ORIGINAL

In the

Supreme Court of the United States

CURTISS-WRIGHT CORPORATION,

PETITIONER,

V.

GENERAL ELECTRIC COMPANY,

RESPONDENT.

No. 79-105

Washington, D. C.
January 14, 1980

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

CURTISS-WRIGHT CORPORATION, Petitioner,	:	
v.	:	No. 79-105
GENERAL ELECTRIC COMPANY, Respondent.	:	

Washington, D. C.,

Monday, January 14, 1980.

The above-entitled matter came on for oral argument at 1:28 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RALPH N. DEL DEO, ESQ., Dolan & Purcell, Gateway 1, Newark, New Jersey 07102; on behalf of the Petitioner

ISAAC N. GRONER, ESQ., Cole & Groner, 1730 K Street, N. W., Washington, D. C. 20006; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-105, Curtiss-Wright Corporation v. General Electric Company.

Mr. Del Deo, I think you may proceed when you are ready.

ORAL ARGUMENT OF RALPH N. DEL DEO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DEL DEO: Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the Third Circuit was in error when it vacated the entry of final judgment by the District Court pursuant to Rule 54(b) after it had entered summary judgment in favor of Curtiss-Wright in the amount of $19 million.

The Third Circuit based its opinion in the main on the existence of counterclaims which it said presented a possibility of setoff and barred the entry of the final judgments.

This is a classic example of complex multi-claim litigation. There are 21 contracts involved, there are 16 counts in the Curtiss-Wright complaint ranging from fraud and misrepresentation on down the line. The General Electric counterclaim allege extraordinary assistance and an unjust enrichment claim which they based on the fact

that they helped Curtiss-Wright which prevented Curtiss-Wright from going into default and therefore General Electric is somehow entitled to the money that Curtiss-Wright would have lost had it been in default.

QUESTION: Could those counterclaims be fairly characterized as unliquidated?

MR. DEL DEO: Yes, Your Honor. They are unliquidated and, you know, obviously their proof is difficult.

The amended complaint is the one on which summary judgment has been granted in this case and that dealt with the balances due on the contracts for the nuclear components that were delivered and accepted by General Electric and its customer and are now in use by them.

The basis for summary judgment is really not at issue here. There were no factual issues in the summary judgment case, and the sole legal issue was the existence of a release clause which is referred to in the briefs as 5c. That clause was -- the interpretation of it was determined in favor of Curtiss-Wright and the summary judgment was granted to them.

In the balance of the case, that release clause has no part. There is therefore no inner relationship factually or legally between the claims on which summary judgment has been granted and the claims in the -- the unadjudicated claims in the balance of the complaint or

in the counterclaims.

Now, the Appellate Court really doesn't question the qualification for finality here. They have not contested the District Court's finding that there was no separate -- that there was a separate and distinct claim here that it could be decided separately, that there was no question of mootness or delay or duplicative appeal or any of those things. They didn't deal with that at all.

They said that the presence of the counterclaim posing a possibility of a setoff was a bar to the entry of the judgment absent harsh and unusual circumstances, and they applied a standard of harsh unusual circumstances which is really akin to an irreparable harm standard because they talked about insolvency and economic duress.

They admit that the result is harsh insofar as Curtiss-Wright is concerned, but they somehow dismiss that injustice and say that it has to be almost irreparable harm, you have to have insolvency.

QUESTION: Mr. Del Deo, I take it you don't question either of the statements in Sears, Roebuck v. Mackey that the primary discretion to certify under Rule 54 is vested in the District Court or that the Court of Appeals may review that certification for abuse of discretion?

MR. DEL DEO: I certainly agree, Your Honor,

that the Sears case -- I emphasize that the primary discretion was in the District Court and any matter in which a court has discretion is obviously always subject to review by a higher court. I think that in the Sears case though, Your Honor, what we had was the court enunciated three things that were important for a Rule 54(b) entry of judgment.

