, 784 F.2d 875, 875-76 (8th Cir. 1986) (stating that an "order dismissing a third-party complaint which is not certified by the district court under Rule 54(b) is not a final appealable order").
required to include the precise language of the Rule in a Rule 54(b) certificate.177

Many courts that have recently dealt with this issue have held that the Rule 54(b) order itself must at least contain the Rule's express language of "no just reason for delay."178 The leading case adopting this view is *Glidden v. Chromalloy American Corp.*179 In that case, Glidden brought a class action suit to recover retirement benefits under an employment benefit welfare program.180 The district court granted summary judgment on the merits prior to its decision on the class certification.181 Glidden appealed the decision on the merits.182

The Seventh Circuit Court of Appeals held that it did not have jurisdiction to hear the appeal. The court first decided that the decision on the merits was not a "final decision" under section 1291.183 The court then held that the district court's order was not final under rule 54(b) because the district court did not make "an express determination that there was no just reason for delay."184 It stated that the operation of Rule 54(b) is mechanical.185 The court stated that this construction was necessary because "the clarity of the rule would be destroyed by a principle that the judgment is appealable when the district court’s opinion, as opposed to the judgment, shows that the court con-

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177. Traditionally, courts simply demanded without further explanation that the district court's order be clear. See David v. District of Columbia, 187 F.2d 204, 206 (D.C. Cir. 1950) (requiring the district court to enter a Rule 54(b) judgment "in a definite, unmistakable manner"); see also Moore's Federal Practice, supra note 16, ¶ 54.41[1] ("Whatever the mechanics for putting the fact of compliance with Rule 54(b) on the record, it must appear that the court has made an express determination that there is no just reason for delay."). But see Republic of Italy v. De Angelis, 206 F.2d 121, 132 (2d Cir. 1953) (Clark, J., concurring) (suggesting that although the trial judge may not make a finding of finality in the very words of the Rule, if he does so in a clear manner an appeal will nevertheless lie).

178. *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 623-24 (7th Cir. 1986); see Willhelm v. Eastern Airlines, Inc., 927 F.2d 971, 973 (7th Cir. 1991); Principal Mut. Life Ins. Co. v. Cincinnati TV 64 Ltd., 845 F.2d 674, 676-77 (7th Cir. 1988); see also *In re Narowetz Mechanical Contractors, Inc.*, 898 F.2d 1306, 1308 n.4 (7th Cir. 1990) (holding that an order was not a final judgment "because it omitted the talismanic words required by Rule 54(b)"); Mooney v. Friedich, 784 F.2d 875, 875-76 (8th Cir. 1986) (holding certification must substantially comply with the mandatory language of the Rule); Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414, 1416 (9th Cir. 1985) (holding that a valid 54(b) certification must make the express determination that there was no just reason for delay).

179. 808 F.2d 621 (7th Cir. 1986).

180. *Id.* at 622. The benefit plan was terminated after Chromalloy acquired Glidden's previous employer. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 623. The court reasoned that the district court had not made final decision because it had failed to identify the parties to be bound by the judgment. *Id.*

184. *Id.*

185. *Id.* The court explained that "[i]f the judgment contains the finding, then the party must appeal at once or not at all . . . [and] [i]f the judgment does not contain the declaration, the party must sit and wait." *Id.* at 623-24 (citations omitted).
templated the prospect of an immediate appeal." It also explained that both the parties and the appellate courts need objective criteria to determine whether an order is appealable under Rule 54(b). Accordingly, the court reasoned that the intent of the district judge was irrelevant. Therefore, the court dismissed the appeal because the district court order did not contain a proper certification.

A few courts, however, reject this "mechanical" interpretation of Rule 54(b)'s certification requirement, and merely look for substantial compliance with the requirements of Rule 54(b). In Alexander v. Chicago Park District, the Seventh Circuit decided to accept a Rule 54(b) appeal despite the district court's lack of technical compliance with the Rule. The court looked to both the language of the district court order and the trial court record to determine that the district court judge intended that the order be appealable under Rule 54(b). The court thus concluded that, despite its reservations about deviating from the requirements of Rule 54(b), "less than technical compliance will suffice when neither party is prejudiced by the lack of formality." Therefore, the Seventh Circuit ruled that the order passed muster under Rule 54(b) although it did not contain the "no just reason for delay" language.

H. Fifth Circuit Cases—Proper Certification

Prior to the decision in Kelly v. Lee's Old Fashioned Hamburgers, the con-

186. Id. at 624; see also Foremost Sales Promotions v. Director, Bureau of Alcohol, Tobacco and Firearms, 812 F.2d 1044, 1046 (7th Cir. 1987) (requiring the express findings contained in Rule 54(b) for finality).
187. Foremost, 812 F.2d at 1046 ("The parties and the courts need objective and easily available criteria to guide their decisions.").
188. Id.; accord Willhelm v. Eastern Airlines, 927 F.2d 971, 973 (7th Cir. 1991) ("Even if the district court intended to enter a partial final judgment pursuant to Rule 54(b), 'that intention is irrelevant absent the express determination.'" (quoting Principal Mut. Life Ins. Co. v. Cincinnati TV 64 Ltd., 845 F.2d 1044, 1046 (7th Cir. 1989))).
189. Glidden, 808 F.2d at 628.
190. Alexander v. Chicago Park Dist., 773 F.2d 850 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); see Pension Benefit Guar. Corp. v. LTV Corp., 875 F.2d 1008, 1015 (7th Cir. 1989), rev'd. on other grounds, 110 S. Ct. 2668 (1990) ("It is more judicially efficient for us to exercise jurisdiction and reach the merits of the dispute now rather than cause a delay by demanding strict technical compliance with the certification requirement."); Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co., 642 F.2d 1065, 1072 (7th Cir. 1981) ("[W]e think that no useful purpose would be served by insisting on [the Rule's] language here.").
191. 773 F.2d 850 (7th Cir. 1985).
192. Id. at 855.
193. Id.
194. The court reasoned that because "the parties were explicitly told that the court wanted guidance from an appellate decision, [it was] convinced that the parties knew of their right to appeal." Id.
195. Id.; see also Amalgamated Meat Cutters, 642 F.2d at 1072 (not requiring technical compliance with the Rule "[s]ince it [was] plain that neither party was prejudiced by the absence of the talismanic wording of Rule 54(b)").
flict within the Fifth Circuit regarding the proper language of a Rule 54(b) certificate was even more pronounced.\textsuperscript{196} Some of the cases addressing this issue rejected the mechanical approach to Rule 54(b) certification.\textsuperscript{197} The first major case that discussed this topic was \textit{EEOC v. Delta Airlines}.\textsuperscript{198} In that case, the district court dismissed some, but not all, portions of the EEOC's sex discrimination complaint.\textsuperscript{199} The district court's order stated that "the Court expressly directs the entry of final judgment of the Court's order of June 30, 1977, dismissing count 7(c)."\textsuperscript{200} The court noted that the order did not literally track the requirements of Rule 54(b).\textsuperscript{201} The court nevertheless held that the district court's wording provided sufficient evidence that the district court intended to issue a Rule 54(b) order.\textsuperscript{202} Accordingly, the court accepted the appeal and decided the case on its merits.\textsuperscript{203}

The next major Fifth Circuit case on this issue was \textit{Mills v. Zapata Drilling Co.}.\textsuperscript{204} In that case, the wife of an employee who was killed in an offshore oil drilling project sued Zapata, and several third-party actions and claims ultimately followed.\textsuperscript{205} The district court entered judgment in favor of the general contractor against the subcontractor based on a previous indemnity agreement.\textsuperscript{206} In determining whether the subcontractor's appeal was properly before it, the appellate court first noted that the trial court had not entered judgment on Mills' original complaint.\textsuperscript{207} It further recognized that the technical requirements of Rule 54(b) had not been met because the district court had not made "an express determination that there was no just reason for delay."\textsuperscript{208} The court nevertheless accepted the appeal. It read the trial court record as though the district court had dismissed one of the two remaining claims.\textsuperscript{209} The court also stated that "[i]t is not necessary for us to enforce a

\textsuperscript{196} Courts in the Fifth Circuit, however, unanimously agreed that a Rule 54(b) order was not final absent proper certification. Borne v. A & P Boat Rentals No. 4, 755 F.2d 1131, 1133 (5th Cir. 1985); see also Thompson v. Betts, 754 F.2d 1243, 1245 (5th Cir. 1985) (holding that the Rule 54(b) order was interlocutory absent proper certification).

\textsuperscript{197} Crowley Maritime Corp. v. Panama Canal Comm'n, 849 F.2d 951 (5th Cir. 1988); EEOC v. Delta Airlines, 578 F.2d 115 (5th Cir. 1978).

\textsuperscript{198} Id. at 116. The district court dismissed those portions of the EEOC's complaint that challenged Delta's policy forbidding the employment of married women as flight attendants. Id.

\textsuperscript{200} Id.

\textsuperscript{201} Id.

\textsuperscript{202} Id.

\textsuperscript{203} Id. at 116-17.

\textsuperscript{204} 722 F.2d 1170 (5th Cir. 1983).

\textsuperscript{205} Id. at 1171-73.

\textsuperscript{206} Id. at 1172-73.

\textsuperscript{207} Id. at 1173.

\textsuperscript{208} Id. The court also stated that "the technical requirements of the aforesaid rule have not been met and, in strictness, [the court] would be warranted in concluding that as yet this is an unappealable case." Id.

\textsuperscript{209} Id. The appellate court stated:

[W]e read the record as though the district court (1) had entered in the principal action a judgment in the amount of $405,000 for the plaintiff Vicki Mills against
mere technical, expensive, and burdensome compliance with a rule whose purposes have already been accomplished."210 The court thus concluded that the case was properly appealable.

