The Appealability of Partial Judgments in Consolidated Cases

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Imagine that a district court has consolidated several suits against a single defendant, pursuant to Federal Rule of Civil Procedure 42(a). The court grants summary judgment in the defendant’s favor on the largest claim. The affected plaintiff may want to appeal this judgment immediately, even though the other claims are still pending. The appellate court lacks jurisdiction of the appeal, however, unless it deems the partial judgment a final decision; if the judgment is a final decision it can be appealed immediately, but if not, the affected plaintiff must wait for all the consolidated cases to be resolved before filing an appeal.

If the appeal were from an unconsolidated case involving multiple claims or parties, the circuit court’s determination of jurisdiction would be simple. Under Federal Rule of Civil Procedure 54(b), district courts are empowered to “certify” partial judgments as final upon an express determination that there is no just reason for delay. If the district court does not certify the judgment

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1 FRCP 42(a) provides:
Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

2 Under 28 USC § 1291 (1982), “[t]he courts of appeals . . . have jurisdiction of appeals from all final decisions of the district courts of the United States . . .” (emphasis added).

3 FRCP 54(b) provides:
Judgment upon Multiple Claims or Involving Multiple Parties.
When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
as final, it can revise the judgment at any time until all of the
claims have been resolved, and the appellate court lacks jurisdic-
tion over an appeal from the judgment.4

Currently, however, the courts of appeals disagree whether
Rule 54(b) also applies to lawsuits that are the result of consolida-
tion under Rule 42(a).

Appeal rights in consolidated cases affect both the litigants
and the justice system. Many litigants want to appeal adverse
judgments as soon as they are rendered, rather than when the en-
tire package of litigation is resolved by the district court months or
years later.5 Parties want to resolve disputes promptly so they can
get on with their lives. They may be harmed financially if they
must wait a long time to collect or enforce a judgment. Protracted
litigation also increases the risk that memories will fade and that
evidence will be lost or grow stale.6 Nonetheless, litigants' interest
in expediting appeals must be balanced against the efficiency ra-
tionale underlying the finality requirement, which seeks to prevent
piecemeal appeals that crowd dockets and waste scarce judicial
resources.

The circuit courts that have considered the issue have reached
three different conclusions on the appealability of uncertified par-
tial judgments in consolidated cases. Some circuits hold that Rule
54(b) does not apply at all because each of the original actions re-
tains its separate identity after consolidation; that is, the consoli-
dation does not produce one multi-party or multi-claim action
to which the Rule 54(b) certification procedure applies. A judgment
in any of the original actions is thus final when rendered, and the
parties can appeal immediately.

4 Courts generally speak of “certifying” judgments under Rule 54(b), although the Rule
does not use this term. See, for example, Sears, Roebuck & Co. v Mackey, 351 US 427, 436
(1956) and Curtiss-Wright Corp. v General Electric Co., 446 US 1, 4 (1980). The process
involves little more than issuance of an order stating that there is no just reason for delay
and directing the entry of final judgment.

5 District court litigation can be a lengthy process. For 1988 and the preceding seven
years, the median time interval from issue to trial in federal district court civil cases was
fourteen months. In some cases, the interval was several years. Annual Report of the Direc-
tor of the Administrative Office of the United States Courts 19, 235-36 (GPO, 1988). Par-
ties appealing district court judgments want to file as soon as they can because the “waiting
list” is long in the federal appellate courts. The Administrative Office of the United States
Courts found in 1988 that eighteen percent of the appellate caseload had been pending for
over a year. Id at 6.

6 Stale evidence would not affect an appeal because appellate courts review the district
court record rather than hear or examine evidence. But the “staleness” problem could arise
if the appellate court reversed a district court's summary judgment and ordered a trial.
Litigants would want such a trial to take place as soon as possible.
Others circuits hold that a partial judgment cannot be final absent Rule 54(b) certification. In these circuits, the plaintiff must obtain district court certification before filing an appeal. If the district court refuses to certify the appeal, the plaintiff may not appeal until all the other claims have been resolved. Under this approach, the district courts control appeal rights.

In between these two positions are circuits that employ a flexible approach, deciding case-by-case whether they will hear an appeal when Rule 54(b) certification was not obtained. These courts consider the degree of consolidation and the rationale for consolidation to decide whether the judgment was final absent Rule 54(b) certification. Appellate courts control appeal rights under this approach, leaving the litigant in something of a bind: he knows that some partial judgments must go through the Rule 54(b) process, but is unsure beforehand whether his is such a judgment.

Appeal rights in consolidated cases thus vary among circuits according to these three approaches. This Comment argues that partial judgments in consolidated cases should be final only if district courts certify them as such under Rule 54(b). In other words, district courts should make finality determinations in consolidated cases, as they do in unconsolidated actions that involve multiple parties or claims.

Section I examines the Federal Rules of Civil Procedure that frame the issue, illustrating that these rules were designed as flexible tools for the district courts to use in shaping litigation. Section II discusses and critiques the three approaches taken by the circuits. Section III recommends adoption of the Ninth and Tenth Circuits' requirement of district court certification in consolidated cases. This approach is permitted by Rule 54(b), and this Comment argues that it is truest to the architecture of the federal rules. But to ensure uniformity, this section proposes an amendment to Rule 54(b) that would make certification in such cases obligatory for appellate review. Section III also outlines how this approach would work in practice.

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7 For a discussion of the “degrees of consolidation,” see text at notes 18-19.

* A fourth group of circuits has not addressed the issue at all; parties in those circuits are entirely uncertain of their appeal rights.
A. Consolidation of Actions Under Rule 42(a)

Rule 42(a)\(^9\) allows district courts to consolidate actions involving common questions of law or fact. District courts thus need not respect the units in which parties have filed cases; they can combine actions involving overlapping issues and evidence in order to conserve judicial resources and prevent duplicative proceedings. At the same time, however, courts must be careful that consolidation does not prejudice the individual actions.

Rule 42(a) grants district courts—the courts most familiar with the parties, issues, and evidence—the power to balance efficiency concerns against the interests of the parties. Consolidation is entirely at the discretion of the district court.\(^10\) One party may move for consolidation (the moving party has the burden of showing that consolidation is desirable), or the court may consolidate actions on its own motion.\(^11\) Consolidation orders are interlocutory and not normally appealable, except under the “collateral order” doctrine.\(^12\) Appellate courts generally defer to the district courts’ greater familiarity with the litigation and do not disturb consolidation orders absent abuse of discretion.\(^13\)

District courts consolidate actions under a variety of circumstances to avoid duplicative proceedings. Sometimes they consolidate actions that require identical legal or factual determinations. In In Re Massachusetts Helicopter Airlines, Inc.,\(^14\) for example, the district court consolidated several lawsuits involving a helicopter crash (the passengers sued the owner of the helicopter, the owner sued the manufacturer, the pilot sued the manufacturer, etc.) when all of the suits required determining the proximate cause of the crash.