One was they said that it had to be a single claim for relief, then they said that claim had to be adjudicated finally, and then they directed the discretion of the District Court to the fact that the District Court should then see that it was independent factually and legally from the balance of the claims in the suit, and that brings into it the attendant questions of mootness, duplicative appeals and so forth. On page 436 of 351 of the Sears case, and I will paraphrase to some extend and quote to some, they said, it cannot well be argued that the claim stated in -- well, they talk about the claims -- it cannot well be argued that the District Court has abused its discretion in certifying that there exists no just reason for delay. And then referring to the claims in that case, they said they certainly can be decided independently of each other.

So what we have here, Your Honor, is a final judgment and the District Court exercising its discretion

under Rule 54(b) to enter that judgment where there is no just reason for delay, and the Sears case emphasizes the broad discretion that the District Court has and it was at that point that it focused on the discretion. This is entirely different than matters involving appeals from interlocutory orders because this is not an interlocutory order.

QUESTION: But on 437 -- let me quote you this language from Sears, Roebuck -- ths court says the District Court cannot in the exercise of its discretion treat as final that which is not final within the meaning of section 1291, but the District Court may by the exercise of its discretion in the interest of sound judicial administration release for appeal final decisions upon one or more but less than all claims in multiple claims actions.

MR. DEL DEO: That's correct.

QUESTION: And then it goes on to say primary discretion in the District Court, abuse of discretion review in the Court of Appeals. Now, how do you articulate the standard by which you feel should have been applied by the Court of Appeals but wasn't here?

MR. DEL DEO: Do you mean in the present case?

QUESTION: Yes.

MR. DEL DEO: Well, I think that insofar as the standards are concerned we did pursuant to Sears have a

separate claim for relief and that claim was finally disposed of and within the framework of the Sears decision we have a final decision under section 1291 of 28 U.S.C.

Now, where the Third Circuit has gotten impaled here I think is on this question of a counterclaim, because they have not applied universally this standard of harsh unusual circumstances to cases where there is no counterclaim. But where they become impaled is where the counterclaim.

Of course, the Cold Metal case disposes of the matter of the counterclaim being a barrier because that was decided right after Sears and said you could have a counterclaim, even a compulsory counterclaim.

The Third Circuit in my view is, number one, treating it as interlocutory order and in the Allis-Chalmers case on which they rely they use the specific words "interlocutory order." They say since final certification of an interlocutory order should occur only in the infrequent harsh case. The dissent in that case picked that up and said the majority has blurred the distinction between appeals from final decisions disposing of separate claims and those from interlocutory orders on appeal of --

QUESTION: 1292(b), where the District Court certifies and then the Court of Appeals can accept or reject?

MR. DEL DEO: Well, that is on an interlocutory, yes, they confuse that. They thought that 54(b) was some type of interlocutory and the District Court can't make final that which is not final, so he can't certify under 54(b) in the first place unless -- can't enter that judgment unless it is a final judgment.

Now, as far as the counterclaims are concerned, the Third Circuit is worried about enforcement and that is not a question of finality. They are worried about who shall hold the money. In their decision they said the practical effect here, the practical thing that we are being asked to decide is who shall hold the money until the case is finally decided and that really is not a Rule 54(b), primarily a Rule 54(b) consideration.

As early as Reeves v. Beardall, which was prior to the change in the rule from single transaction over to its present state, this Court held that the stay provisions of Rule 54(b) govern who should hold the money. Now, what has happened now is that the 54(b) stay provisions have been split off into 62(h) which is now where you stay a 54(b) judgment. So if you apply Reeves v. Beardall you say after the judgment has been entered if you want a stay because you want to determine who shall hold the money, then you go under Rule 62(h).

I think the fact that they split that into a

separate rule may well have been to avoid having the confusion of the processes under the stay provisions being confused in the processes under finality.

QUESTION: Your position is that this appeal could have proceeded in the Court of Appeals on the merits and the judgment nonetheless have been stayed pending the outcome of the Third Circuit ruling?

MR. DEL DEO: It could have if the District Court had so determined, and there are a number of cases that we have cited in our brief to this effect. 54(b) certification can be entered, judgments can be entered and a motion made to stay them under 62(h) because of a counterclaim or whatever reason and they can either be stayed or not, not only pending appeal but pending final determination of all the issues.