Another case that adopted this approach to Rule 54(b) certification was Crowley Maritime Corp. v. Panama Canal Commission.211 In Crowley, Rolstad, an employee of Crowley, was injured in a maritime accident.212 He filed a motion to intervene in an action brought by Crowley.213 The magistrate granted Rolstad’s motion, but the district court dismissed his intervention on statute of limitations grounds.214 In doing so, the district court issued an order that mentioned Rolstad’s motion, which included the Rule 54(b) certification language.215 The order itself, however, did not contain the language.216

The court of appeals accepted Rolstad’s subsequent appeal. The court first admitted that the district court did not expressly include Rule 54(b)’s “magical language” in any of its orders.217 Nevertheless, the court declined to adopt a “form-over-substance” approach to Rule 54(b)’s requirements.218 It reasoned that the district court’s order called attention to Rolstad’s motion containing the requisite language.219 Furthermore, the court held that the district judge’s intent to issue a Rule 54(b) order “cannot genuinely be disputed.”220 Therefore, the court concluded that it would “not enforce a ‘technical, expensive, and burdensome compliance’ where to do so would not significantly advance the purposes of Rule 54(b) and would only frustrate the manifest intent of the

Zapata, CNG, and Home Insurance Company and all other parties defendant or intervening; and (2) had left unadjudicated the third party complaint of Zapata against CNG; and (3) had dismissed with prejudice all other actions, third party actions, claims, counterclaims, and other pleading of every kind.

Id.
210. Id.
211. 849 F.2d 951 (5th Cir. 1988).
212. Rolstad suffered leg injuries while on a barge during a mooring operation in the Panama Canal. Id. at 952.
213. Id. Crowley brought its suit against the Panama Canal Commission after Congress amended the Panama Canal Act in 1985. Crowley had previously settled with Rolstad and sought reimbursement from the Commission. Id.
214. Id.
215. Rolstad’s motion and proposed order stated in pertinent part:

[P]laintiff requests that this Court amend the order dated May 12, 1987, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to include the expression of opinion that "the Court has made an express determination that there is no just reason for delay and that it is adjudged that the plaintiff’s complaint be and the same hereby is dismissed."

Id. at 953.
216. Id. The district court’s order merely stated, “Considering the motion, the memorandum, the record and the law, IT IS ORDERED that the [second paragraph of the] motion be GRANTED.” Id.
217. Id.
218. Id.
219. Id.
220. Id.
parties and the trial court."  

A split developed in the circuit when the Fifth Circuit Court of Appeals decided In re Wood & Locker, Inc.  

In that case, the trustee for Wood & Locker filed an action in bankruptcy court to avoid a preference of Interfirst Bank-Dallas, Inc., one of Wood & Locker's creditors. The United States Bankruptcy Court for the Western District of Texas granted summary judgment in favor of one of the creditors, Williams-Patterson. The trustee then appealed to the district court. The district court upheld the bankruptcy court's decision, and the trustee then appealed the case to the court of appeals.

The court of appeals first determined that it did not have jurisdiction over the case under section 158(d) of the Bankruptcy Code. The court stated, however, that it may have jurisdiction to hear the appeal under Bankruptcy Rule 7054, which specifically incorporated Rule 54(b). In analyzing the case under Rule 54(b) principles, the court initially noted that the bankruptcy court did not make an express determination that there was "no just reason for delay." The court then stated that "the aim ... of Rule 54(b) [was] to provide a bright-line rule for determining the appealability of orders by the trial court" that finally adjudicate less than all claims or parties in an action. It further stated that "we have generally required that Rule 54(b) be strictly followed: If the trial court has not followed Rule 54(b) and expressly certified a partial judgment as final, the appeal will be dismissed." Accordingly, the court dismissed the appeal for want of jurisdiction because the bankruptcy court failed to certify its order.

221. Id. (quoting Mills v. Zapata Drilling Co., 722 F.2d 1170, 1173-74 (5th Cir. 1983)).
222. 868 F.2d 139 (5th Cir. 1989).
223. The trustee sought to disallow a pre-petition claim filed by Williams-Patterson for $1,090,000. Id. at 140-41. Eventually, Williams-Patterson's claim was transferred to Interfirst. Id.
224. Id. at 141.
225. Id.
226. Id. at 141-42.
227. Section 158(d) states in pertinent part: "The courts of appeals shall have jurisdiction over appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d) (1988). The court held that the bankruptcy court's partial summary judgment was not a final decision under section 158(d). In re Wood & Locker, Inc., 868 F.2d at 142.
228. The court held that a non-final order may still be appealable if the nonfinality can be "cured" under Rule 7054. In Re Wood Locker, Inc., 868 F.2d at 142.
229. Id. at 143.
230. Id. at 145. The court also stated that "[t]he certification process adopted in Rule 54(b) was intended to avoid in ordinary civil cases the uncertainty that previously characterized the appealability of partial judgments." Id.
231. Id. (citing Borne v. A & P Boat Rentals No. 4, 755 F.2d 1131, 1133 (5th Cir. 1985); Matthews v. Ashland Chem., 703 F.2d 921 (5th Cir. 1983); Bouldeloche v. Tenrec, 693 F.2d 546, 547 (5th Cir. 1982); Cook v. Eizeinman, 312 F.2d 134, 137 (5th Cir. 1963)). But see Mills v. Zapata Drilling Co., 722 F.2d 1170, 1173 (5th Cir. 1983) (declining to require technical compliance with Rule 54(b) where purposes of the rule are already accomplished).
232. In re Wood & Locker, Inc., 868 F.2d at 145. The court ultimately concluded:
The Fifth Circuit endorsed this bright-line approach again in FSLIC v. Tullos-Pierremont. In that case, the Federal Savings and Loan Insurance Corporation ("FSLIC") brought an action against Tullos-Pierremont and several others based on a past due promissory note. It also sued James Gallagher on his alleged promise to purchase the note. The district court granted summary judgment in favor of Gallagher and against FSLIC on April 25, 1988. In October of 1988, FSLIC then moved to dismiss without prejudice its claims against the remaining defendants because it was unable to serve them. It then appealed the summary judgment in favor of Gallagher.

Gallagher moved to dismiss the appeal as untimely because the summary judgment had become final under Rule 54(b) in April. However, the court decided that for purposes of appeal, the unserved defendants were not "parties" to the action. Therefore, the district court's grant of summary judgment had become final in April under Section 1291 instead of under Rule 54(b). Accordingly, the court held that no Rule 54(b) certificate was necessary to make the summary judgment appealable. The court went on to note in dictum, however, that "Rule 54(b) suggests and condones a more definite and express means of dealing with . . . appealable finality." The court also stated that the Rule provides "much needed certainty" in determining when a final judgment has been entered. The court concluded that "the rule of Nagle—that unserved defendants are
The Fifth Circuit was thus sharply divided over the issue of whether proper certification requires a district court to include the phrase "no just reason for delay" in its Rule 54(b) order. Perhaps the court in *Warfield v. Fidelity & Deposit Co.* best summarized the dilemma over proper certification when it stated that the circuit’s "precedent on what constitutes a Rule 54(b) certification is in disarray." The Fifth Circuit Court of Appeals sat en banc in *Kelly v. Lee's Old Fashioned Hamburgers* to attempt to resolve the controversy brewing over proper certification for Rule 54(b) orders.

II. *Kelly v. Lee's Old Fashioned Hamburgers*

In *Kelly v. Lee's Old Fashioned Hamburgers*, the Fifth Circuit Court of Appeals sat en banc to decide whether a district court must include the words "no just reason for delay" in order to properly certify a Rule 54(b) order. The court, by a ten-to-seven margin, rejected this form-over-substance approach. Instead, the court held that an order is final under Rule 54(b) as long as the reviewing court can determine that the district court judge unmistakably intended to issue such an order.

A. Facts

In *Kelly*, the plaintiff, Wendolyn Kelly, was injured when she was struck by an automobile driven by Douglass Chetta, an employee of the defendant. Chetta was allegedly intoxicated at the time of the accident. Kelly sued several parties, including Lee's insurer, State Farm Fire & Casualty Co. State Farm sought summary judgment based on the "liquor liability" exclusion in its policy. The district court granted summary judgment in favor of State Farm, but it did not state in its order that there was "no just reason for

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245. See supra notes 196-244 and accompanying text (discussing Fifth Circuit cases establishing the language required in a Rule 54(b) order).

246. 904 F.2d 322 (5th Cir. 1990).

247. 908 F.2d 1218 (7th Cir. 1990).

248. 904 F.2d 322 (5th Cir. 1990).

249. 908 F.2d 1218 (7th Cir. 1990).

250. Id. at 1220.

251. Id.

252. 896 F.2d 923 (5th Cir.) (Kelly I), aff'd, 908 F.2d 1218 (5th Cir. 1990) (en banc).

253. Id. at 923.

254. Id. Chetta, who was not on duty at the time of the accident, allegedly had been drinking beer with fellow employees while the restaurant was being cleaned. Id.

255. Id.

256. The liquor liability provision excluded coverage for any liabilities the insured incurred "as a person or organization engaged in the business of . . . selling or serving alcoholic beverages." Id. at 923 n.1.
delay” of appeal.257 Instead, the district court captioned its order “Rule 54(b) Judgment.”258 The court also stated in the body of the order that it was entering “final judgment pursuant to Federal Rule of Civil Procedure 54(b).”259 Kelly appealed the district court’s order.