\(^9\) See note 1 for the text of Rule 42(a).

\(^10\) James W. Moore, Jo D. Lucas, and Jeremy C. Wicker, 5 Moore’s Federal Practice ¶ 42.02[1] at 42.4 (Matthew Bender, 2d ed 1986) (“Moore’s”).

\(^11\) Id ¶ 42.02[1] at 42.5-42.7.

\(^12\) See id ¶ 42.02[5] at 42.33-42.34. The doctrine, which applies to all interlocutory orders, was announced in Cohen v Beneficial Industrial Loan Corp., 337 US 541 (1949). This doctrine allows appeal of that “small class” of decisions that finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Id at 546.

\(^13\) 5 Moore’s ¶ 42.02[5] at 42.34 (cited in note 10).

\(^14\) 469 F2d 439 (1st Cir 1972).
Often courts consolidate claims of similarly situated plaintiffs or defendants. In *Jones v Den Norske Amerikalinje A/S*,\(^1\) for example, the district court consolidated the lawsuits of three longshoremen, each of whom had sued a shipowner for personal injuries caused by a carbon monoxide leak. Consolidation is also common when a defendant files an action bringing what are essentially counterclaims against the plaintiff. In *Sandwiches, Inc. v Wendy's International, Inc.*,\(^2\) for example, the plaintiff sued the defendant for disseminating false rumors that the plaintiff had stolen a television commercial; the defendant sued the plaintiff for infringing the commercial's copyright. The court consolidated the actions because the parties were simply fighting over the copyright.

Finally, courts often consolidate actions that they judge could or should have been filed as a single action in the first place. In *Ringwald v Harris*,\(^3\) the district court consolidated the plaintiff's suit on a promissory note with his suit to set aside allegedly fraudulent conveyances which were hindering his ability to collect on the note; the Fifth Circuit commented approvingly that the actions "could originally have been brought as a single suit."\(^4\)

Just as Rule 42(a) enables district courts to consolidate cases for a variety of reasons, it permits various degrees of consolidation. Cases may be consolidated for discovery, for pre-trial proceedings, for trial, or for all purposes. In *Katz v Realty Equities Corporation of New York*, the district court even ordered seventeen plaintiffs in private securities cases to file one consolidated complaint.\(^5\) Rule 42(a) also gives courts the power to manage consolidated litigation by making "such orders concerning proceedings . . . as may tend to avoid unnecessary costs or delays." Courts can, for example, appoint a lead counsel to supervise the litigation.\(^6\)

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\(^1\) 451 F2d 985 (3d Cir 1971).
\(^2\) 822 F2d 707 (7th Cir 1987).
\(^3\) 675 F2d 768 (5th Cir 1982).
\(^4\) Id at 771.
\(^5\) 521 F2d 1354 (2d Cir 1975). The Second Circuit held that this consolidation order was not an abuse of the trial court's discretion. See also *In Re Equity Funding Corp. of America Securities Litigation*, 416 F Supp 161, 176 (C D Cal 1976), in which the district court cited *Katz* in support of an order for a consolidated complaint.
\(^6\) 5 Moore's ¶ 42.02[2] at 42.7-42.9 (cited in note 10).
B. Partial Judgments in Multiple Claim or Multiple Party Actions Under Rule 54(b)

1. The history of the rule.

As noted above, Rule 54(b) allows district courts to issue partial judgments in actions involving multiple parties or multiple claims. Under the Rule, district courts have the power to revise partial judgments at any time before resolving the entire lawsuit, unless they expressly determine that there is no just reason for delay and direct the entry of a final judgment.

The purposes of Rule 54(b) emerge from its history, which reflects the evolution of ideas concerning what constitutes a judicial unit. Common-law pleading, in theory, reduced each lawsuit to a single issue of law or fact.\(^2\) Hence, common law courts deemed an entire action to be the appropriate unit for appellate review; a judgment was not final unless it completely disposed of an action.\(^2\) The federal courts subscribed to the common law rule until the promulgation of the Federal Rules of Civil Procedure in 1937.\(^2\)

The federal rules created a liberal pleading regime that provided for increased joinder of claims and parties. Actions could involve multiple issues and claims. The drafters adopted Rule 54(b) "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."\(^2\) 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. Consequently, the drafters decided that "the dimensions of the action as filed would no longer determine the unit of disposition."\(^2\)

The original Rule 54(b) permitted partial judgments on individual claims and their "related counterclaims," expressly empowering district courts to stay enforcement of these partial judgments.


\(^{22}\) See Metcalfe’s Case, 77 Eng Rep 1193, 11 Coke Rep 38 (King’s Bench, 1615).

\(^{23}\) See Hohorst v Hamburg-American Packet Co., 148 US 262, 264 (1893); Rexford v Brunswick-Balke-Collender Co., 228 US 339, 345 (1913); and Collins v Miller, 252 US 364, 370 (1920). These cases were cited by the 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 FRD 433, 472 (1946) ("1946 Committee Notes").

\(^{24}\) 1946 Committee Notes, 5 FRD at 472.

\(^{25}\) 6 Moore’s ¶ 54.04[3-3] at 54.50 (cited in note 10).
and to take steps to secure their benefits. Two problems arose in practice. First, Congress had declared the relevant judicial unit to be a claim and its related counterclaims; courts encountered a variety of lawsuits with multiple claims and found this definition of judicial units to be unduly restrictive. Second, litigants did not know their appeal rights because district courts simply issued the partial judgments without saying anything about finality. As the Advisory Committee noted, uncertain litigants almost always appealed partial judgments to make sure that they did not sleep on their appeal rights.

To prevent premature appeals and to establish a more flexible approach to classifying judicial units, Congress amended Rule 54(b) in 1946. No longer would the relevant unit for partial judgments be a claim and its related counterclaims. Courts could in-

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26 The original Rule 54(b) read in full: *Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. Id ¶ 54.01[3] at 54.13-54.14.

27 See the following discussions of problems with the original version of Rule 54(b): Case Comment, *Entry of Final Judgment Under Rule 54(b) of the Federal Rules of Civil Procedure: The Third Circuit Imposes a Requirement of a Statement of Reasons,* 56 BU L Rev 579, 583-84 (1976); and T. J. Carnes, *To Appeal or Not to Appeal, That is the Question—An Overview of Rule 54(b),* 40 Ala Lawyer 213, 216 (1979).