The District Court certainly has that power but I don't think that goes to finality. That goes to the enforcement of the judgment.

QUESTION: I haven't heard you describe the harsh extraordinary circumstances that are postulated as the basis.

MR. DEL DEO: Well, for one thing, Mr. Chief Justice, I think that harsh unusual circumstances has never been articulated by this Court in describing Rule 54(b).

QUESTION: What did the District Court consider

was the circumstance that justified his certification?

MR. DEL DEO: The District Court considered the fac that Curtiss-Wright was being deprived of its property, its monetary property and would be so deprived for a long time and would suffer financial loss because of it while the unadjudicated claims of both parties went through a long process and while the defendants in this case had the full use of the property. But the rule does not say unusual harsh circumstances to the extent of having to prove some type of irreparable harm. The rule speaks in terms of in my view what justice and fairness dictate and the provision in the rule is no just reason for delay and there is no showing in this case of a just reas for delay other than the fact that there exists a counterclaim. And you cannot really accuse a District Court judge of having abused his discretion by not incorporating Rule 62(h) considerations in the 54(b) determinative process with respect to finality.

I think that to sustain the decision of the Third Circuit is not in harmony with the policy of judicial economy and justice to the litigants. It usurps the discretion of the District Court and I think also it will put a chill on attorneys using the joinder provisions of the rule and joining all their claims where possible in one case. I think it will rather encourage them to start a number of lawsuits rather than do what is judicially

economical and put them in the one case.

Also I think that if you --

QUESTION: That wouldn't really be up to you in this case, would it, because your opponent always has at least a permissive counterclaim and if he wants the benefit of delay as a result of a counterclaim he can always file it.

MR. DEL DEO: Well, Your Honor, I think that one of the dangers of the Third Circuit's position in this case is with respect to counterclaims, that it will encourage imaginative counterclaims certainly and it will also encourage litigants to prolong litigation because --

QUESTION: You were suggesting -- I just wanted to make that point -- you were suggesting -- you have a group of claims on the contract and you also have some claims for additional monies because of alleged fraud and all of that.

MR. DEL DEO: Yes.

QUESTION: You were suggesting that you would be discouraged from joining those in the same action by a contrary rule, but it seems to me even if you had separate actions for your two groups of claims, General Electric could still counter a claim in whichever one they chose.

MR. DEL DEO: Your Honor, that may well be. I haven't addressed myself to that thought frankly, but I

know of very few cases where imaginative counsel -- and I am not accusing my opponent of being imaginative certainly -- but I know --

QUESTION: That is not necessarily an insult.

MR. DEL DEO: What?

QUESTION: That is not necessarily an insult.

(Laughter)

MR. DEL DEO: I know very few cases where somebody can't think up a counterclaim if they are pressed to do it and one good enough to get by a motion to dismiss for failure to state a cause of action. And it was a motion to dismiss for failure to state a cause of action that was made here on the counterclaims that are referred to in our opponent's brief. It was by no ways a decision on the merits.

QUESTION: But you haven't pinpointed what I thought I read in your brief, that ne of the harsh circumstances here is that they are going to be deprived specifically of about a million dollars a year.

MR. DEL DEO: Well, that is a financial injustice. If you just calculate that, if you just calculate by figuring the pre-judgment interest rate and apply it against the present rate, it is not a million any more. I think the last time I figured it out, Your Honor, it was $1.8 million a year and, of course, that doesn't even get into what the value of the use of that money in the marketplace might be.

QUESTION: Would it have served your purposes, your client's purposes if the judge had ordered that the judgment be paid into the registry of the court and invested in high-yield government obligations pending the outcome of the suit so that there might be 11 or 12 percent return instead of 6 percent return?

MR. DEL DEO: Of course, Your Honor, that is really a 62(h) consideration. It doesn't go to the finality of the judgment. In this case, even --

QUESTION: You have gotten into the subject or at least on the edge of the subject of imaginative or innovative remedies and that is why I raised this question. I was wondering if that would solve the problem, would have solved the problem.