B. Fifth Circuit Panel Opinion

A Fifth Circuit panel affirmed the trial court by a two-to-one margin.260 The court initially held that it had jurisdiction to hear the appeal under Rule 54(b) although the district court’s order did not expressly contain the phrase “no just reason for delay.”261 The majority relied on the reasoning in Crowley Maritime Corp. v. Panama Canal Commission262 and EEOC v. Delta Airlines263 to decide that the Fifth Circuit does not require strict compliance with the express language requirement of Rule 54(b).264 The rule that the majority extracted from these cases was that the district court did not need to include any particular language in its Rule 54(b) order so long as the order reflected its “unmistakable intent” to enter an appealable order under Rule 54(b).265 Accordingly, the majority concluded that the district court’s order, entitled “Rule 54(b) Judgment,” reflected the district court judge’s unmistakable intent to issue a Rule 54(b) partial judgment.266 The panel majority then upheld the district court’s grant of summary judgment on the merits.267

Judge Williams dissented in part and concurred in part with the majority decision.268 He argued that the court did not have jurisdiction to hear the appeal because the district court’s order did not satisfy the certification require-

257. Id. at 923-24.
258. Id. at 924.
259. Id.
260. Kelly I, 896 F.2d at 923. Judge Davis wrote the majority opinion, and it was joined by Judge Garza. Id. Judge Williams dissented in part and concurred in part. Id. at 925 (Williams, J., concurring in part and dissenting in part).
261. Id. at 924.
262. 849 F.2d 951 (5th Cir. 1988); see supra notes 208-18 and accompanying text (discussing Crowley).
263. 578 F.2d 115 (5th Cir. 1978); see supra notes 198-203 and accompanying text (discussing Delta Airlines).
264. Kelly I, 896 F.2d at 924. The court stated that the Fifth Circuit had “refused to take a ‘form-over-substance’ approach to Rule 54(b), but rather recognized ‘the manifest intent of the parties and the trial court’ that a final judgment would be entered.” Id. (quoting Crowley, 849 F.2d at 953.).
265. Id. The court added that “although we encourage the district courts to follow the rule and make the ‘express determinations’ . . . we do not now require it.” Id.
266. Id.
267. The court unanimously upheld the district court’s grant of summary judgment based on the liquor liability exclusion in Lee’s insurance policy. Judge Davis found that, under Louisiana law, liquor liability clauses have consistently been found to be unambiguous and thus are enforced as written. Id. at 924-25.
268. Id. at 925-27 (Williams, J., dissenting in part and concurring in part). Judge Williams dissented on the Rule 54(b) certification issue and concurred with the majority on the merits. Id.
ment of Rule 54(b). Judge Williams felt that the Rule's certification requirement should be interpreted strictly. He stated that federal courts consistently demand trial courts to state sufficiently and expressly that "no just reason for delay" exists. Judge Williams reasoned that strict enforcement of the certification requirement was necessary to insure that Rule 54(b) is applied only in proper cases. Accordingly, Judge Williams dissented on the issue of the appellate court's jurisdiction to hear the appeal. A rehearing, before the en banc Fifth Circuit, was granted on April 23, 1990.

C. The En Banc Decision

1. The Majority Opinion

The en banc majority, by a ten-to-seven margin, affirmed the panel's decision per curiam. The court first recognized that in prior Fifth Circuit decisions, "where neither the order appealed from nor the related portions of the record reflect an intent by the district judge to enter a partial final judgment, we refused to consider the order appealable as a final judgment." Additionally, the majority found Fifth Circuit precedent consistent in that where the language of the order or the related record evidenced such an intent, courts have considered the order appealable. The court thus adopted the following rule: where the language of an order appealed from, either independently or together with the related portions of the record referred to in the order, re-

269. Id. at 926.
270. Id. at 925. Judge Williams argued that Fifth Circuit precedent was inconclusive on this issue. Id.
271. Judge Williams stated that "the overwhelming majority of case authority is that Rule 54(b) means what it says." Id. at 926 (emphasizing the holding in Frank Briscoe Co v. Morrison-Knudsen Co., 776 F.2d 1414, 1415 (9th Cir. 1985)).
272. Id. Judge Williams also stated:

All the Rule undertakes to do is to require that the court focus specifically upon the requisite findings. This in turn means that the court can have the issue briefed if there is any real question with respect to it and can give it the full consideration it deserves. This is little enough to ask in enforcing a rule which constitutes an exception to an extremely basic and important policy against piecemeal appeals. If we do not remand when the requisite findings are not made, there simply is no enforcement of the rule. Then a rule which was designed with great care and with express requirements becomes a rule of boilerplate. That is not and cannot be what is intended by the rule.

Id. at 927.
273. Id.
274. Id.
275. 908 F.2d 1218 (5th Cir. 1990) (en banc). Circuit Judges Davis, Duhe, Garwood, Garza, Higginbotham, Jones, King, Politz, Reavley and Wiener joined in the majority per curiam opinion.
276. Id. at 1219-20 (citing Borne v. A & P Boat Rentals No. 4, 755 F.2d 1131 (5th Cir. 1985), and Thompson v. Betts, 754 F.2d 1243 (5th Cir. 1985)).
277. Id. at 1220. The en banc majority, like the panel majority, relied on Crowley and Delta Airlines for this proposition. See supra note 264 and accompanying text (noting that the reasoning in Crowley and Delta Airlines supports the proposition that the Fifth Circuit does not require strict compliance with the express language requirement of Rule 54(b)).
flects the district court's "unmistakable intent" to enter a partial final judgment under Rule 54(b), the order is appealable even if it omits the words "no just reason for delay."\textsuperscript{728}

The majority first argued that its holding was consistent with Rule 54(b)'s requirement that the district judge make an "express determination that no just reason for delay" exists.\textsuperscript{729} It reasoned that where the district court recites the words "Rule 54(b)" in its order, the court expressly incorporates the entire Rule in its order.\textsuperscript{280} The court further reasoned that where the district court incorporates the Rule by reference, "it signals that the requirements of the Rule have been met and entry of partial final judgment is proper."\textsuperscript{281} The majority also asserted that this "incorporation" theory was a common-sense interpretation of Rule 54(b).\textsuperscript{282} It reasoned that its liberal approach to Rule 54(b) was consistent with the command in Rule 1 that the Federal Rules of Civil Procedure be construed "to secure the just, speedy and inexpensive determination of every action."\textsuperscript{283} Finally, the majority contended that its "unmistakable intent" standard was in accord with the purpose of Rule 54(b)'s "express determination" requirement.\textsuperscript{284} The majority reasoned that this liberal interpretation of Rule 54(b) furthers the purpose of the requirement because such an interpretation, to its knowledge, never caused litigants problems in the past.\textsuperscript{285}

After supporting its new standard, the majority overruled Mills v. Zapata.\textsuperscript{286} The majority held that the court in Mills "apparently inferred the

\textsuperscript{728}Kelly, 908 F.2d at 1220. Obviously, the majority's new standard does not require the district court to include a statement of reasons in its order either.

\textsuperscript{729}Id.

\textsuperscript{280}Id.

\textsuperscript{281}Id. at 1220-21.

\textsuperscript{282}Id. at 1221.

\textsuperscript{283}Id. Federal Rule of Civil Procedure 1 states:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with all the exceptions stated in Rule 81. \textit{They shall be construed to secure the just, speedy and inexpensive determination of every action.}\" Federal Rule of Civil Procedure 1 states: \textit{They shall be construed to secure the just, speedy and inexpensive determination of every action.}\"

\textsuperscript{284}Kelly, 908 F.2d at 1221.

\textsuperscript{285}Id.

The court accordingly stated:

Counsel should know that the district court has entered a partial final judgment when the order alone or the order together with the motion or some other portion of the record referred to in the order contains clear language reflecting the court's intent to enter the judgment under Rule 54(b).

\textsuperscript{286}Mills v. Zapata Drilling Co., 722 F.2d 1170 (5th Cir. 1983).
district court's intent to enter a final judgment from the posture of the case and the circumstances surrounding the entry of judgment.\(^{287}\) Thus, the majority noted that the decision was inconsistent with its "unmistakable intent" approach and was therefore overruled.\(^{288}\)

Finally, the majority applied the "unmistakable intent" standard to the facts of *Kelly*.\(^{289}\) Under this standard, the majority stated that the only issue was whether the district court's language reflected with unmistakable clarity an intent to enter a partial final judgment under Rule 54(b).\(^{290}\) The majority held that since the district court order in *Kelly* was captioned "F.R.C.P. 54(b)" and further directed "that there be a final judgment entered pursuant to Federal Rule of Civil Procedure 54(b)," it was unmistakably clear that the trial judge intended to issue a partial final judgment under Rule 54(b).\(^{291}\) The majority ruled that it was reasonable to assume that federal district court judges know the requirements of such a frequently used Rule.\(^{292}\) Therefore, where a district court directs that a 54(b) judgment be prepared and then enters judgment pursuant to the Rule, it could only mean that the requirements of the Rule were met.\(^{293}\) Accordingly, the majority affirmed the panel's decision.

2. The Dissent

The dissent, written by Judge Smith,\(^{294}\) attacked the majority opinion on several grounds. In general, the dissent argued that the majority misinterpreted the clear and unambiguous language of Rule 54(b). Judge Smith also asserted that the majority's "unmistakable intent" standard was contrary to the purpose of the certification requirement. Finally, Judge Smith argued that this case-by-case approach would lead to greater confusion for litigants and reviewing courts attempting to determine the appealability of a district court partial final judgment.