28 1946 Committee Notes, 5 FRD at 472-73 (cited in note 23). In *Dickinson v Petroleum Conversion Corp.,* 338 US 507 (1950), a litigant lost its right to obtain review because it did not appeal a decree that the Supreme Court later ruled was a final judgment. (The 1946 amendment was not yet in effect when the decree was issued, so the district court had not said anything about the finality of the judgment.) Justice Black, in dissent, stated that the litigant was a victim of the “jungle of doubt” created by the original version of Rule 54(b). Id at 517. The Advisory Committee cited several other cases in which uncertainty of appeal rights had caused problems. 1946 Committee Notes, 5 FRD at 472-73.

29 The text of the 1946 amended version of 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. 6 Moore's ¶ 54.01[5] at 54.14 (cited in note 8).
stead issue partial judgments on any combination of claims in the action. The certification process was added to create certainty for litigants. Absent certification, litigants could not appeal until the district court resolved the entire action. District courts could provide for the appealability of partial judgments through certification.

A third amendment, in 1961, addressed another lingering uncertainty, making clear that Rule 54(b) applied to multiple party actions as well as actions with multiple claims.30

Rule 54(b) thus replaced the common law definition of judicial units with a flexible concept more compatible with the federal rules regime. As the courts and Congress observed actual litigation practices under the federal rules and the changing notions of judicial units, they recognized that there were many kinds of complex actions in which litigants would endure hardship if their appeals were delayed. Accordingly, amendments were made in 1946 and 1961 to increase the number of situations in which partial judgments could be certified as final. This Comment argues that the Rule should again be extended, this time to reach consolidated cases.

2. The rule in practice.

Like Rule 42(a), Rule 54(b) is a flexible tool, vesting district courts with the power and discretion to shape and manage litigation. Discretion is lodged in the district courts "because of [their] firsthand knowledge of the litigation."31 Appellate courts review Rule 54(b) certifications under an abuse of discretion standard, generally deferring to the district courts' greater familiarity with the claims, pleadings, and parties.32

The Supreme Court last established guidelines for district court discretion under Rule 54(b) in Curtiss-Wright Corp. v General Electric Co,33 stating that certification decisions must follow a two-step process. First, the district court must "determine that it is dealing with a 'final judgment.'"34 This requirement was originally set forth in Sears, Roebuck & Co. v Mackey,35 where the

30 For a discussion of circuits' disagreement regarding Rule 54(b)'s application to multiple party cases, see Steiner v 20th Century-Fox Film Corp., 220 F2d 105, 107 (9th Cir 1955).
33 446 US 1 (1980).
34 Id at 7.
Court held that Rule 54(b) does not enlarge or modify the statutory appellate jurisdiction of the circuit courts granted by 28 USC § 1291, which limits the appellate courts’ jurisdiction to final decisions of the district courts. In other words, the district court must look to the case law interpreting § 1291 and “cannot, in the exercise of its discretion, treat as ‘final’ that which is not ‘final’ within the meaning of § 1291.”36

Upon determining that the judgment can be a final judgment under the substantive law of § 1291, the court then “must go on to determine whether there is any just reason for delay.”37 The Court issued some general guidelines governing this inquiry, but emphasized that it was “reluctant either to fix or sanction narrow guidelines for the district courts to follow” because “the number of possible situations is large.”38 The Court did state that “a district court must take into account judicial administrative interests as well as the equities involved.”39 The relevant judicial interest is the longstanding federal court policy against piecemeal appeals.40 The relevant equities of allowing or delaying an appeal vary from case to case. In Curtiss-Wright, for example, the Court suggested that delay would be unjust if the losing party was in a precarious financial position and delay might impair the winning party’s ability to collect on the district court’s judgment.41 The Court emphasized that the task of weighing the equities is one for the trial judge because he can “explore all the facets of a case.”42

Following the general guidance of the Supreme Court, district and appellate courts have announced more specific criteria to govern Rule 54(b) determinations. The Third Circuit, for example, developed a commonly-cited list of factors:

(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 a set-off against the judgment sought to be made final; (5)

36 351 US at 437 (emphasis in original).
37 Curtiss-Wright, 446 US at 8.
38 Id at 10-11.
39 Id at 8.
40 Id.
41 Id at 12.
42 Id.
miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.\textsuperscript{43}

District courts have broad discretion to control Rule 54(b) finality determinations. They often use criteria identified by the courts of appeals, as above, but the ultimate decisions rest with them.

II. THREE APPROACHES TO PARTIAL JUDGMENTS IN CONSOLIDATED CASES

To date, eight federal courts of appeals have considered their jurisdiction over uncertified appeals from partial judgments in consolidated cases; the question has arisen as parties have appealed without obtaining Rule 54(b) certification, and the appellees have challenged the courts' jurisdiction to hear the appeals. The appellate courts have taken three different approaches to the question whether partial judgments are final decisions, reviewable on appeal. This section outlines and analyzes the three approaches: the per se rule that partial judgments in consolidated cases are always final judgments; the flexible approach; and the per se rule that Rule 54(b) certification is required for finality.

A. The Per Se Rule of Finality: Rule 54(b) Certification is Never Required to Make Partial Judgments in Consolidated Cases Final

The First\textsuperscript{44} and Sixth\textsuperscript{45} Circuits have held that partial judgments are always final decisions because actions that have been consolidated retain their separate identities. Under this interpretation, Rule 54(b) and its certification procedure are irrelevant because the "partial" judgments are not "partial" at all; they are final decisions in independent actions.\textsuperscript{46}

\textsuperscript{43} Allis-Chalmers Corp. v Philadelphia Electric Co., 521 F2d 360, 364 (3d Cir 1975).

The court cited other cases that mentioned one or more of the listed factors. See Cold Metal Process Co. v United Engineering & Foundry Co., 351 US 445, 452 (1956); Panichiella v Pennsylvania Railroad Co., 252 F2d 452, 455 (3d Cir 1958); TPO Inc. v FDIC, 487 F2d 131, 134 (3d Cir 1973); and Campbell v Westmoreland Farms, 403 F2d 939, 941-43 (2d Cir 1968).

\textsuperscript{44} In Re Massachusetts Helicopter Airlines, Inc., 469 F2d 439 (1st Cir 1972). The First Circuit recently affirmed its adherence to Massachusetts Helicopter in FDIC v Caledonia Investment Corp., 862 F2d 378, 380-81 (1st Cir 1988).

\textsuperscript{45} Kraft, Inc. v Local Union 327, Teamsters, Chauffeurs, Helpers, and Taxicab Drivers, 683 F2d 131, 133 (6th Cir 1982).