MR. DEL DEO: Well that I don't think is a -- with all respect to Your Honor, I think that would come under 62(h) with a stay on terms, and that I suppose could be one of the terms. Even normal --

QUESTION: Are you saying that that would be within the equity powers of the judge?

MR. DEL DEO: Your Honor, what I am saying really is that it is not a consideration under 54(b). I feel that the --

QUESTION: Well, on the finality issue.

MR. DEL DEO: On the finality issue, and it is

not a consideration on the question of abuse of discretion because he has the discretion under this rule and he has not abused it, and there is no standard of harsh unusual circumstances that goes to irreparable harm here. We --

QUESTION: I submit to you only that if you agreed that this would be a reasonable solution, the hypothetical solution I suggested, then would that not have some bearing on the other arguments you are making about the correctness of the District Judge's ruling --

MR. DEL DEO: Well, I --

QUESTION: -- that he had alternative remedies, this hypothetical one being possibly one, and the one he adopted based on finality being another one?

MR. DEL DEO: Well, the motion that I made was under 54(b) and I think the decision he made was a correct one. The question here is a deprivation of property, Your Honor, and I think as far as injustice is concerned, to exercise discretion, I don't know what more injustice you could have, if what you are suggesting is almost a settlement type of thing where the court might say, well, the money will be put up and placed in high-yield securities, but I think there without -- I don't know, the defendant might object to that, without a final judgment.

I think really that 62(h) is the place to consider whether the money should be paid and who should hold

the money.

QUESTION: Well, the Third Circuit here conceded that these decisions are binding under 1291, didn't it?

MR. DEL DEO: They did not quarrel with that. Their dispute with the decisions was really on the question of harsh -- of the existence of the counterclaim and who should hold the money. It didn't bother them apparently that we are not holding our equipment any more and that the General Electric counterclaims are unadjudicated and that the balance of our claims which are substantial are also unadjudicated, and that this claim that we have here is adjudicated. It is finally judgment.

QUESTION: It is my understanding that the Third Circuit -- and I think analytically it would have to make its reversal of the District Court turn on the no just reason for delay standard in Rule 54.

MR. DEL DEO: Well, to the extent then that they are saying that the existence of a counterclaim is a just reason for delay, they are in clear conflict with the Supreme Court decision in the Cold Metal case which held exactly to the contrary, and with the terminology of the rule which envisions that any claim for relief, whether it is in a counterclaim or in the main action, can be subject to entry of final judgment here.

Now, by the fact that, for instance, you can

get a judgment on a counterclaim, chances are there is going to be in existence a complaint and the mere existence of a competing claim is not a barrier to 54(b) certification and entry of judgment, and that is exactly what the Third Circuit is holding in the Allis-Chalmers case by dicta and in this case straight out, and --

QUESTION: Do you feel they laid down a flat rule that any time there is a counterclaim the District Court is not entitled to certify under Rule 54?

MR. DEL DEO: The Third Circuit, to the extent they laid down any standard at all, said that you had to deal with situations like insolvency and economic duress. They dealt with almost irreparable harm type situations. But they have this rule confused with interlocutory orders and that is why they are getting into that type of consideration. They are not treating it as a final order, as a final judgment.

QUESTION: Mr. Del Deo, I'm not sure you answered Mr. Justice Rehnquist's question. Is it your position that whenever there is a counterclaim you, the prevailing party on the original complaint is always entitled to a 54(b) finding?

MR. DEL DEO: No.

QUESTION: You don't take that position?

MR. DEL DEO: No.

QUESTION: But do you take this position? Do you

take the position that the no just reason for delay language only goes to the question of whether the case is appropriate for appeal and that the questions of financial solvency and collectability and all are the questions that are appropriately raised under 62(h)?

MR. DEL DEO: That's correct. Your Honor, I think that what the discretion that the court is to look to is to see whether as in Cold Metal the claims are separate, whether there is an interrelation between those claims that poses problems of mootness, duplicative appeal and so forth that would --

QUESTION: The whole piecemeal appeal problem.

MR. DEL DEO: Yes, that was --

QUESTION: Wasn't there a stay under 62(h) in this case?

