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Featured Article

But the Court's Order says There Is "No Just Reason for Delay" . . .

by Susan Audey & Chad M. Eggspuehler

It's a good day. You received an order from the district court granting your motion for summary judgment and all the claims asserted against your client have been dismissed. You know claims remain against other parties, but all claims asserted against *your* client have been dismissed and the judge certified the summary judgment order as final by finding "no just reason for delay." Good, you think, the 30-day clock for appeal starts to run and if the losing party does not appeal in that time, case over—or so you think.

Think again. Assuming the judgment is otherwise final, did the judge, in addition to making an express finding of "no just reason for delay," *explain* why he or she did so? If not, review of that order may have to wait until another day. This was the case in *Adler v. Elk Glenn, LLC*, 758 F.3d 737 (6th Cir. 2014), which we came across while updating research recently on what constitutes proper certification under Rule 54(b). The per curiam decision itself is not quite three pages and the court, in short order, dismisses the appeal because the district court's only reason for certifying an immediate appeal in the multiple-claim, multiple-party action was that the intervening insurer granted summary judgment would suffer "real prejudice." Finding this reference, "without further explication," insufficient to warrant immediate review, the court found certification improper and the summary judgment order not immediately reviewable. *Id*. at 738-39. But that pithy opinion is not what drew our attention. Instead, it was the lengthy concurrence by Judge Jeffrey Sutton that made us question whether a district court is required to provide an "explanation" for its certification in the first instance when the plain language of the rule itself imposes no such requirement. *Id*. at 740 (Sutton, J., concurring).

As Judge Sutton recognized, the Sixth Circuit is not alone in requiring an express "explanation" in addition to an express "finding" of no just reason for delay; indeed, other federal courts of appeals have adopted variations of a rule requiring or encouraging district courts to explain their reasons for Rule 54(b) certification of a partial judgment. *Id*. at 739-40. And Judge Sutton is not the first to recognize that Rule 54(b) contains no express requirement that district courts explain their certification orders. *See Rothenberg v. Sec'y Mgmt. Co., Inc.*, 617 F.2d 1149, 1150 (5th Cir. 1980) (per curiam) ("Rule 54(b) contains no specific requirement that a district court include a statement explaining its reasoning for applying the rule."). And at least one commentator appears to agree with Judge Sutton that "many circuits have gotten the question wrong." Conor Dugan, *Rule 54(b): Have the Courts Been Getting It Wrong?*, American Bar Association, Section of Litigation (Mar. 6, 2015).

Yet, the federal courts of appeals have not conjured this statement-of-reasons rule out of thin air or paternalistic self-aggrandizement. Rather, they seem to be taking their cues from the Supreme Court's unanimous 1980 decision in *Curtiss-Wright Corp. v. General Electric Co.*, which instructed that "[t]he 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." 446 U.S. 1, 10 (1980). No idle phrase, this statement appears in *Curtiss-Wright*'s discussion of the abuse-of-discretion standard that appellate courts must apply to review of partial judgments certified for appeal under Rule 54(b). Once the appellate court *scrutinizes* the district court's *evaluation* of the certification factors—i.e., the "juridical concerns"—"the discretionary judgment of the district court should be given substantial deference," reflecting its greater familiarity with the case, and "[t]he reviewing court should disturb the trial court's assessment of the equities only

if it can say that the judge's conclusion was clearly unreasonable." *Id.* Sensibly, federal courts of appeals have endeavored to review district courts' evaluation of Rule 54(b) certification factors—a lens of review that necessarily requires peeking into the district court's thinking.[1]

Following *Curtiss-Wright*, the federal courts of appeals have taken slightly different approaches to reviewing Rule 54(b) certification orders containing no statement of reasons. Among the stricter approaches, the Tenth Circuit deems statements of reasons mandatory for certification orders and refuses to review blank certifications to see if the record supports them. *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016). Unsupported certification orders may result in the summary dismissal of the appeal. *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1266 (10th Cir. 2005).

The Second Circuit similarly follows a mandatory statement-of-reasons rule, but applies it in a less severe manner, employing a formal remand procedure that enables district courts to explain blank certification orders. *See SEC v. Frohling*, 614 F. App'x 14, 17-18 (2d Cir. 2015) (summary order) (tracing the Circuit's statement-of-reasons requirement to 1976 and invoking the remand procedure established by *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)).