\textsuperscript{46} The First Circuit has suggested that some flexibility in application of the per se rule may be appropriate, however:

Whether . . . consolidated actions must remain separate actions under every conceiva-
The courts have made two arguments in support of this per se rule of finality. The First Circuit notes that Rule 54(b) applies to an “action” involving multiple parties or multiple claims, and uses Federal Rules of Civil Procedure 2 and 3 to interpret the term “action.”\(^{47}\) Rule 2 provides that there is one form of “action.”\(^{48}\) Rule 3 provides that an “action” is commenced by filing a complaint.\(^{49}\) The First Circuit noted that separate complaints had been filed in *Massachusetts Helicopter* (i.e., several “actions” were commenced) and that the cases had maintained separate identities, despite consolidation for pre-trial and trial purposes.\(^{50}\) The court concluded that “the literal reading of Rule 54(b) in conjunction with Rules 2 and 3 would foreclose any interpretation which mandates certification in all consolidated action settings.”\(^{51}\) In other words, Rule 54(b) does not apply to consolidations of separately commenced actions.

Second, both circuits have relied on the “theory behind consolidation” outlined in the Supreme Court’s decision in *Johnson v Manhattan Railway Co.*\(^{52}\) In *Johnson* the Court stated that “consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.”\(^{53}\) The First Circuit stated that “merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.”\(^{54}\) Hence, the Circuit concluded that the consolidated actions retained their separate identi-
ties and that relevant judgments were not partial at all; they disposed of an entire action and were final as rendered. This implied that the litigants retained their appeal rights. Rule 54(b) was thus irrelevant.

Both of the arguments made by the First and Sixth Circuits are flawed. The First Circuit's "literal reading" of Rules 2, 3, and 54(b) does not support a per se rule of finality. The court's reference to Rule 2, which provides for one form of action, is mysterious. The rule was designed to abolish the distinction between actions at law and suits in equity, and to abolish the common law forms of action. It is hard to see how this bears on consolidations and Rule 54(b), and the court offers no explanation.

The reference to Rule 3 likewise is questionable. Rule 3 establishes the mechanism for commencing an action under the federal rules, that is, filing a complaint. The First Circuit suggests that the term "action" is restricted to the judicial unit commenced by a single complaint. Rule 54(b) would thus apply to unconsolidated actions and to each action that has been consolidated (if the consolidation involved multiple parties or claims), but would not apply to the consolidation as a whole. Nothing in the federal rules, however, forecloses the application of Rule 54(b) to consolidations. The rules do not resolve the crucial question: Does consolidation merge separate "actions" into one "action"? Rule 3 tells us that what commences by a complaint is an action, but it does not preclude the possibility that a consolidated lawsuit should also be treated as one action under the rules. A "literal" reading of the rules simply does not resolve whether Rule 54(b) applies to consolidated cases.

Other courts have criticized the First and Sixth Circuits' reliance on the *Johnson* dicta that consolidation is merely a matter of convenience and does not change the rights of the parties. Indeed, the reliance on *Johnson* is inappropriate. *Johnson* was a complicated pre-federal rules case involving a receivership. One of

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55 Field, Kaplan, and Clermont, *Civil Procedure* at 301 (cited in note 21).
56 One commentator has argued that consolidations "clearly fall within the language of the rule," concluding that "Rule 54(b) should invariably apply to appeals from consolidated actions. . . ." Comment, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 Fordham L Rev 637, 647 (1989). But if the applicability of 54(b) were so clear, the circuits would not have developed two rules for consolidated cases so much at variance with this interpretation of Rule 54(b). To provide clear guidance, this Comment argues that the Rule should be amended to make explicit what is implicit in the structure of the federal rules.
57 See *Ringwald v Harris*, 675 F2d 768, 770 (5th Cir 1982); *Ivanov-McPhee v Washington National Insurance Co.*, 719 F2d 927, 929 n 1 (7th Cir 1983); and *Bergman v City of Atlantic City*, 860 F2d 560, 565-67 and n 9 (3d Cir 1988).
the many issues was whether an attack made in one of the suits against the order in another was a direct or collateral attack. The district judge was not sure, but held that the attack would be direct if he consolidated the suits. The Supreme Court made its famous statement in finding that the consolidation did not change the nature of the attack. The Court was not speaking to the finality or appealability of judgments and did not have Rules 42(a) and 54(b) to consider. Hence, Johnson does not compel the result reached by the First and Sixth Circuits.

In addition, the First and Sixth Circuits’ interpretation of Johnson is not uniformly followed in practice, even by the Supreme Court. Courts have ruled that the rights of parties, including appeal rights, are changed by consolidation. In Bousher v Synar, for example, two suits were filed challenging the Gramm-Rudman-Hollings Act, one by a group of Congressmen and one by an employees’ union and its members. The district court consolidated the cases. When the case was presented to the Supreme Court, a threshold issue was whether the plaintiffs (now appellees) had Article III standing to challenge the Act. The Court held that the union members had standing and that “[t]his [was] sufficient to confer standing under . . . Article III. We therefore need not consider the standing issue as to the Union or Members of Congress.” Johnson notwithstanding, the rights of the union and the Congressmen were changed by the consolidation. These parties obtained federal court adjudication of their claims without having to meet the Article III case or controversy requirement.

Lower court cases further discredit the First and Sixth Circuits’ interpretation of Johnson. In In Re Adams Apple, Inc., the district court had consolidated several bankruptcy cases, including one in which the United States government was a party. Under Federal Rule of Appellate Procedure 4(a)(1), a notice of appeal must be filed within thirty days of a district court order, but

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59 The Seventh Circuit doubts “that the Supreme Court adheres to all of the language in Johnson.” Sandwiches, 822 F2d 707. See also Bergman, 860 F2d at 565-66 n 9.
60 478 US 714 (1986).
61 Synar v United States, 626 F Supp 1374, 1378 (D DC 1986).
62 Bousher v Synar, 478 US at 721.
63 The Supreme Court did the same thing in Secretary of Interior v California, 464 US 312 (1984), a case cited in Bousher, 478 US at 721. The Court asserted jurisdiction in the case because one of the parties in the consolidated suit had standing, and stated that it did not have to address the standing of the other respondents. Secretary of Interior v California, 464 US at 319 n 3.
64 829 F2d 1484, 1487 (9th Cir 1987).
within sixty days if the United States is a party. The Ninth Circuit held that all parties to the consolidated suit had sixty days to appeal, whether or not they were part of the original action involving the government. Because of the consolidation, then, some parties gained an additional thirty days to appeal.

Additionally, Rule 42(a) itself empowers the district courts to change or limit a party’s rights in order to streamline litigation; it provides that the courts may “make such orders concerning [consolidated] proceedings therein as may tend to avoid unnecessary costs or delay.” Courts exercising this power in the interest of efficiency can change the rights of parties considerably. A district court can, for example, appoint a lead counsel to supervise the consolidated litigation, even though this may restrict the actions of the individual attorneys and thus prevent each litigant from conducting his case as he wishes.