MR. DEL DEO: None was applied for, Your Honor.

QUESTION: Has the judgment been collected?

MR. DEL DEO: No, the Third Circuit vacated the District Court's --

QUESTION: But there was a period before it was argued in the Third Circuit --

MR. DEL DEO: The judge in the District Court granted a stay pending appeal.

QUESTION: I see. But now if you win here, is it correct that the case would go back to the Third Circuit

for them to pass on this contract defense?

MR. DEL DEO: Then they would go to the merits of the original appeal which is the 5c release clause in the contract.

QUESTION: Right.

QUESTION: The District Court, as I read his letter opinion on page -- the last paragraph of it on page 13a of the appendix to your petition for writ of certiorari, did say and presumably considered that the presence of the counterclaim as a factor weighing against certification, that he thought that factor was over-balanced by the other factors weighing in favor of certification under 54(b). You concede, as I understand it, that he was correct in weighing that as one of the factors.

MR. DEL DEO: I think he is correct certainly in weighing it insofar as the inner relationship of the claims and the counterclaim and the main case, applying the Cold Metal standard and the Sears standard as to the fact that you look to the inner relationship of those claims.

Insofar as the balance of it, whether or not he weighed it on any other basis, you know, I can't tell you what all of his mental processes were.

QUESTION: In any event, he decided in your favor and you're not going to quarrel with him very much.

MR. DEL DEO: Correct, Your Honor.

I would like to reserve the rest of my time for rebuttal, if I may.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Del Deo.

Mr. Groner.

ORAL ARGUMENT OF ISAAC N. GRONER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRONER: Mr. Chief Justice, and may it please the Court:

The principal ground upon which respondent relies is that Rule 54(b) was a rule in the service of and not contrary to the fundamental policy against piecemeal appeals and that the Third Circuit was correct when it vacated the District Court's entry of the judgment as final which made it appealable under section 1291 for the reason that the grounds upon which the District Court relied did not comport with the tests which were established at the beginning in the adoption of Rule 54(b) and were consistent with the policy against piecemeal appeals.

QUESTION: Of course, an even more effective way to prevent piecemeal appeals would have been to avoid adopting Rule 54(b) at all, wouldn't it?

MR. GRONER: Yes indeed, Your Honor, that is correct, and it was a very serious question to the advisory committee on the rules and to the court presumably in

adopting them as to precisely what scope should be allowed, deviation from the previous rule that there could be no piecemeal appeals, and there is no question that what was intended and what was provided was only a very, very narrow exception and that the burden was to be upon someone who was claiming that exception.

Let me read to you, if I may, the concluding sentences of the advisory committee report and then refer to the initial sentence.

QUESTION: Do you suggest, before you go into that, Mr. Groner, that the District Court wasn't aware of all of these factors when he did this weighing process?

MR. GRONER: I could not say that he was not aware of it. There is no reference, Your Honor, to the advisor's notes. There is reference to the Court of Appeals decision in Allis-Chalmers and to other cases of the Third Circuit which show recognition of the revisor's notes and the very narrow standard. The judge certainly sought to apply that standard in good faith. In our view, as in the view of the Third Circuit, he abused his discretion by exceeding the narrow bounds and indeed relying upon grounds which are improper to be relied upon.

First, to show how narrow the exception to the rule against piecemeal appeals was intended --

QUESTION: Mr. Groner, may I just clarify one

thing. You do agree, do you not, that the judgment was final?

MR. GRONER: No, Your Honor, I take it that that is the issue in this case. The issue in this case --

QUESTION: Is there any question of his power to enter a 54(b) finding?

MR. GRONER: I'm sorry, Your Honor?

QUESTION: Then you question his power to enter a --

MR. GRONER: No, no, no. No, Your Honor. As I understand it, the judgment is not to be considered final in a case in which there are a multitude of claims unless and until the District judge validly enters a certification and --

QUESTION: If there were no just reason for delay, then it would be the kind of order which could be made final, I --

MR. GRONER: Oh, yes indeed.

QUESTION: Okay.

MR. GRONER: No question about it.

QUESTION: All right.

MR. GRONER: In that sense, we don't question the jurisdiction at all.