At the other end of the spectrum, the First, Fourth, and Fifth Circuits appear to review blank certification orders on a case-by-case basis, reserving the right to request supplemental explanation from the district court as necessary. *LaPierre v. City of Lawrence*, 819 F.3d 558, 561 n.2 (1st Cir. 2016) (noting that it requested and reviewed supplemental reasons from district court); *Braswell Shipyards, Inc. v. Beazer East, Inc.*, 2 F.3d 1331, 1336 (4th Cir. 1993) (stressing that district courts "should state [Rule 54(b)] findings on the record or in its order" and "reserv[ing] the right to" employ a remand procedure for supplemental reasons "if future Rule 54(b) certifications arrive before us devoid of any findings or reasoning"); *Rothenberg*, 617 F.2d at 1150 (noting prior instance where the court had requested supplemental reasons for certification, explaining that "when the case is of such a nature that the reasons for the 54(b) certification are unclear, it may be necessary for adequate appellate review to require that the district court's reasons be stated"). The Sixth Circuit's decision in *Adler* appears to have left this sort of remand-supplement option available. *Adler*, 758 F.3d at 739 (noting option, but declining request for remand because the parties failed to seek a "proper certification" in response to the court's order to show cause).

Perhaps the most unusual approach is that taken by Eighth and D.C. Circuits (and occasionally the Sixth Circuit, too); the absence of certification reasons dissolves the deference articulated in *Curtiss-Wright*. *See, e.g.*, *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 774 (8th Cir. 2009); *Bldg. Indus. Ass'n of Superior California v. Babbitt*, 161 F.3d 740, 745 (D.C. Cir. 1998); *Corrosioneering, Inc. v. Thyssen Envt'l Sys., Inc.*, 807 F.2d 1279, 1282-83 (6th Cir. 1986) (collecting cases). Though a certain logic underpins these appellate courts' attempt to provide *some* rationale for unexplained certifications, the result is something akin to *de novo* review, in that the court must supply its own examination of the record and findings of fact and law to justify (or defeat) certification—the very sort of second-guessing and reweighing prohibited by *Curtiss-Wright*. *See Curtiss-Wright*, 446 U.S. at 10 ("[T]he proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record."). In fairness, the same critique may be levied against appellate courts that, without nominally eliminating deferential review, "cull[] the *entire record* on appeal" in search of reasons supporting the blank certification instead of seeking answers from the court whence it came. *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 706 (1st Cir. 1996).

If, as *Curtiss-Wright* instructs, appellate courts should *scrutinize* district courts' *evaluation* of the Rule 54(b) factors—themselves, a judicial construct having no basis in the text of Rule 54(b)—it follows that appellate courts should have an understanding of the district court's reasons, in the same way that appellate courts must know the basis of district courts' sentencing determinations under the advisory U.S. Sentencing Guidelines—another discretionary determination subject to abuse-of-discretion review. The statement of reasons enables the appellate court to provide meaningful review. *E.g.*, *Trujillo*, 813 F.3d at 1316 (explaining that mandatory statement-of-reasons rule enables it to review certification orders "more intelligently and thus avoid jurisdictional

remands"); *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 630 (2d Cir. 1991) ("Absent an explanation by the district court, [the appellate court has] no basis for conducting a meaningful review of the district court's exercise of its discretion.").

Though we part company with Judge Sutton's critique of appellate courts requiring statements of reasons, which in our view fails to grapple with the standard of appellate review articulated in *Curtiss-Wright*, we agree that courts and practitioners would benefit from a revised Rule 54(b) clarifying the district court's certification obligations. In the meantime, practitioners requesting Rule 54(b) certification would do well to ask the district court for a statement of reasons, lest they may find themselves back at square one.

Susan Audey *is a partner in the Appellate & Legal Issues Group at Tucker Ellis LLP, certified as an appellate specialist by the Ohio State Bar Association, and a frequent presenter on appellate-related issues at the state and local level. Before joining Tucker Ellis, she clerked for the Honorable Timothy E. McMonagle of the Ohio Court of Appeals, Eighth Appellate District.*

Chad M. Eggspuehler *is a member of the Tucker Ellis Appellate & Legal Issues Group. Before joining Tucker Ellis, he clerked for federal trial and appellate judges in New Jersey and Ohio, including the Honorable Deborah L. Cook, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit.*

[1] The factors to consider include, but are not limited to:

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

Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1030 (6th Cir. 1994).