The dissent first argued that the majority's interpretation of Rule 54(b) ignored the word "express" in the Rule's command that a district court make an "express determination that no just reason for delay" exists.\(^{296}\) Judge Smith contended that the majority's interpretation of the Rule effectively changed the word "express" in the Rule to "implied."\(^{296}\) The dissent further argued...
that the drafters of the amended Rule 54(b) included the word "express" in the Rule for a specific reason: to insure that litigants know with certainty when to appeal a partial final judgment. Judge Smith asserted that after the majority holding, "the same uncertainty that attended the pre-1946 rule will appertain now." The dissent thus concluded that the majority, by ignoring the obvious meaning of the word "express," read the 1946 Amendment out of the Rule.

The dissent next argued that the majority opinion was inconsistent with the Supreme Court's direction in *Harris v. Reed*. Judge Smith believed that the Court in *Harris* dealt with an issue similar to the one at bar: whether a reviewing court should require that requisite findings be set forth expressly. The dissent then quoted *Harris*, stating that the "plain statement rule relieves a federal court from having to determine whether in a given case . . . the state court has chosen to forgive a procedural default." Judge Smith reasoned that by analogy, the same rationale should apply in a Rule 54(b) context: if the order appealed from does not indicate anywhere that the trial court considered whether the requirements of the Rule have been met, an appellate court need not attempt to do so through conjecture, supposition, and surmise. The dissent thus concluded that the majority's "unmistakable intent" approach will require an appellate court to engage in this type of speculation, precluded by *Harris*, to determine whether the trial court made the required findings under Rule 54(b).

host of cases that illustrate the obvious difference between an express and implied term. *Id.* at 1224 n.3.

297. *Id.* at 1223. The dissent briefly examined the history of Rule 54(b) and the problems that litigants and courts encountered with the original Rule 54(b). *Id.*

298. *Id.* The dissent further stated that "[w]ithout such a[n] [express] statement, the prospective appellant is left in the same Never-Never-Land as before, wondering whether to take a prospective appeal or risk losing the right to appeal after judgment on the remaining claims." *Id.* (emphasis added).

299. *Id.*

300. *Id.* at 1224. In *Harris*, defendant Harris, who had been convicted of murder in an Illinois state court, brought a petition of writ of habeas corpus on the grounds of ineffective assistance of counsel. *Harris v. Reed*, 489 U.S. 255, 257-58 (1989). The Supreme Court, per Justice Blackmun, held that the "plain statement rule" of *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), applied to appeals raised on federal habeas corpus grounds as well as ones on direct review. *Harris*, 489 U.S. at 257. The *Long* rule permits the court to reach a federal question on review unless the state court's opinion contains "a plain statement" that its decision rests on adequate state grounds. *Id.* at 260-65. Accordingly, Justice Blackmun held that the Illinois Appellate Court's statement that Harris' ineffective counsel claim "could have been raised [on] direct appeal" did not satisfy the plain statement rule. *Id.* at 266. Thus, Justice Blackmun concluded that federal review was not precluded. *Id.*

301. *Kelly*, 908 F.2d at 1225 (Smith, J., dissenting).

302. *Id.* (quoting *Harris*, 489 U.S. at 264 n.11.).

303. *Id.*

304. *Id.* ("[F]or all we know, the district court may have overlooked (or chosen to forgive) the [certification] requirement."). Judge Smith also argued that, since the Supreme Court in *Harris* held that the Illinois Appellate Court's statement that Harris' allegations "could have been raised [on] direct appeal" was insufficient as an "explicit" reliance on state grounds, *Harris* stands for
The dissent also attacked the majority's reasoning because it ignored the "however designated" clause in Rule 54(b). This clause states: "In the absence of such express determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all 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." Judge Smith argued that this provision serves to underscore the importance of the express determination requirement by preventing a district court from circumventing the Rule through the use of a title. Accordingly, the dissent concluded that the "however designated" clause in Rule 54(b) precluded the majority's argument that an order that is captioned "Rule 54(b)" incorporates the entire Rule.

The dissent next argued that the majority's construction of Rule 54(b) violated the "plain meaning rule." Relying on recent Supreme Court opinions, Judge Smith believed that courts are required to interpret the Federal Rules strictly where the terms are unambiguous, even if the result is sometimes harsh. Similarly, the dissent also noted that the Supreme Court had previously rejected Fifth Circuit attempts to depart from the precise words of a statute in the interest of "policy considerations." The dissent concluded by arguing that the majority's "unmistakable intent" standard was nothing more than an attempt to engage in prohibited judicial legislation.

The dissent also scolded the majority for its cursory inspection of Fifth Circuit precedent. Judge Smith specifically took issue with the majority's assertion that "[w]ith one exception, our Rule 54(b) cases follow a consistent

the proposition that the term "expressly" should be interpreted strictly. Id.

305. Id. at 1226.

306. The express determination that "no just reason for delay" exists and the express direction that "final judgment be entered." FED. R. CIV. P. 54(b).

307. Id. (emphasis added).

308. Kelly, 908 F.2d at 1226 (Smith, J., dissenting) ("In other words, the name [of an order] makes no difference: Whatever the document is entitled or 'designated,' it nevertheless must contain the requisite express determination.").

309. Id. Judge Smith simply argued that under the Rule's plain language, any order, however designated, is not final under Rule 54(b) absent the certification language. Id.

310. Id.


312. Kelly, 908 F.2d at 1227 (Smith, J., dissenting).

313. Id. Judge Smith referred to Northbrook Nat'l Ins. Co. v. Brewer, 493 U.S. 6 (1989), which overruled Campbell v. Insurance Co. of N. Am., 552 F.2d 604 (5th Cir. 1977) (holding that an insurer attempting to invoke federal diversity jurisdiction does not preclude application of a state statute under which an insurer is deemed a citizen of the insured's state).

314. Kelly, 908 F.2d at 1227 (Kelly, J., dissenting) ("Here, in adopting what it modestly terms as a 'practical, common sense interpretation of Rule 54(b),'... the en banc court has resorted to the same policy-consideration approach that was rejected in Northbrook.").

315. Id. at 1228.
He noted that several Fifth Circuit opinions had stated that the Rule's certification requirement should be strictly construed. The dissent also criticized the majority for overruling Mills. Judge Smith questioned the majority's decision to base its holding on Crowley and yet overrule Mills, when Crowley explicitly relied on Mills in adopting its substance-over-form approach. The dissent thus concluded that the majority, which had set out to clarify the issue of Rule 54(b) certification, actually made the topic more confusing for litigants.

Finally, the dissent criticized the majority's new case-by-case approach to finality under Rule 54(b). Judge Smith argued that a "bright-line" test requiring strict compliance with the certification requirement is a better approach for three reasons. First, it clearly warns litigants when the time for appeal begins to run. Second, a bright-line rule avoids duplicative and unnecessary appeals. Finally, such a rule is easier to administer and provides greater objectivity. Accordingly, Judge Smith stated that it was not too onerous to require a district court to expressly state that it has decided there is "no just reason for delay." Judge Smith concluded his dissent by arguing that the majority's new case-by-case approach will only add to the confusion surrounding Rule 54(b)'s certification requirement.

With the decision in Kelly, Rule 54(b) certification requirements retreated from a formalistic approach dictating strict adherence to the technical wording of Rule 54(b). Instead, the Fifth Circuit majority found a case-by-case, interpretive approach the more reasonable alternative. In the following section of this Note, the contrast between these two approaches is examined, focusing on a thorough analysis of the en banc decision in Kelly.

IV. Analysis

The Kelly decision is subject to both a broad and a narrow interpretation. If interpreted narrowly, the opinion stands for the proposition that where a dis-

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316. Id.
317. Id. (citing In re Wood & Locker, Inc., 868 F.2d 139 (5th Cir. 1989), and Thompson v. Betts, 754 F.2d 1243 (5th Cir. 1985)). The dissent also noted that the majority decision "puts [the circuit] out of step with other circuits," id. at 1227, which impose a more exacting requirement, such as a statement of reasons. Id. at 1228. For a detailed discussion of the statement-of-reasons debate, see supra notes 163-73 and accompanying text.
318. Kelly, 908 F.2d at 1228 (Smith, J., dissenting).
319. Id.
320. Id. ("[T]he court leaves it to the hapless litigant to determine whether this circuit henceforth recognizes the strict interpretation of Wood & Locker and Thompson or the relaxed standard of Crowley . . . [and] therefore, our Rule 54(b) law in this circuit remains in disarray.").
321. Id.
322. Id. at 1227.
323. Id.
324. Id. For support of the advantages of bright-line jurisdictional rules, see supra notes 56-61, 185-89 and accompanying text.
325. Kelly, 908 F.2d at 1228 (Smith, J., dissenting).
326. Id. at 1229 ("[T]he en banc majority has only muddied the water.").
district court judge entitles an order "Rule 54(b)" and further directs that "there be final judgment entered pursuant to F.R.C.P. 54(b)," the order is properly certified under the Rule.\footnote{Id. at 1220 ("When the court recites Rule 54(b) in the order or grants a motion requesting entry of judgment under Rule 54(b), the court expressly incorporates the entire Rule by reference and signals its conclusion that the requirements of the Rule have been met.").} If interpreted broadly, the decision stands for the proposition that where any language, either in the order itself or together with the related record, reflects the district court judge's intent to enter a partial final judgment pursuant to Rule 54(b), the order is properly certified.\footnote{Id. at 1228 ("Where, on the other hand, the language in the order [appealed from], either independently or together with related parts of the record [referred to in the order] reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b), [we consider] the order appealable.").} This Note contends that the majority's legal reasoning supporting either interpretation is flawed.