To turn to the revisor's notes which this Court in another context has held do indeed give guidance as to

what the intentions of the revisors were and what the intention embodied in the amendments to the Federal Rules of Civil Procedure are: After extended consideration, the advisory committee said, it concluded that a retention of the older federal rule was desirable, and that older federal rule, as I shall make clear beyond doubt, was the rule against piecemeal appeals.

Returning to the revisors -- and that this --

QUESTION: It would help me if you would indicate at what date the revisors notes, if you have it --

MR. GRONER: These were I believe in 1946, Your Honor, amendments adopted in 1946, effective in 1948, which put the pertinent words of Rule 54(b) as they are today, although there was a later amendment that had to do with multiple parties and not with any issue that I am aware of that we are talking about this afternoon.

After extended consideration, it concluded that a retention of the older federal rule was desirable and that this 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. This is afforded by amended Rule 54(b). It reestablishes an ancient policy with clarity and precision. And the initial sentence in the revisors' note is, "The historic rule in the federal courts has always prohibited piecemeal disposal of

litigation and permitted appeals only from final judgments except in those special instances covered by statute."

Now, this ancient rule as it existed and was consistently applied by this Court prior to the 1946 amendment was that there should be no appeal and that there could be no appeal --

QUESTION: There is no question but that 54(b) is an exception to that rule, and the question in this case is the breadth of that exception, isn't that correct?

MR. GRONER: Yes indeed.

QUESTION: You would concede that 54(b) is whatever its scope is an exception to that rule?

MR. GRONER: Yes indeed. Yes indeed, Your Honor, and the question as we would see before this Court is whether that exception is to be interpreted and applied narrowly as was intended by the revisors so that there will be fundamental adherence to the rule against piecemeal appeals or whether there shall be deviation from that rule, spreading the exception so wide as to embrace virtually every money judgment case.

QUESTION: What you have to tell us and what I take it you are telling us and about to enlarge on is that the loss of $1.8 million a year, that it was an abuse of discretion for the District judge to say, to believe that the loss of $1.8 million per year on this interest problem

was simply not founded, but that didn't bring it within the infrequent exception rule?

MR. GRONER: That is precisely our position, Your Honor, and it is precisely our position that if there is to be an exception based upon the fact that there is a money judgment and that the market rate of interest, that is to say the rate charged to borrowers of funds, exceeds the statutory interest rate, those grounds would apply to every money judgment.

QUESTION: Are you saying in effect that it has to be a situation almost like Chrysler Motor Company that is on the verge of bankruptcy so it can get some cash right away?

MR. GRONER: That would be the type of case that we would think the framers of the rule intended and would be an infrequent harsh case, because that would be a case that would present special circumstances. To say that the ordinary money judgment presents special circumstances could not --

QUESTION: Well, is a judgment of this size, does that fall in the category of an ordinary money judgment?

MR. GRONER: It is --

QUESTION: What is this, about $20 million, the judgment?

MR. GRONER: Almost $20 million, Your Honor, and

I would not say --

QUESTION: It isn't very ordinary, is it?

MR. GRONER: I'm sorry, Your Honor?

QUESTION: It is not very ordinary.

MR. GRONER: It depends, Your Honor, on whether we are adopting an absolute standard or a relative standard. To me that is huge. On the other hand, there may be corporations -- Curtiss-Wright may be included -- to whom this would be the same kind of relative money judgment as perhaps a few hundred dollars would be to us.

In any event, it was not so large a sum that Curtiss-Wright even tried to present to the District Court any specific grounds for saying that this is an infrequent harsh case.

QUESTION: When you say "us," you're not referring to General Electric, are you? $1.8 million being to Curtiss-Wright like a few hundred dollars would be to General Electric?

MR. GRONER: No, Your Honor, I was really only trying to apply it relative to us, and in all candor I do know how the relative test would come out for any individual or for any corporation.

QUESTION: Well, speaking of relativity, Mr. Groner, I suppose if the advisory committee in the rule-making process was trying to have some firm rules that

would be applicable forever, $20 million in 1946 isn't the same as $20 million in 1980, is it?