Strict adherence to the Johnson model of consolidation, embodied in the per se rule of finality, would defeat the efficiency and judicial economy intended by consolidation. If the courts never allowed consolidation to change the rights of parties, they would be unable to move consolidations along as procedural units. The per se rule of finality allows parties to effectively unravel consolidated cases; they can pursue separate appeals that may result in duplicative proceedings and piecemeal appeals—the very things the consolidation was designed to prevent.

This is not to say that Johnson’s focus on the rights of parties is misguided or that efficiency should be the courts’ sole concern. As noted above, litigants have an interest in prompt appeals. The problem with the Johnson approach and the per se rule of finality is that they require courts to hear all early appeals—even when the benefits to the parties are not compelling or when doing so

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65 Id. Accord, Cablevision Systems Development Co. v Motion Picture Ass’n, 808 F2d 133, 136 (DC Cir 1987). The DC Circuit gives all parties sixty days to appeal, provided that the actions were consolidated for all purposes and the district court entered a single judgment disposing of all the actions.

66 The Sixth Circuit does adhere to its strict interpretation of Johnson. In Stacey v Charles J. Rogers, Inc., 756 F2d 440, 442-43 (6th Cir 1985), the court, citing Kraft and Johnson, held that parties to actions that have been consolidated must independently meet all filing deadlines.

67 5 Moore’s ¶ 42.02[2] at 42.7-42.9 (cited in note 10).

68 Immediate appeals may also prejudice the rights of other parties in the pending litigation. For example, a co-defendant appealing a summary judgment in the plaintiff’s favor might try to shift liability to other defendants. During the appeal, the plaintiff could learn additional legal theories and lines of factual inquiry to use against the other defendants in the trial court.
would defeat the purposes of the consolidation. Courts should weigh the benefits of an early appeal against its possible harms. A per se rule is inappropriate because these considerations vary in each case.

A final shortcoming to the First and Sixth Circuits’ approach is that it creates perverse incentives. The approach rewards litigants who file separate actions (which are later consolidated) when they could and probably should have filed a single action. The litigant who files a flurry of lawsuits imposes costs on the court and the other parties, yet gains under the per se rule of finality because he can appeal partial judgments right away, while the litigant who properly files a single action in the first place must follow the Rule 54(b) procedure. As the Third Circuit has observed:

No well-counseled plaintiff in those circuits would ever join separate claims in a single complaint; he should instead file a separate complaint for each claim and then have them consolidated. This procedure . . . would allow the plaintiff to appeal an adverse judgment on one claim even while the related consolidated claims were still pending in the district court. Such a result plainly violates the purpose of avoiding piecemeal appellate litigation intended by the finality requirement of § 1291 and Rule 54(b).69

This result does not serve the purpose of the per se rule of finality, which is to protect and maintain the rights of parties in the face of consolidation, not to create rights for people whose claims should not be handled separately or independently in the first place.

The per se rule of finality, therefore, has little to recommend it. First, contrary to its proponents’ assertions, it is not compelled by the federal rules or the case law. Second, the rule can nullify consolidation by allowing litigants to “un-consolidate” cases. Finally, the per se rule of finality encourages litigants to engage in strategic behavior when filing complaints in order to gain appeal rights, undercutting the purposes of Rule 54(b) and the per se approach itself. Because the per se rule of finality, by definition, yields no discretion to the courts of appeals, the appellate courts are unable to combat undesirable litigation practices and restrict early appeals to those cases where the benefits outweigh the harm.

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69 Bergman, 860 F2d at 566 n 9.
B. The Flexible Approach: Rule 54(b) Certification is Sometimes Required to Make Partial Judgments in Consolidated Cases Final

The Second, Third, Fifth, and Seventh Circuits reject a per se approach to appeals of partial judgments because of the great variety in the reasons for, and forms of, consolidation. Since no two partial judgments involve quite the same circumstances, these circuits have opted to retain flexibility in deciding whether Rule 54(b) certification is required. When presented with an appeal from an uncertified partial judgment in a consolidated suit, these courts decide case-by-case whether to hear the appeal. Their decision turns on factors such as the degree of consolidation, the severability of the issues appealed, whether the cases could have been filed as a single suit in the first place, and the harm to the appellant's interests if the appeal is delayed.

Two circuits have announced the principles governing their decisions. The Seventh Circuit stated in Sandwiches, Inc. v

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70 See Hageman v City Investing Co., 851 F2d 69 (2d Cir 1988); Bergman v City of Atlantic City, 860 F2d 560 (3d Cir 1988); Ringwald v Harris 675 F2d 768 (5th Cir 1982); and Ivanor-McPhee v Washington National Insurance Co., 719 F2d 927 (7th Cir 1983).

71 The Second Circuit found merit in both the per se rule requiring Rule 54(b) certification (adopted by the Ninth and Tenth Circuits, as discussed below) and the flexible approach, so it compromised and decided that it would use case-by-case analysis, but with a "strong presumption that the [partial] judgment is not appealable absent Rule 54(b) certification." See Hageman v City Investing Co., 851 F2d 69, 71 (2d Cir 1988). The presumption can only be overcome by "highly unusual circumstances." Id. Even with the presumption, this is a discretionary or flexible approach and this Comment analyzes it as such.

The Eleventh Circuit has not yet taken a position on the issue, but may favor the flexible approach. In Bank South Leasing, Inc. v Williams, 769 F2d 1497, 1500 n 1 (11th Cir 1985), the Circuit dismissed the appeal of a partial judgment in a consolidated suit because Rule 54(b) certification had not been obtained. The court cited Ringwald, in which the Fifth Circuit adopted the flexible approach.

The DC Circuit, in dicta, cited with approval "several recent decisions [holding] that an order deciding fewer than all of several cases consolidated for all purposes does not become a final judgment" absent Rule 54(b) certification. Cablevision Systems Development Co. v Motion Picture Ass'n, 808 F2d 133, 136 (DC Cir 1987) (emphasis added). The court then cited the Seventh and Fifth Circuits, which use the flexible approach, and the Ninth Circuit, which requires Rule 54(b) certification for all partial judgments in consolidated cases. Thus, it is not clear whether the DC Circuit would require Rule 54(b) certification for all partial judgments in consolidated cases or only in cases "consolidated for all purposes."