A. Narrow Interpretation

The narrow interpretation of \textit{Kelly} commands that where a district court entitles its order "Rule 54(b)" and orders judgment entered pursuant to the Rule, the order incorporates the entire Rule, including an express determination that there is "no just reason for delay."\footnote{Id. at 1220-22.} The majority's basic rationale for this position is that where the title of the order mentions Rule 54(b) and the district court enters judgment pursuant to the Rule, the order provides the same "trigger" of appealability as if the phrase "no just reason for delay" were included in the order.\footnote{Id. at 1220 ("We do not require the judge to mechanically recite the words 'no just reason for delay.' ") (emphasis added).} Accordingly, the majority adopted a substance-over-form approach to the certification requirement and declined to require formal compliance with the Rule when its substance is accomplished.\footnote{Id. at 1220 ("'We do not require the judge to mechanically recite the words 'no just reason for delay.' ") (emphasis added).}

The majority's reasoning in support of this "incorporation theory" is suspect for several reasons. First, this approach discourages district courts from properly asserting their role in the Rule 54(b) procedural framework. Second, this...
new rule contradicts the plain language of Rule 54(b). Finally, the "incorporation rule" fails to recognize that bright-line rules are preferable to case-by-case determinations when deciding jurisdictional issues.

The first problem with the majority's incorporation rule is that it severely distorts the procedural framework of Rule 54(b). That framework was established by the Supreme Court in Sears, Roebuck & Co. v. Mackey and in Curtiss-Wright Corp. v. General Electric Co. In those cases, the Court held that the district court's role in the Rule 54(b) process is to act as a "dispatcher." More specifically, the district court must first determine that a judgment regarding a separate party or claim is final under section 1291. The district court must then decide whether that final judgment is sufficiently separate from the rest of the case so that there is "no just reason for delay" of appeal. Finally, the Court emphasized that the trial court's decision must be carefully reviewed by the courts of appeals on an abuse of discretion standard.

The Kelly majority's incorporation rule distorts the district court's role in this framework because it discourages district court judges from carefully considering the factors relevant to determining that there is "no just reason for delay." If a district court may properly certify an order under Rule 54(b) by simply entitling it "Rule 54(b)," then the court certainly has little reason to meticulously examine the factors relevant to the determination that there is "no just reason for delay." This defeats the very reason why the Supreme Court granted the district court such broad discretion in making the determination.

334. Curtiss-Wright, 446 U.S. at 8; Sears, 351 U.S. at 435-38; see also Pahlavi v. Paladjian, 744 F.2d 902, 904 (1st Cir. 1984) (mentioning district court's role as a "dispatcher").
335. Sears, 351 U.S. at 436.
336. Id.; Curtiss-Wright, 446 U.S. at 8.
337. Curtiss-Wright, 446 U.S. at 10 ("The court of appeals must, of course, scrutinize the district court's 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.").
338. See Hayden v. MacDonald, 719 F.2d 266, 269 (1983) (arguing that where a district court is required to include both the language of the Rule and the reasons behind it, the court is more likely to find that immediate appeal is unwarranted). This is not to say that when a judge is required to include in his order the language "no just reason for delay," he will automatically consider the factors relevant to such a determination. However, there certainly is a much better chance that he will consider those factors if he is required to state those five words in the order.
339. The Court in Curtiss-Wright emphasized that the reason district courts are given such broad discretion is because of their unique ability to determine whether "no just reason for delay" of appeal exists. Curtiss-Wright, 446 U.S. at 10 ("[T]he discretionary judgment of the district court should be given substantial deference, for that court is 'the one most likely to be familiar with the case and with any justifiable reason for delay.'" (quoting Sears, 351 U.S. at 437)); see also 10 WRIGHT & MILLER, supra note 19, at § 2659, at 97 (2d ed., 1983) ("Because of the trial court's familiarity with the case, this decision [to certify a Rule 54(b) appeal] rests in the discretion of the [trial] judge.").
The majority responded to this argument by stating that it is reasonable to presume that district court judges know the requirements of the Federal Rules of Civil Procedure. Accordingly, it refused to adopt a form-over-substance approach to the Rule 54(b) certification requirement. This argument, however, ignores the fact that “form is substance” with respect to jurisdictional rules. The drafters of Rule 54(b) selected the five words “no just reason for delay” as the “trigger” for appealability for a specific reason: so that district court judges will meticulously consider the reasons why there is “no just reason for delay” of appeal in each particular case. Subsequent federal courts have thus held that if the certification requirement is interpreted as written, it insures that Rule 54(b) orders will be issued only in warranted cases.

The majority’s incorporation rule, conversely, selects its own new triggers: an order entitled “Rule 54(b),” or an order that enters judgment pursuant to Rule 54(b). Clearly, these triggers have nothing to do with the requirement that district courts carefully weigh the competing factors relevant to a determination that there is “no just reason for delay.” Therefore, the majority’s

340. Kelly v. Lee’s Old Fashioned Hamburgers, 908 F.2d 1218, 1221 (5th Cir. 1990) (en banc).
341. Id. at 1220.
342. See Carroll v. United States, 354 U.S. 394, 406 (1957). In Carroll, the Court responded to the government’s argument that it should not exalt form over substance by stating:

[F]orm is substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form. Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered . . . .

Id.; see also 15 WRIGHT & MILLER, supra note 19, § 3913, at 523 (1st ed., 1976) (“Formality . . . is not always sterile.”).

343. While the certification requirement clearly was intended to increase certainty, see supra notes 114-17 and accompanying text, the drafters could have chosen any phrase to signal appealability. For instance, the Rule could have required the order to state that it was an “appealable partial final judgment.” Instead, however, the drafters presumably chose the phrase “no just reason for delay” to induce courts to in fact carefully consider whether there is any reason for delaying immediate appeal. See Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1071-72 (7th Cir. 1981) (“The discretionary component of Rule 54(b), which requires the district court to make an ‘express determination that there is no just reason for delay,’ serves [to] . . . limit its power to grant certification by requiring it to weigh the virtues of accelerated judgment against the possible drawbacks of piecemeal review.”) (emphasis added).

344. See, e.g., Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958). In Panichella, the court stated:

[A]n application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present . . . [and] the draftsmen of this Rule have made explicit their thought that it would serve only to authorize “the exercise of a discretionary power to afford a remedy in the infrequent harsh case.”

Id. (quoting Fed R. Civ. P. 54(b) advisory committee’s note).

345. In fact, the Rule on its face requires the district court to make an express direction for the entry of final judgement as a separate requirement from the express determination that there is “no just reason for delay.” Fed. R. Civ. P. 54(b). Furthermore, the title of an order cannot be
incorporation rule condones, if not promotes, judicial laziness and inefficiency.

The final problem with the majority's incorporation rule is that it completely contradicts Rule 54(b)'s plain language. Rule 54(b)'s certification requirement commands that a district court may issue a partial final judgment under the Rule only if it includes an "express determination that there is no just reason for delay" of appeal and an "express determination that judgment be entered." The rule also states that any other form of judgment, however designated, does not terminate the rights of the parties. An order that is entitled "Rule 54(b)," or that contains a direction for judgment pursuant to the Rule, clearly is not a final order under a literal reading of the Rule.

Nevertheless, the majority reasoned that its diversion from the literal language of the Rule was required by the command in Rule 1 that the Federal Rules be "construed to secure the just, speedy and inexpensive determination of every action on the merits." While Rule 1 allows a court to interpret the Federal Rules liberally, it does not permit a court to rewrite them in favor of its view of practicality. In fact, the Supreme Court has recently held that statutory construction is inappropriate where language of a rule is unambiguous. Accordingly, the majority's reliance on Rule 1 to "blue-pencil" Rule 54(b) is nothing more than prohibited judicial legislation.

B. Broad Interpretation

The majority opinion in Kelly can be interpreted as detailed above. The opinion, however, most likely stands for the broad proposition that a Rule 54(b) order is properly certified so long as the reviewing court can determine, from either the language of the order itself or from the related record, that the district court had an "unmistakable intent" to issue a Rule 54(b) order. The majority's legal analysis in support of this broader standard is even less persuasive. First, this new standard transforms the Rule's requirement of an

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346. Id.
347. Id.
348. Kelly v. Lee's Old Fashioned Hamburgers, 908 F.2d 1218, 1221 (5th Cir. 1990) (en banc); see supra note 283 (discussing Rule 1 and authorities arguing that the Federal Rules should be construed liberally).
349. See Schlangenhauf v. Holder, Inc., 379 U.S. 104, 121 (1964) ("The Rules should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations.").
351. Kelly, 908 F.2d 1227 (Smith, J., dissenting).
352. Id. at 1220. Since this is the standard that the majority applied to the facts in Kelly, it is reasonable to assume that the court intended courts to apply the "unmistakable intent" standard in future Rule 54(b) jurisprudence.
353. Clearly, however, the same criticisms of the narrow interpretation of the majority opinion in Kelly, see supra notes 329-51 and accompanying text, also apply to the more broad understanding of the decision.
“express” determination that there is “no just reason for delay” into a requirement of a mere “implied” determination. Second, the “unmistakable intent” standard’s case-by-case approach to finality completely eradicates the purpose and effectiveness of the certification requirement.

The first flaw in the majority’s rationale for the “unmistakable intent” standard is that it is inconsistent with the language of Rule 54(b). Under this new standard, the district court need not include any precise language in its Rule 54(b) order. Instead, the only issue is whether the order, read independently or together with the related record, unmistakably reflects the district court judge’s intent to issue a partial final judgment under Rule 54(b). The majority justified this new approach by reasoning that such a rule was a “practical, common sense” interpretation of Rule 54(b)’s certification requirement and is consistent with its purpose.