MR. GRONER: I suppose not, Your Honor, but again I repeat that it is a large sum of money and, as a matter of fact, that is one of the two grounds that we respectfully urge as not a proper ground for the District Court to take into account. The District Court said this is a large sum of money and it will earn a large sum of money in interest in terms of the difference between the statutory interest and the market interest rate.

QUESTION: Mr. Groner, can I suggest another approach to the case. Perhaps one could read 62(h) as being primarily directed at questions of solvency and collectability and things like that, and that 54(b) is primarily directed at the problems related to piecemeal appeals and total conclusion of litigation. And if the judge's discretion he thought it might expedite winding up the whole case to get a part of it settled finally, that then the rest of it might be settled by adjustment between the parties. Would that be a proper consideration for the judge to take into account, that there is a better chance of settling this monstrous litigation if we get this $18 million item out of the way?

MR. GRONER: Your Honor, the considerations in Rule 54(b) are whether there ought to be an appeal at this

particular time.

QUESTION: Correct, thinking in terms of getting the whole case over.

MR. GRONER: Thinking in terms of perhaps getting the whole case over but weighing that in terms of the historic policy against piecemeal appeal which has well-grounded public policy considerations for it. The effect upon the litigation of the other claims would be a proper consideration. There is no indication here in any way that the judge thought that the disposition of the litigation would be expedited or facilitated by resolution of this issue.

QUESTION: It is a rare District judge who isn't constantly thinking about ways to get a case of this magnitude settled.

MR. GRONER: Well, Your Honor, there is no indication of that and if that was a consideration, that sort of consideration may well be the kind of consideration that ought to be weighed in terms of its significance as against the historic policy against piecemeal appeals. And to say that a judge may certify as final under Rule 54(b) and require the Court of Appeals to pass on the appeal a piecemeal disposition of a particular claim because he may have an unarticulated opinion that it may expedite settlement, does not fall we believe within the purposes or the effects of the rule.

QUESTION: On this record, he didn't articulate any such consideration.

MR. GRONER: No, Your Honor.

QUESTION: What if the Third Circuit, Mr. Groner, had said in this case, considering Rule 54(b) and its relationship to the tradition against piecemeal appeals, that in any case in which there is a pending plausible counterclaim a District Court in this circuit shall not certify for appeal a final decision pursuant to Rule 54(b)? Do you think that would be consistent with Sears, Roebuck v. Mackey?

MR. GRONER: We do not think that that is what the Third Circuit did.

QUESTION: Mine is a hypothetical question.

MR. GRONER: If they had done so, if they had established a rule which actually barred the District judge from certifying any case in which there was a counterclaim, we would not think that that would be a proper exercise of discretion. Certainly the framers of Rule 54(b) intended that there be discretion. We are talking about the standards for the exercise of discretion, and to provide that kind of absolute rule I don't think we would regard it as proper and the Court of Appeals did not do so. And although petitioner does attempt to frame the question at some point, and even at some point this afternoon he stated that the

question was whether the certification should be barred when there are counterclaims, that is not what the Third Circuit did and in any event that is not a proper reading of Rule 54(b).

QUESTION: If it is not a proper reading of Rule 54(b) but is what the Third Circuit did, then it ought to be reversed.

MR. GRONER: It is not what the Third Circuit did, Your Honor. The Third Circuit said that in the absence of harsh and unusual circumstances, the existence of a counterclaim is a factor that weighs heavily against the certification of a judgment as final. In other words, what they were saying is two things: One, that this is a factor which we think should be given importance; and, secondly, precisely by wording it as a factor, they were saying this is an issue where discretion should be allowed, we are not barring, we are not putting forth any absolute rules, what we are saying is that it is a matter of particular facts and under these particular facts on this record that is a factor to which we the Court of Appeals ascribe potent weight.

QUESTION: Mr. Groner, if you know, has there been any great rush of certifications under Rule 54?

MR. GRONER: We do not know, Your Honor, but --

QUESTION: I must say that there is some

observation that in a general way up here, I have never heard that there has been any great use of the rule of exceptions such as Judge Coolahan made here.