72 See, for example, Ivanov-McPhee, 719 F2d at 930, in which the pro se plaintiff filed ten actions alleging employment discrimination. Upon her motion, the court consolidated them for discovery and trial. The plaintiff appealed the district court's dismissal of several of the claims without first obtaining Rule 54(b) certification. The appellate court identified several factors in dismissing the appeal and holding that Rule 54(b) should have been complied with: the case could have been filed as one action, the consolidation was substantial, and the appellant's interests would not be undermined by making her wait until all the actions were resolved (she had requested that the actions be handled together in the first place).
Appealability of Partial Judgments

Wendy's International, Inc.\(^73\) that cases consolidated for all purposes must comply with Rule 54(b), and thus any partial judgments must be certified to be appealable. If the cases are not consolidated for all purposes, the court will evaluate whether the issues are sufficiently separate that the court could hear one appeal "confident that the same problem will not recur on a later appeal in the same case."\(^74\) Absent this confidence, the court will hear the appeal only upon Rule 54(b) certification.\(^75\) Similarly, the Third Circuit announced in Bergman v City of Atlantic City\(^76\) that it would consider the degree of consolidation and whether the consolidated suits involved the same parties, forum, and judge.\(^77\)

The circuits following this flexible approach cite little authority to support their position; instead, they note that neither court rulings nor the federal rules compel a particular approach,\(^78\) and advance two policy arguments in support of their flexible solution. First, these courts argue that a discretionary approach is preferable to a per se rule because consolidations vary in the degree of consolidation, the severability of issues, the alignment and interests of the parties, etc.; flexibility permits the circuit court to weigh all these factors in deciding whether hearing a given appeal will best serve the purposes of Rule 42(a) and 54(b).\(^79\) Second, these courts favor the flexible approach because it gives them some control over finality determinations and increases their ability to manage their dockets.\(^80\)

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\(^73\) 822 F2d 707 (7th Cir 1987).
\(^74\) Id at 709.
\(^75\) The Seventh Circuit reiterated the Sandwiches approach in Soo Line Railroad Co. v Escanaba & Lake Superior Railroad Co., 840 F2d 546, 548 (7th Cir 1988): "If the cases have been merged for all purposes, any open question prevents an appeal in the absence of findings under Rule 54(b) . . . ." To determine the applicability of Rule 54(b) to suits in which the district court consolidation order was unclear or the cases were not merged for all purposes, the court inquires whether the cases are "functionally similar and present overlapping issues." Id.

\(^76\) 860 F2d 560 (3d Cir 1988).
\(^77\) See Bergman, 860 F2d at 564. The court explained that consolidation for trial cut in favor of treating the entire case as a judicial unit requiring Rule 54(b) certification, as did identity of parties, forum, and judge. Id at 564-66.
\(^78\) See Ringwald, 675 F2d at 770 ("There appears to be little direct authority on this point"); and Ivanov-McPhee, 719 F2d at 928-29.
\(^79\) See Hageman, 851 F2d at 71 ("Given the infinite array of consolidated actions that can arise, we are somewhat hesitant to adopt an absolute rule that will conclusively bind this Court in all future actions"); Ivanov-McPhee, 719 F2d at 929 ("[T]he policy concerns involved in the appealability of a consolidated case may lead us in differing directions with respect to the different kinds of consolidation"); and Bergman, 860 F2d at 567 ("[O]ur adoption of the case-by-case approach will require individual examination of different types of consolidation orders ... ").
\(^80\) See text at note 88.
The courts advocating this flexible approach to partial appeals in consolidated cases are correct that consolidations vary enormously. They also are correct that this variety calls for different treatment in different cases. Their lapse is in assuming that such case-by-case determinations should be made by the courts of appeals rather than the district courts.

Several problems inhere in relying on appeals courts to make case-by-case determinations of the desirability of appeals. First, a trial court is in a better position than an appeals court to evaluate the need for and consequences of an immediate appeal. The district court has first-hand knowledge of the claims, the parties, and the evidence; the appeals court only reviews a paper record. Since it consolidated the cases in the first place, the district court is also more familiar with the purpose of the consolidation, the overlap of issues, and the degree of consolidation. Hence, a district court is better positioned than an appellate court to assess the effects on the parties and the judicial system of allowing an early appeal.

A second problem with the flexible approach's reliance on the courts of appeals is that it provides litigants with no guidance concerning their appeal rights. When a litigant receives a partial judgment from the district court, he does not know whether that judgment is final. As shown above, the original version of Rule 54(b) presented just the same problem, and the certification process was devised to inform litigants of the finality of partial judgments. To obtain a finality determination under the flexible approach, a litigant must appeal the case. The appellate court will decide either that the judgment was final, in which event it will hear the appeal, or that Rule 54(b) certification was necessary for finality, in which

\[\text{81 See Huene } v\text{ United States, 743 F.2d 703, 705 (9th Cir 1984) (The district court "is best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose"); and Trinity Broadcasting Corp. } v \text{ Eller, 827 F.2d 673, 675 (10th Cir 1987).}

\[\text{82 Appellate courts admit that they have difficulty interpreting district court consolidation orders, which often do not clearly indicate the degree of consolidation. See the Seventh Circuit's pleas to the district courts for greater clarity and specificity in consolidation orders in Ivanov-McPhee, 719 F.2d at 930 n 2; Sandwiches, 822 F.2d at 710; and Soo Line, 840 F.2d at 548. This interpretation problem does not arise when district courts make finality determinations.}

\[\text{83 See Huene, 743 F.2d at 704: "[The flexible approach] has the disadvantage of leaving the finality of the judgment hazy and subject to varying interpretations. In our opinion, it is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it."}

\[\text{84 See text at notes 27-29.} \]
event it will dismiss the appeal. This system is grossly inefficient, since whenever the latter situation arises, appealing the partial judgment was premature and a waste of the appellant's time and money; the appellant must try to obtain Rule 54(b) certification from the district court or wait for the district court to resolve the entire case. The appellee also wastes resources contesting the appeal.

Conversely, this uncertainty is also unfair in that a litigant may end up sleeping on his appeal rights. A litigant may believe that his partial judgment is not final and wait until the entire case is resolved to appeal, only to have his appeal dismissed as untimely if his belief was wrong. It makes no sense for the litigant to have to appeal to find out whether his partial judgment was final, and hence whether he has the right to appeal.

Appellate courts could mitigate litigants' uncertainty by developing rules or guidelines for different types of consolidations. While guidelines are helpful to litigants, they cannot significantly reduce the uncertainty problem inherent in the flexible approach. Since the chief advantage of the flexible approach is that it permits case-by-case analysis of partial judgments, appellate courts will probably be unwilling to bind themselves to a comprehensive set of rules or categories; in the end, they will reserve the discretion to handle cases according to their facts, and leave the parties without a reliable decision on appealability until after the appeal. The Seventh Circuit, for example, announced a once-and-for-all rule for cases consolidated for all purposes, but has declined to reduce any other kind of consolidation to a rule.