The problem with this analysis, however, is that it ignores the language of Rule 54(b). The Rule states that in order to issue a partial final judgment under Rule 54(b), the district court judge must make an “express determination that there is no just reason for delay.” Notwithstanding this language, under the unmistakable intent standard a district court is only required to somehow inject its “unmistakable intent” to issue a Rule 54(b) final judgment somewhere in the order or in the “related record.” In essence, the majority has simply rewritten the Rule, replacing the word “express” with the word “implied.” This form of statutory construction is not only prohib-

354. See supra note 111 (stating the text of Rule 54(b)).
355. Kelly, 908 F.2d at 1220 (“If the language in the order appealed from, either independently or together with the related portions of the record referred to in the order, reflects the district court’s unmistakable intent to enter a partial final judgment, nothing else is required to make the order appealable.”) (emphasis added).
356. Id.
357. Id. at 1221.
359. It is irrelevant that the majority continually qualifies its standard by stating that the district court’s intent must be “unmistakable.” This is true because the majority offers no guidelines as to when a district court’s intent is “mistakable.” It merely states that in the case at bar where the order was entitled “Rule 54(b),” the court’s intent was unmistakable. Kelly, 908 F.2d at 1220. However, this offers no guidance for future courts and litigants who try to determine whether a district court’s intent is “unmistakable.” Furthermore, the majority does not list any factors that future interested parties could rely on to determine the “mistakeness” of the district court’s intent. Accordingly, the majority has established a “case-by-case” approach to Rule 54(b) appealability in the true sense of the term.
360. The fact that the majority requires the district court’s unmistakable intent in the “related record” is also meaningless. The majority never attempts to define which portions of the record are related to a Rule 54(b) order. Presumably, any part of the record that evidences the district court’s intent to issue a partial final judgment would be related to the Rule 54(b) order.
361. Judge Smith persuasively argued in his dissent that the majority analysis involves implication, not expression. Kelly, 908 F.2d at 1222 (Smith, J., dissenting). He also pointed out that if the majority’s definition were applied to other substantive areas of the law, total chaos would result. Id. at 1223.
While the majority’s “unmistakable intent” approach clearly contradicts the precise language of rule requiring an “express” determination, it also frustrates the very purpose of the certification requirement. The majority stated that the purpose of the express determination requirement was to give litigants a clear statement of what the court intended with reference to the finality of a partial judgment. The majority then concluded that its “unmistakable intent” standard was compatible with that purpose because it had never caused litigants problems in the past.

Although the majority correctly identified the purpose of the certification requirement, its interpretation of the Rule is not compatible with it. The “unmistakable intent” standard essentially requires the appellate court to interpret the district court judge’s intent regarding the appealability of its order under Rule 54(b) on a case-by-case basis. In emphasizing the need for clarity in jurisdictional rules, modern federal courts have consistently rejected this type of case-by-case approach to finality. The majority has thus replaced an easy-to-apply, bright-line test that simply required interested parties to look for one specific phrase in one specific place. In its place, the majority established an ambiguous case-by-case approach requiring litigants and reviewing courts to look virtually everywhere in the record for presumably anything that could indicate the district court judge’s intent to issue a partial final judgment under Rule 54(b). Therefore, the “unmistakable intent” approach clearly is not compatible with the purpose of the certification requirement: to provide

362. See supra notes 112-19 (asserting that federal rules should not be interpreted to disregard their plain language).
363. See infra notes 379-89 and accompanying text.
364. See infra notes 379-89 and accompanying text.
365. See infra notes 326-83 and accompanying text. The majority quoted the often-cited passage from Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950), stating that the obvious purpose of the Rule is to “reduce . . . the uncertainty and the hazard assumed by a litigant” who does not appeal from a potentially final judgment under Rule 54(b). For the full quotation from Dickinson, see supra text accompanying note 116.
366. Kelly v. Lee’s Old Fashioned Hamburgers, 908 F.2d 1218, 1221 (5th Cir. 1990) (en banc). The majority also stated that “[c]ounsel should know that the district court has entered a partial final judgment when the order alone or the order together with the motion or some other portion of the record referred to in the order contains clear language reflecting the court’s intent to enter the judgment under Rule 54(b).” Id.
367. See supra note 352-64 (discussing the unmistakable intent standard).
368. Modern federal courts, especially those in the Fifth Circuit, have rejected a case-by-case approach to finality both in the general finality context under section 1291, see In re Klein, 776 F.2d 628, 631 (7th Cir. 1985); Newpark Shipbldg. & Repair v. Roundtree, 723 F.2d 399, 405 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); and in the Rule 54(b) context, see FSLIC v. Tullous-Pierremont, 894 F.2d 1469, 1476 (5th Cir. 1990) (“We conclude that the rule of Nagle . . . is clearly preferable to making a case-by-case determination of [finality under Rule 54(b)].”) (emphasis added).
369. For citation to cases adhering to the benefits of a bright-line approach to Rule 54(b), see supra note 178.
370. See supra note 359 (discussing the practical problems with the case-by-case approach).
clarity and predictability for litigants.\textsuperscript{371} Nevertheless, the majority in \textit{Kelly} baldly asserted that its “unmistakable intent” standard has never before caused litigants problems in determining when a partial final judgment was appealable.\textsuperscript{372} This assertion is meaningless because federal courts have never applied this standard before \textit{Kelly}.\textsuperscript{373} The “unmistakable intent” standard is, however, remarkably similar to the Rule 54(b) jurisprudence that existed prior to the 1946 Amendment.\textsuperscript{374} Under the original Rule, the district court had no duty to expressly state whether its order was final for Rule 54(b) purposes.\textsuperscript{375} Furthermore, even if the court did expressly state its intentions, the appellate court often set aside its interpretation.\textsuperscript{376} Consequently, litigants had no reliable way to determine whether a district court’s partial judgment was final under original Rule 54(b).\textsuperscript{377} The drafters of Rule 54(b) thus devised a bright-line test for finality because the case-by-case method of determining finality under the Rule was ineffective.\textsuperscript{378}

The “unmistakable intent” approach can only lead to the same result. Since the majority has removed the trigger of appealability under the Rule,\textsuperscript{379} courts and litigants can only determine how “unmistakable” the district court judge’s intent must be or how “related” it must be to the order itself on a case-by-case basis.\textsuperscript{380} Consequently, as in practice under the original Rule, interested parties will be faced with the same dilemma of having no dependable way of determining if a partial judgment is final under Rule 54(b). Accordingly “hapless litigants” who attempt to discover whether to appeal a partial judgment are thus once again left in “Never-Never-Land.”\textsuperscript{381}

The impracticality of the “unmistakable intent” standard is exemplified by the majority’s attempt to justify its overruling of \textit{Mills v. Zapata Drilling Co.}\textsuperscript{382} The majority overruled \textit{Mills} because “[n]either the order appealed

\textsuperscript{371} See supra note 368.
\textsuperscript{372} Kelly v. Lee’s Old Fashioned Hamburgers, 908 F.2d 1218, 1221 (5th Cir. 1990) (en banc).
\textsuperscript{373} Although some courts have looked to the intent of the district court to determine finality under Rule 54(b), see supra note 190, no federal circuit has adopted this standard and applied it consistently.
\textsuperscript{374} Kelly, 908 F.2d at 1223 (Smith, J., dissenting).
\textsuperscript{375} See supra note 101 and accompanying text.
\textsuperscript{376} See supra note 102 and accompanying text.
\textsuperscript{377} See supra notes 104-07 and accompanying text.
\textsuperscript{378} See FED. R. CIV. P. 54(b) advisory committee’s note ("It hardly seems a case where multiplicity of precedents will tend to remove the problem [of the lack of certainty] from debate.").
\textsuperscript{379} The court attempted to bury the importance of the “trigger” in a footnote by stating, “Prudence might dictate use of what some view as the talismanic words of Rule 54(b), as at least a nod to the wisdom of the adage ‘an ounce of prevention’ . . . .” Kelly, 908 F.2d at 1221 n.2.
\textsuperscript{380} See supra note 359 (discussing the practical problems with the adoption of the unmistakable intent standard).
\textsuperscript{381} Kelly, 908 F.2d at 1223 (Smith, J., dissenting). Judge Smith asserted in his dissent that litigants will be “hapless” in this “Never-Never-Land” because they will be in a state of wonderment over whether they should take a protective appeal immediately or take the risk of losing the right to appeal by waiting until after judgment on the remaining claims. \textit{id}.
\textsuperscript{382} 722 F.2d 1170 (5th Cir. 1983). For a more detailed discussion of \textit{Mills}, see supra notes
from nor related pleadings in the record recited Rule 54(b)." The court reasoned that Mills must be overruled because "the panel apparently inferred the district court's intent to enter a final judgment from the posture of the case and the circumstances surrounding the entry of judgment."  

In interpreting this language, the majority in Kelly did not state that the district court's intent was "unmistakable." Instead, the majority ruled that the district court's "intent" was not contained in the "related record." Of course, the court offered no reasons why the "posture of the case" and the "circumstances surrounding the entry of judgment" were too far removed from the order. Consequently, in the next case, where perhaps the "unmistakable intent" will be a little closer to the order, counsel will have no idea whether that intent is part of the "related record." The litigant will once again be left in "Never-Never-Land." Clearly, by not recognizing the absurdity of this type of Rule 54(b) jurisprudence, the majority has effectively eliminated the value of the certification requirement that the drafters added in 1946.

Under either a narrow or broad interpretation of the Kelly decision, the language of Rule 54(b) becomes superfluous. Despite the explicit command in the Rule to use the trigger phrase of "no just reason for delay," the "unmistakable intent" standard disregards this command and looks to the intent of the district court. In addition, the purpose of Rule 54(b) is undermined by use of the "unmistakable intent" standard. By looking in the order and the accompanying record for any indication of the district court's intent, the majority in Kelly removes the certainty and clouds the clarity that amended Rule 54(b) was intended to provide litigants and reviewing courts. Although these textual arguments are persuasive, the impact of the standard used in Kelly provides the most telling arguments for adherence to a bright-line approach utilizing the trigger language present in Rule 54(b).

