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Federal Procedure - Jurisdiction - Appeal from Judgment on Some of Several Multiple Claims Under Rule 54(b)

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FEDERAL PROCEDURE—JURISDICTION—APPEAL FROM JUDGMENT ON SOME OF SEVERAL MULTIPLE CLAIMS UNDER RULE 54 (b)—Plaintiff filed a complaint in a federal district court alleging in six counts that defendant was engaged in unfair competition against business ventures carried on by the plaintiff. The defendant filed a motion to dismiss the complaint. The court ordered two counts to be stricken, found that there was no just reason for delaying the final determination of the issues raised by these counts, and directed that judgment be entered thereon against the plaintiff. The plaintiff appealed and the defendant moved to dismiss the appeal on the ground that the order and judgment appealed from was not a final or appealable order under the requirements of section 1291, title 28, U.S.C.

(1952). *Held,* motion to dismiss denied. The district court's decision was a "final decision" within the meaning of section 1291. *Mackey v. Sears, Roebuck & Co.,* (7th Cir. 1955) 218 F. (2d) 295.

Prior to the Federal Rules of Civil Procedure, the order in the principal case would not have been appealable since it did not dispose of all of the claims involved.[1] In the various multiple-claim proceedings so liberally permitted by the federal rules,[2] the original rule 54(b) gave the district courts a discretionary power to enter final judgment on one or more claims in the action.[3] Except where the district court expressly made its order subject to further consideration, this resulted in uncertainty as to what orders were actually final for appellate purposes. This uncertainty required an unsuccessful litigant either to undergo an expensive appeal which might be dismissed for lack of finality, or risk losing his right to appeal if the order was ultimately determined to have been final.[4] In 1948, rule 54(b) was amended in order to reduce the number of appeals from multiple-claim suits and to protect litigants from inadvertently losing their right to appeal.[5] The trial judge was given the discretion to permit appeals where hardship would otherwise result.[6] Where the trial court makes the "determination" and "direction" specified in rule 54(b), the question arises whether such action, of itself, renders the judgment appealable even though it might not have been so prior to the rule. The appellate courts which have considered this question have reached opposite conclusions. Some have said that the amended rule merely adds another formal prerequisite for finality, i.e., the "determination" and "direction" by the lower court, and that the appellate court still has to determine its own jurisdiction on appeal.[7] Other courts have decided that once the litigant has secured the trial judge's determination, he is assured of having his appeal heard on the merits.[8] Under either view, the danger of one's

1 Collins v. Miller, 252 U.S. 364, 40 S.Ct. 347 (1920); Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945).

2 Rules 13, 14, 18, 20, 24, Fed. Rules Civ. Proc., 28 U.S.C. (1952).

3 Rule 54(b), Fed. Rules Civ. Proc., 28 U.S.C. (1938); Reeves v. Beardall, 316 U.S. 283, 62 S.Ct. 1085 (1942).

4 See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S.Ct. 322 (1950); 47 MICH. L. REV. 233 (1948).

5 "When more than one claim for relief is presented in an action . . . 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 not just reason for delay and upon an express direction for the entry of judgment. . . ." Rule 54(b), Fed. Rules Civ. Proc., 28 U.S.C. (1952).

6 Notes of Advisory Committee on Amendments to Rules, following rule 54b, 28 U.S.C. (1946); MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 518 (1949).

7 Flegenheimer v. General Mills, (2d Cir. 1951) 191 F. (2d) 237, noted in 51 MICH. L. REV. 300 (1952); Gold Seal Co. v. Weeks, (D.C. Cir. 1954) 209 F. (2d) 802. Cf. Creel v. Creel, (D.C. Cir. 1950) 184 F. (2d) 449.

8 Pabellon v. Grace Line, Inc., (2d Cir. 1951) 191 F. (2d) 169; Lopinsky v. Hertz Drive-Ur-Self Systems, Inc., (2d Cir. 1951) 194 F. (2d) 422; Bendix Aviation Corp. v. Glass, (3d Cir. 1952) 195 F. (2d) 267; Boston Medical Supply Corp. v. Lea & Febiger, (1st Cir.

losing his right to appeal is largely eliminated since an order disposing of less than all counts is appealable only if the requirements of the rule are met.[9] However, only under the latter interpretation will the number of appeals be limited. The courts adopting the former approach argue that to allow appeals which would not have been possible before the amended rule would materially alter appellate jurisdiction. They contend that changing the established meaning of "final decision" goes beyond the scope of the Supreme Court's rule making power.[10] If by "final decision" it is meant that a court must end its consideration of the judicial unit with which it is dealing,[11] then the district judge is given the power to change the meaning of section 1291 by attributing finality to claims without considering whether the entire litigation has been disposed of. But in view of the great confusion surrounding the meaning of the term "final decision"[12] and the need for revision of the finality concept brought about by the expanded joinder provisions of the federal rules,[13] the latter view appears to be more practical. Furthermore, the courts have had no difficulty in upholding a number of other federal rules which also have a direct effect on appellate jurisdiction.[14] A conclusive determination by the trial court is the best way to prevent unnecessary litigation, and it also reflects the intent of the framers of the amended rule.[15]

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1952) 195 F. (2d) 853; Francis v. Crafts, (1st Cir. 1953) 203 F. (2d) 809. Cf. Eversharp, Inc., v. Pal Blade Co., (2d Cir. 1950) 182 F. (2d) 779.

[9] Winsor v. Daumit, (7th Cir. 1950) 179 F. (2d) 475; Republic of China v. American Express Co., (2d Cir. 1951) 190 F. (2d) 334; Dyer v. MacDougall, (2d Cir. 1952) 201 F. (2d) 265.

[10] 28 U.S.C. (1952) §2072; United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767 (1941).

[11] For a discussion of the meaning of a "final decision," see 51 MICH. L. REV. 300 (1952).

[12] Crick, "The Final Judgment as a Basis for Appeal," 41 YALE L.J. 539 (1932); 62 YALE L.J. 263 at 269 (1953).

[13] See 41 MICH. L. REV. 535 (1942).

[14] Lopinsky v. Hertz Drive-Ur-Self Service Systems, Inc., note 8 supra, at 428; Ray v. Morris, (7th Cir. 1948) 170 F. (2d) 498.

[15] 6 MOORE, FEDERAL PRACTICE, 2d ed., 228 (1953).