The circuits' second argument in favor of the flexible approach is that by giving them power to make finality determinations in

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85 Courts applying the flexible approach often dismiss appeals without prejudice, allowing the appellant to attempt to obtain Rule 54(b) certification for the partial judgment from the district court. See, for example, Bergman, 860 F2d at 567; and Ringwald, 675 F2d at 771.
86 See note 28.
87 Sandwiches, 822 F2d at 709-10. Judge Becker of the Third Circuit has suggested that there are essentially three types of consolidations and that courts could handle all cases with three rules: one for cases consolidated for all purposes; one for cases consolidated only for trial; and one for cases that had not been consolidated for trial. Bergman, 860 F2d at 568 (Becker concurring). This approach would create certainty for litigants, but only because it is a system of per se rules. Like the bright-line rules adopted by the other circuits, it would preclude appellate court discretion and case-by-case analysis (once the circuit has developed its rule for each category). The appellate courts would be precluded from considering factors other than the degree of consolidation, such as the overlap of issues, the likelihood of piecemeal appeals, the harm to the party of delaying an appeal, and whether the suit could have been filed as one action in the first place. No circuit has yet adopted Judge Becker's tripar-
consolidated cases, it enables them to better control their dockets. The Second Circuit stated that “there are certain advantages to preserving some flexibility in the appellate courts in making finality determinations.”88 The per se rules bind the courts of appeals, leaving them no role in deciding whether to hear an appeal. They can review district court certification decisions for abuse of discretion, but this deferential standard gives them little real control over finality determinations. The flexible approach allows appeals courts to determine, in the first instance, whether judgments are final and hence ripe for review.89

The circuits have not explained, however, why such control is appropriate for consolidated cases when appellate courts lack it in unconsolidated actions. By creating the certification requirement, the drafters of Rule 54(b) made district courts the arbiters of finality in unconsolidated actions involving multiple claims or multiple parties because district courts have greater familiarity with the cases. The role of appellate courts is merely to review district court orders for abuse of discretion. District courts are simply in a better position than appellate courts to make finality decisions, and their doing so ensures a more efficient allocation of judicial resources.

If anything, district court control in the consolidated context should be stronger, not weaker. The district court, which took a close look at the structure of the case when it consolidated the actions, has that additional knowledge to draw on when it makes a finality determination.

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88 Hageman, 851 F2d at 71.

89 It is questionable whether the flexible approach will in fact give the appellate courts the control they attribute to it. Instead, it may simply encourage litigants to seek Rule 54(b) certification whenever they have a partial judgment in a consolidated lawsuit. Why file a notice of appeal without certification when it could prove to be a waste of time? Appellants will probably ask district courts for certification and not appeal unless they get it, knowing that an appeals court will generally defer to a district court determination that part of the litigation should not proceed as a separate unit. To obtain needed guidance concerning appeal rights, litigants may effectively give trial courts the discretion to conduct case-by-case analysis by always requesting Rule 54(b) certification. This parallels the “always appeal” incentive that arose under the original version of Rule 54(b). See text at note 28. Litigants are rational and seek to avoid procedural pitfalls. They adopted the “always appeal” strategy to make sure that they did not sleep on their appeal rights. Here, litigants will seek certification to avoid premature appeals.
C. The Per Se Certification Requirement: Rule 54(b) Certification is Always Required to Make Partial Judgments in Consolidated Cases Final

The Ninth and Tenth Circuits hold that judgments that do not entirely dispose of consolidated cases are final and appealable only if certified as such by district courts pursuant to Rule 54(b). An appellate court thus lacks jurisdiction over a partial judgment in a consolidated case absent Rule 54(b) certification. This approach assumes that consolidation merges the separately filed actions into one “action,” which is then governed by Rule 54(b). Rule 54(b) thus applies to all lawsuits involving multiple claims and multiple parties.

Both circuits adopted this rule in very brief opinions. Neither suggested that its decision was compelled by precedent; rather, both criticized and rejected the other approaches and adopted the per se certification requirement as the most sensible option. The Ninth Circuit called the First and Sixth Circuits’ rule that partial judgments in consolidated cases are automatically final and appealable “overly mechanical.” It noted that consolidation is meant to conserve resources, and that always allowing early appeals could “frustrate the purpose for which the cases were originally consolidated” and lead to duplicative appeals.

The Ninth Circuit found two main flaws with the flexible approach, both discussed above: it grants discretion over finality determinations to appeals courts rather than to district courts, and it leaves litigants uncertain about the finality of district court judgments. Requiring Rule 54(b) certification avoids these problems: discretion is still exercised on a case-by-case basis, but it is lodged in the courts “best able to evaluate the affect of an interim appeal on the parties and on the expeditious resolution of the entire action.”

The Ninth and Tenth Circuit approach is most compatible with the federal rules framework. Rules 42(a) and 54(b) both point to district court discretion and control over finality determinations.

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90 Huene v United States, 743 F2d 703 (9th Cir 1984).
91 Trinity Broadcasting Corp. v Eller, 827 F2d 673 (10th Cir 1987). As noted in note 71, the DC Circuit has, in dicta, approved a rule that could be understood either as the flexible approach or as the per se rule requiring certification.
92 Huene, 743 F2d at 706; and Trinity, 827 F2d at 675, citing Huene.
93 Huene, 743 F2d at 704.
94 Id.
95 See text at notes 81-87.
96 Huene, 743 F2d at 705.
in consolidated cases. The per se certification requirement recognizes that the considerations that led to Rule 54(b) and its amendments apply to consolidated cases as well. The Rule's drafters understood that some claims in complex actions become ripe for review before the entire action is resolved. They gave district courts the power to certify partial judgments as final on a case-by-case basis because: (1) district courts have a comparative advantage in determining the factual and legal overlap of issues and the interests of the parties; and 2) litigants need to know their appeal rights as soon as the district court renders judgment.

As explained above, these considerations are equally relevant in the consolidation context. Indeed, the argument for district court discretion in the consolidation context is even more compelling than in the single action context because the drafters of the federal rules granted district courts the power to consolidate cases and then manage them. In consolidated cases, district courts continually evaluate the benefits and costs of joint proceedings. They can draw on this knowledge when making finality determinations.

The Ninth and Tenth Circuits' use of the existing Rule 54(b) process allows them to avoid a procedural asymmetry that exists in other circuits: different treatment of the finality issue in unconsolidated multi-claim or multi-party cases than in consolidated multi-claim or multi-party cases. All circuits handle unconsolidated cases under the Rule 54(b) procedure, as mandated by the federal rules. But other circuits besides the Ninth and Tenth circuits handle consolidated cases by an entirely different procedure. Circuits using the per se rule of finality presumptively grant finality to partial judgments in consolidated suits. Circuits using the flexible approach allow appellate courts to make finality determinations.