204-10 and accompanying text.

383. Kelly, 908 F.2d at 1221.

384. Id.

385. It is ironic that the majority, in discarding Mills, overruled one of the leading cases that established the liberal approach to Rule 54(b), an approach that the majority now adopts.

386. Kelly, 908 F.2d at 1221. The court also stated in this instance that the district court's intent was not in the "related pleadings." Id. This may or may not mean that the "unmistakable intent" must be in the order or the pleadings, however the majority would define pleadings.

387. Perhaps the judge might orally announce that there is "no just reason for delay." Certainly, an argument could be made that the judge's statement, recorded in the transcript, would be sufficiently related to a Rule 54(b) order.

388. See supra note 381 (discussing Judge Smith's dissent in Kelly in which he argues that the majority's interpretation of Rule 54(b) will leave litigators unsure whether they should appeal immediately or lose their right to appeal).

389. Judge Smith stated in his dissent that although the majority "pays lip service" to the 1946 Amendment's language, it has now "expunged what the Supreme Court added in 1946." Kelly, 908 F.2d at 1223 (Smith, J., dissenting).
V. Impact

After the decision in Kelly, a district court no longer needs to include in its Rule 54(b) order the specific phrase "no just reason for delay."\(^{390}\) The reviewing court must assume that the district court determined that there was "no just reason for delay" of appeal if the order or the related record evidences the district court's unmistakable intent to issue a partial final judgment pursuant to Rule 54(b).\(^{391}\) Presumably, some judges may choose to include the Rule's language in their Rule 54(b) orders to make their intentions perfectly evident.\(^{392}\) However, where a district court feels that it has clearly manifested its intent to issue a partial final judgment pursuant to Rule 54(b) in the related record, the court may very well decide that it is mere surplus to include the "no just reason for delay" language in its order.\(^{393}\)

Unfortunately, counsel faced with orders that do not contain the "no just reason for delay" language will be in "Never-Never-Land."\(^{394}\) Counsel will no longer simply be able to look for specific language in the order to decide if they should appeal it. They must instead try to determine "at their peril"\(^{395}\) whether the district court unmistakably intended to issue a partial final judgment pursuant to Rule 54(b).\(^{396}\) If counsel decide that the court did not intend to do so and are wrong, they will lose the right to appeal the order on its merits and may face malpractice actions from their clients.\(^{397}\) Most attorneys, in order to avoid this harsh result, will decide to "err on the side of caution"\(^{398}\) and appeal any order that could potentially be final under Rule 54(b).\(^{399}\) This multitude of protective appeals will have several adverse effects on federal practice, including: 1) an increase in the time and cost of federal litigation; 2) an increase in the use of Rule 38 sanctions against attorneys; and 3) an increase in the caseload of already overcrowded appellate court dockets.\(^{400}\)

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390. Id. at 908 F.2d at 1220.
391. Id.
392. The majority somewhat suggested this in a footnote by stating that "[p]rudence might dictate use of what some would view as the talismanic words of Rule 54(b), as at least a nod in the wisdom of the adage 'an ounce of prevention.'" Id. at 1221, n.2.
393. The majority clearly implied that the language "no just reason for delay" was mere surplusage. Id. at 1220 ("We do not now require the judge to mechanically recite the words 'no just reason on for delay.'").
394. Id. at 1227 (Smith, J., dissenting).
395. See Moore's Federal Practice, supra note 16, ¶ 54.23[1] ("The losing party . . . was required to determine finality at his peril.").
396. Kelly, 908 F.2d at 1221.
397. See infra notes 407-12 and accompanying text (noting that the Kelly decision may force attorneys to appeal almost any order that potentially disposes less than all the claims or parties in order to avoid being held for malpractice).
399. See infra note 413 and accompanying text (noting that attorneys will "err on the side of caution" instead of facing potential malpractice charges).
400. See infra notes 413-35 and accompanying text (discussing the effects of Kelly on counsel, litigants, and the appellate dockets).
A. Decision Not to Appeal

Inevitably, some attorneys will decide not to immediately appeal orders that may potentially dispose of less than all claims or parties and that do not contain the phrase "no just reason for delay." Counsel instead may wait until the entire litigation is adjudicated before they appeal the order on its merits. This may lead to two dreadful consequences.

First, if counsel does not immediately appeal an order that the reviewing court later finds was in fact a partial final judgment under Rule 54(b), the party will lose its right to appeal. 401 28 U.S.C. § 2107 unambiguously states that "[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action . . . of a civil nature before a court of appeals unless notice of appeal is filed, within thirty days after entry of judgment." 402 The filing of a notice of appeal within 30 days under this rule is mandatory. 403 It is well settled that the courts of appeals must dismiss untimely appeals. 404 Since the time for appeal of a partial final judgment issued pursuant to Rule 54(b) begins to run at the entry of the order, 405 a reviewing court certainly will dismiss any appeal of such an order not filed until after the entire trial. 406 Accordingly, counsel who erroneously conclude that a district court did not intend to issue a partial final judgment under Rule 54(b) will in essence forfeit the rights of their clients to appeal the order on its merits.

This erroneous guess described above also could lead to another harsh consequence for counsel: an attorney malpractice suit by a client for negligently failing to protect the client's right to appeal. Previous courts have held that negligence of an attorney in failing to take proper steps to protect a client's right of appeal is actionable. 407 For example, in Pete v. Henderson, 408 a California Court of Appeals found that Henderson was liable to his client, Pete, for the fee which Pete had paid him. 409 The court also held that the attorney

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402. Id. (emphasis added).
404. See, e.g., Gunther v. E.I. Du Pont De Nemours & Co., 255 F.2d 710, 715 (4th Cir. 1988) ("[U]nless appeal is taken within [30 days from entry of judgment,] the court of appeals is without jurisdiction to entertain it . . . and must dismiss it on its own motion."); Lathrop v. Oklahoma City Hous. Auth., 438 F.2d 914, 915 (10th Cir.), cert. denied, 404 U.S. 840 (1971) (dismissing untimely appeal despite the fact that timely post-trial motion was denied without notice to parties).
405. See 10 Wright & Miller, supra note 19, § 2654, at 39 (2d ed., 1983) ("[T]he time for appeal begins to run from the entry of an order that meets the requirements of the Rule.").
407. Pete v. Henderson, 269 P.2d 78 (1954); see In re Kruger's Estate, 63 P. 31 (Cal. 1900); see also Jack Leavitt, The Attorney as Defendant, 13 Hastings L.J. 1, 23-24 (1961) ("On proper proof, an attorney is negligent for . . . failing to observe the required procedures for obtaining a new trial or perfecting an appeal."); 7 Am. Jur. 2d Attorney at Law § 204 (1980) ("Negligence of an attorney failing to take proper steps to protect his client's right to appeal has been held actionable where, as a result, the right of appeal was lost.").
409. Id. at 80.
would be liable for any other damage that the plaintiff could prove was "proximately and directly caused" by counsel's failure to protect his appeal. While it is often difficult for a client to establish that an attorney's malpractice proximately caused him damage, the decisions in this area are often quite unpredictable. Consequently, the consequences of counsel's erroneous decision as to the finality of a district court's Rule 54(b) order may extend far beyond the actual litigation in which it arises.

B. Decision to Appeal

Due to the harsh consequences that may accompany counsel's decision not to appeal a potentially final district court order, most attorneys will decide to "err on the side of caution" and appeal almost any court order that potentially disposes less than all claims or parties. These prospective appeals will have several adverse effects on litigants, attorneys, and federal court dockets.

1. Effect on Litigants

The practice of taking precautionary appeals could have two rather severe effects on litigants in federal litigation. First, the length of a complex civil trial will be drastically increased due to the number of piecemeal appeals. This development could realistically delay the ultimate disposition of complex trials by several years. Considering that trials in federal court are already immensely time consuming, many more litigants will be adversely impacted by the length of federal litigation.

410. Id. at 79.
411. This is perhaps the greatest obstacle to a plaintiff in a malpractice suit. The plaintiff in this situation would have to prove that the judgment would have been reversed by the reviewing court had the appeal been perfected. See, e.g., Kilmer v. Carr, 274 Cal. App. 2d 81, 82, 78 Cal. Rptr. 800, 803 (1956) (affirming judgment for defendant attorney affirmed despite his failure to file appellate brief because plaintiff had not proved that he would have prevailed on appeal if the brief would have been filed). For a more detailed discussion of the problems that face a plaintiff in an attorney malpractice action, see William W. Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 HARV. L. REV. 633, 646-49 (1980).
412. See Leavitt, supra note 407, at 24-37. Of course, the time, cost, and potential damage to professional reputation are other negative aspects of malpractice litigation for attorneys.
413. See supra note 106 and accompanying text (illustrating that most litigants, when faced with this dilemma in practice under the original Rule, chose to take precautionary appeals).
414. See supra note 28 (noting the adverse effects of piecemeal litigation).
415. Between July, 1985 and June, 1986, the median time interval between the filing of a notice of appeal and the disposition of the appeal was 10.8 months. L. RALPH MEECHAM, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 153 (1986).
416. Between July, 1985, and June 1986, the median time interval from the filing of a civil suit until ultimate disposition of a trial (for those case that resulted in a jury trial) was 19 months. Id. at 233. However, the median time frame for the longest 10% of the trials, where Rule 54(b) is primarily used, was 47 months. Id.
417. Experts were well aware of these potential evils that accompany piecemeal appeals. See supra notes 108-113 and accompanying text (discussing the intent of the Supreme Court commit-
Another adverse effect that precautionary appeals will have on litigants in federal court is that the cost of a trial will escalate. Intuitively, the cost of federal litigation would not only rise dramatically because of the increased length of trial, but also because of the extra costs involved in preparing the multitude of piecemeal appeals. The practice of taking precautionary appeals to protect against losing the right of appeal under the unpredictable "unmistakable intent" standard will thus substantially increase the burden on litigants in federal court.