The use of different procedures and different judicial decisionmakers for single and consolidated suits is arbitrary. The procedure for determining whether a partial judgment in a multi-claim case is final should not depend on whether the lawsuit started out as a single action or was the result of consolidation. The task in either case is the same—to decide whether the benefits of allowing part of the litigation to proceed as a procedural unit outweigh the harm. Different factors may become relevant to the finality determination when the lawsuit was consolidated. But the procedure for making the decision should not differ just because the suit was consolidated. Actions that are eventually consolidated often could and should have been filed as a single action in the
first place. A dual procedural system, as discussed above, simply encourages strategic filing behavior. Litigants in the First and Sixth Circuits (which deem partial judgments in consolidated cases final per se) have an incentive to file actions separately and then have them consolidated because of the early appeal rights accorded consolidated cases. In short, the existence of dual procedures unwisely makes appeal rights turn on how cases begin, a factor easily manipulated by litigants.

The Ninth and Tenth Circuit approach, then, has much to recommend it. Its primary advantage is that it gives district courts the discretion to make finality determinations; it thereby better comports with the federal rules, provides litigants with early guidance on their appeal rights, and efficiently allocates decisionmaking power to the district courts. Extending the existing Rule 54(b) single action framework to the consolidation context eliminates the problems inherent in dual procedures.

III. Recommendations: Adoption of the Per Se Certification Approach and Amendment of FRCP 54(b)

The analysis in the previous section suggests that Rule 54(b), which was developed to deal with complex suits involving multiple claims and multiple parties, is equally suited to the problem of partial judgments in consolidated suits. The Ninth and Tenth Circuits’ per se certification requirement recognizes this fact, and is therefore superior to the dual procedures advanced by the other circuits.

A. Amendment of FRCP 54(b)

Although the other circuits could simply adopt the Ninth and Tenth Circuit approach, uniformity would best be achieved by explicitly amending Rule 54(b) to govern consolidated cases. Absent an amendment, courts remain free to adopt other approaches because extension of the Rule to consolidated cases is not compelled by its current language; the federal rules do not make clear that a consolidated suit is an “action” under Rule 54(b). An amendment would make this clear, requiring all federal courts to apply the rule to consolidated cases. Just as Rule 54(b) was amended in 1961 to explicitly apply to multi-party actions (in accord with the interpretation of some courts at the time), it should be amended today to encompass consolidated cases.

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87 See text at note 69.
The following is a proposed revision of Rule 54(b). New language is emphasized.

Judgment Upon Multiple Claims or Involving Multiple Parties.
When more than one claim for relief is presented in an action, including a consolidated action resulting from a Rule 42(a) order, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . .

B. District Court Standards Under Amended Rule 54(b)

What factors should a district court consider in making finality decisions in consolidated cases under proposed Rule 54(b)? As discussed above, district courts already perform the finality inquiry in single actions and have developed standards to guide their decisions based on the parameters outlined by the Supreme Court in Curtiss-Wright.\textsuperscript{9} The Third Circuit, for example, considers the factual and legal overlap between the adjudicated and unadjudicated claims, the possibility of piecemeal appeals if finality is granted, the possibility that future developments in the case might moot the need for review, the solvency of the parties, the frivolity of the claims, and other factors.\textsuperscript{9} These standards and factors would also be relevant in consolidated cases.

Some additional considerations would come to bear, however. The court, for example, should consider the degree of consolidation that it ordered (consolidation for all purposes, consolidation only for trial, or consolidation only for discovery, etc.) and whether an early appeal would jeopardize the planned future structure of the case. Consider a partial summary judgment granted prior to trial in a consolidated case. If the cases were consolidated for pre-trial proceedings only (i.e., separate trials were planned), allowing an early appeal would avoid unnecessary hardship for the affected parties while creating little risk of duplicative proceedings. If the cases were consolidated for all purposes, however, allowing immediate appeal of the same summary judgment might result in piecemeal appeals.

\textsuperscript{9} 446 US 1 (1980).
\textsuperscript{9} Allis-Chalmers, 521 F2d at 364. See text at note 43.
The district court should also consider who requested the consolidation and who resisted it. Consolidation is often imposed on one or more of the parties upon the motion of another party or the court itself. When an appellant resisted the consolidation, the court should assume that he considered his interests ill-served by the consolidation, and that he may have convincing reasons why his appeal should be handled separately from the rest of the lawsuit. On the other hand, when an appellant sought the consolidation, or did not oppose it, the court should assume that he originally considered the consolidation to be in his own interest. The appellant probably has little basis to assert that he would now be burdened or prejudiced if he had to wait to appeal. Finally, when the court consolidated the actions upon its own motion for efficiency reasons, it should be careful not to frustrate its own efforts by unraveling the consolidation.

The involuntary nature of many consolidations is particularly relevant in multiple party contexts. When courts combine lawsuits involving multiple plaintiffs or defendants, tension may develop because different parties will want to pursue different litigation strategies; they may have different interests at stake, desire different remedies, or want to advance different arguments or defenses. These considerations may cut in either direction. On the one hand, litigants will generally have a strong interest in obtaining immediate review when a district court judgment affects only some of the parties. The parties affected by the judgment will want to pursue their separate litigation strategies and end their role in the case as soon as possible; it will often be "unjust" to make them wait for the resolution of actions that they are not involved in, especially if they had resisted the consolidation.

On the other hand, two factors may weigh in favor of keeping the case together until final resolution of all the claims. First, allowing an early appeal creates the risk of piecemeal appeals. The district court may decide—as it did when it consolidated the actions in the first place—that the benefits of keeping the case as a single procedural unit outweigh the harm to the parties. Second, allowing one party to obtain an early appeal could prejudice the rights of the remaining litigants; the party seeking review may wish to pursue an appeal strategy that would disadvantage the other plaintiffs or defendants.101

100 Recall Ivanov-McPhee, 719 F2d at 930, in which the Seventh Circuit noted that the plaintiff's interests would not be harmed if she had to wait to appeal because "[i]t was she who moved to consolidate in the first place."

101 See note 68.
The district courts may discover other factors that are important to finality determinations in consolidated cases. Under the proposed version of Rule 54(b), district courts would simply consider these factors in making their discretionary finality determinations. In order to certify a partial judgment under the Rule, district courts would still have to determine that there was "no just reason for delay" and expressly direct the entry of final judgment.

Conclusion

Rule 54(b) was developed to permit partial judgments in the broader kinds of actions, often involving multiple parties and multiple claims, permitted by the new federal rules. The Rule was amended twice to reflect changing ideas about what constitutes a judicial unit and to cover different multiple issue situations brought to light by new litigation practices.

Consolidation of related or similar actions has become a common way to streamline litigation and ease crowded dockets. Separate judgments are sometimes appropriate in consolidated cases which involve multiple parties or multiple claims. District courts should have the power to decide whether these judgments should be final, as they do in single actions which involve multiple parties or multiple claims. Rule 54(b) has evolved to reflect changing litigation practices under the federal rules and should be amended, again, to govern consolidated cases.