2. Effect on Counsel

In addition to the increased burdens of time and cost piecemeal appeals will impose on litigants, counsel may also be adversely affected if they "err on the side of caution." Federal Rule of Appellate Procedure 38, the appellate rule's counterpart to Federal Rule of Civil Procedure 11, unequivocally states, "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Under Rule 38, a court of appeals may sanction either the attorney, the client, or both.

Like modern federal courts' expanded use of Rule 11, appellate courts are
increasingly willing to impose Rule 38 sanctions on attorneys who file frivolous appeals.\footnote{422} Courts of appeals have sanctioned attorneys for filing an appeal from a nonfinal order.\footnote{423} In Maneikis \textit{v.} Jordan,\footnote{424} Jordan agreed to voluntarily dismiss a counterclaim in exchange for the plaintiff's promise to forego certain discovery.\footnote{425} The court accordingly dismissed the counterclaim. Nevertheless, Jordan later moved to reinstate the same counterclaim.\footnote{426} The district court denied the motion and Jordan appealed.\footnote{427}

The Seventh Circuit Court of Appeals dismissed the appeal for lack of jurisdiction. It held that the trial court's dismissal of Jordan's counterclaim was obviously not final "since the court never directed the entry of judgment or made the required certification" under Rule 54(b).\footnote{428} Accordingly, the court decided that Rule 38 sanctions were appropriate in that case because the defendant's appeal was frivolous,\footnote{429} and because of the disregard of the jurisdictional requirement by Jordan's attorney.\footnote{430}

Additionally, unlike Rule 11 where sanctions are usually limited to attorney fees and costs, Rule 38 allows for damages as well as double costs.\footnote{431} Courts of appeals have not hesitated to impose extremely harsh sanctions on attorneys who file frivolous appeals.\footnote{432} Consequently, federal practitioners may pay a

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\item \footnote{422} See, e.g., \textit{In re} Hartford Textile Corp., 659 F.2d 299, 303 n.11 (2d Cir. 1981) (citing eight cases where Rule 38 sanctions had recently been imposed). Generally, an appeal is frivolous if the result is obvious and the appellant's argument is completely without merit. \textit{Mays}, 865 F.2d at 138.
\item \footnote{423} See, e.g., \textit{Maneikis}, 678 F.2d at 722 (imposing Rule 38 sanctions against appellant for appealing an order not certified under Rule 54(b)); \textit{Self v. Self}, 614 F.2d 1026, 1028 (5th Cir. 1980) (finding appeal frivolous because "review of applicable jurisprudence" showed that court of appeals lacked jurisdiction); \textit{Mancuso v. Indiana Harbor Belt R.R.}, 586 F.2d 553 (7th Cir. 1978) (sanctioning appellant because it was "crystal clear" that the order was not final).
\item \footnote{424} 678 F.2d 720 (7th Cir. 1982).
\item \footnote{425} Id. at 721.
\item \footnote{426} Id.
\item \footnote{427} Id.
\item \footnote{428} Id.
\item \footnote{429} Id. at 722 ("The appellant . . . makes only the most perfunctory attempt to demonstrate his compliance with that essential threshold [finality] requirement, [and] [u]nder these circumstances, we find the appeal frivolous.").
\item \footnote{430} Id. The court decided, however, that it would be "more purposeful to assess damages and costs . . . against the attorney pursuant to 28 U.S.C. § 1957." \textit{Id.} at 723 n.8.
\item \footnote{431} The committee comments to Rule 38 state that "damages are awarded by the court in its discretion . . . as a matter of justice to the appellee and as a penalty against the appellant. \textit{FED. R. CIV. P. 38} advisory committee's comments; see also \textit{In re} Hartford Textile Co., 659 F.2d at 303 n.9 ("The determination [to impose sanctions] is one of doing justice between the parties [and] of penalizing a party for unnecessarily wasting the time and resources of the court.")."
\item \footnote{432} See, e.g., \textit{Bankers Trust Co. v. Publisher Indus.}, 641 F.2d 1361, 1368 (2d Cir. 1981) (assessing double costs and $410,000 in damages against appellant and its attorney); \textit{Oscar Gruss \& Son v. Lumbermens Mut. Cas. Co.}, 422 F.2d 1278, 1284-85 (2d Cir. 1970) (imposing an additional four percent interest on judgment, double costs, and $722,500 in attorney fees on appellant).
steep price for taking precautionary appeals to protect against losing their right to review.

3. Effect on Appellate Dockets

The increased number of protective appeals could also have a severe effect on the already overcrowded appellate dockets.\textsuperscript{433} As the majority's case-by-case approach commands, courts of appeals will be required to conduct a comprehensive review of each partial appeal to determine whether the trial court unmistakably intended to issue a partial final judgment pursuant to Rule 54(b).\textsuperscript{434} Consequently, valuable judicial resources will consistently be wasted as reviewing courts sift through each record to ascertain the lower court's intent.\textsuperscript{435} Accordingly, the majority's new substance-over-form approach will only add to overcrowded appellate docket concerns.

VI. Conclusion

In \textit{Kelly v. Lee's Old Fashioned Hamburgers},\textsuperscript{436} the Fifth Circuit attempted to clarify how a district court may properly certify a partial final judgment order under Rule 54(b) and what language a district court must include in its order. The majority adopted a "substance-over-form" approach and formulated an unmistakable intent standard.\textsuperscript{437} The majority's new approach commands that although Rule 54(b) states that a district court can only issue a Rule 54(b) order by making an "express determination that there is no just reason for delay" of appeal,\textsuperscript{438} no particular language need be included in the court's order.\textsuperscript{439} Instead, the order will be appealable if either the related


\textsuperscript{434} \textit{See supra} note 356 and accompanying text (discussing how under the unmistakable intent standard, courts are now forced to look through the entire record for anything that might evidence the district court's intent to issue a Rule 54(b) partial final judgment). Of course, the court of appeals must then determine if the trial court abused its discretion in deciding that there was no just reason for delay. \textit{See supra} note 160 and accompanying text (noting that in \textit{Curtiss-Wright}, the Court explicitly held that an appellate court has the duty to review the district court's decision that there was no "just reason for delay").

\textsuperscript{435} \textit{See supra} note 160 (noting that the Court in \textit{Curtiss-Wright Corp. v. General Elec. Co.}, 446 U.S. 1, 10 (1980), held that an appellate court has the duty to review the factors that the trial court found relevant to certifying a Rule 54(b) order).

\textsuperscript{436} 908 F.2d 1218 (5th Cir. 1990) (en banc).

\textsuperscript{437} \textit{Id.} at 1220.

\textsuperscript{438} \textit{Fed. R. Civ. P.} 54(b).

\textsuperscript{439} \textit{Kelly}, 908 F.2d at 1220.
CERTAINTY UNDER RULE 54(B)

This Note has attempted to illustrate that the legal reasoning of the majority in Kelly was flawed. The majority has violated the plain meaning rule of statutory construction by ignoring the explicit language of the Rule. More importantly, it has disrupted the Rule 54(b) framework by creating a disincentive for district courts to carefully consider the factors relevant to its determination that there is "no just reason for delay." Most egregiously, however, the majority's "unmistakable intent" standard has read the very purpose of the certification requirement right out of the Rule.

The majority's misconstruction of Rule 54(b)'s language and purpose may have a serious adverse effect on complex civil litigation in federal court. The potentially harsh consequences facing counsel who do not appeal orders that dispose less than all claims or parties will likely force attorneys to take precautionary appeals. These piecemeal appeals will lead to an increase in length and cost of litigation, in the number of Rule 38 sanctions against counsel, and in the burden on appellate court dockets.

The framers of the 1946 amendment to Rule 54(b) added the certification requirement to prevent these consequential evils. Subsequent courts recognized the Rule's effectiveness and its preservation of the traditional policy against piecemeal appeals. In adopting its new "unmistakable intent" standard, the Kelly majority has swept aside a policy formulated hundreds of years ago to prevent relatively simple litigation from becoming complex. Today, where civil litigation is ordinarily long and complex, the results of the majority holding could prove to be extremely harsh. In essence, the Kelly decision has set practice under Rule 54(b) back forty-five years: back to the pre-1946 era.

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440. Id.
441. See supra notes 346-51, 354-64 and accompanying text (noting the manner in which the majority in Kelly ignored the express language of the Rule).
442. See supra notes 338-44 and accompanying text (discussing the effects on district courts of not requiring use of Rule 54(b)'s literal language).
443. See supra notes 365-89 and accompanying text (noting that the majority decision in Kelly does injustice to the purpose of the certification requirement in Rule 54(b)).
444. These consequences are: (1) the loss of the party's right to appeal; and (2) a malpractice suit from the lawyer's client. See supra notes 401-12 and accompanying text.
445. See supra text accompanying note 413.
446. See supra text accompanying notes 414-17.
447. See supra notes 418-32 and accompanying text (discussing Rule 38).
448. See supra notes 433-35 and accompanying text (noting that the increased number of protecting appeals waste valuable judicial resources).
449. See supra note 109 and accompanying text (listing the purposes of the amendment to Rule 54(b)).
450. See Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956) ("The amended rule preserves the historic federal policy against piecemeal appeals ... in many cases more effectively that did the original rule.").