MR. GRONER: We have not made such a study, Your Honor. We would submit that the reversal of the judgment below would encourage more Rule 54(b) certifications and more Rule 54(b) disputes. We would not necessarily describe it as a rush because in all candor we would have no way of predicting it.

QUESTION: Well, the fact is that the Mine Run Plain Manila case doesn't lend itself to 54(b) disposition, does it?

MR. GRONER: I'm sorry, I --

QUESTION: The ordinary case isn't amenable to 54(b), it doesn't involve separate issues.

MR. GRONER: Well, the ordinary case may or may not involve separate issues, Your Honor. There are many cases in which there are --

QUESTION: Yes, but comparatively few compared to most civil cases in the Federal District Courts, there are not many cases comparatively where 54(b) would be applicable.

MR. GRONER: There are a number of cases which apply Rule 54(b). The annotations, of course, do contain --

QUESTION: But you earlier said everything --

MR. GRONER: Is relative.

QUESTION: -- is relative.

MR. GRONER: Compared to other issues, compared to Rule 56 issues, for example --

QUESTION: Right.

MR. GRONER: -- certainly they are small in number.

QUESTION: Of course, the District judge here obviously placed his emphasis on the extraordinary aspect of this case, that is the large amounts involved, and on the fact that these issues could be treated separately and on the fact that if he was in error in his exercise of discretion there could be a judgment, a collectable judgment the other way. Those three factors were all in his finding, is that not so?

MR. GRONER: Yes, Your Honor, but the large amount of money was critical, it appears to us, not so much for its own sake but for the difference in the interest rate which it represented.

We would like to say first of all as to the amount of money, what you have is a District judge who in effect is saying, I am reaching a different decision because a claim is large, because in effect there is a large corporation making that claim than I would make if the claim were small. And we would respectfully submit that that is not an appropriate type of determination for a system which grants equal

justice under law, perhaps more significantly for a District judge to be concerned with the difference in interest rate between what state law has provided, and this in a diversity case, and what he regards as the market rate of interest is for him to be concerned with something which ought not to concern him.

The State of New York, which was the governinr law with respect to this issue, the State of New York has set a particular percentage rate of interest on judgments. The legislature and the governor and the entire legislative process of the State of New York must have been well aware of the competing considerations, the desire for definiteness for set rate in all cases as against the factors on the other side, namely that there would be market variances and that there might be the possibility in a commercial sense of obtaining a higher interest rate.

Now, the legislature of the State of New York decided that it would provide a set rate, not a flexible rate depending on a market rate, and it made that applicable to the kind of judgment that is involved here.

QUESTION: Do you know the date that that was done?

MR. GRONER: I believe 1970 or '71, Your Honor.

QUESTION: Well, the legislature always lags behind the current facts, doesn't it?

MR. GRONER: Well, I am not prepared to say that about the legislature of the State of New York, Your Honor. But in any event, if they do they would know that and it is precisely that the legislature would take into account, Mr. Justice Blackmun, what would happen in the future, that this is a matter of legislative policy. Certainly, the legislature understood that in the future there might be all kinds of economic situations, there might be inflation, there might be elevations in the interest rate. They had the possibility of making a flexible rate, precisely the kind of thing that is now before the Senate of the United States, the Congress of the United States. A Senate bill passed by the Senate is now before the House which would make applicable the judgments in federal cases a variable interest rate. It would make applicable to judgments the interest rate provided in the Internal Revenue Code which is tied to the market rate.

Now, what is involved here is a judge in effect saying what the legislature of the State of New York has provided is improper, is unjust. In my judgment in this case, if I apply the law of the State of New York as the legislature has adopted it and specified it, then Curtiss-Wright will lose more money than I like to see a litigant lose. And in a diversity case we say to Your Honors that that is an improper judgment for a federal district judge

to make.

We say further that the matter of interest rates on judgments is clearly a legislative matter. As I have indicated, there is a Senate bill which seeks to change that. The Congress of the United States has many different provisions with respect to interest in different statutes. In some cases they have provided for no interest with respect to the United States. In other cases they provided different rates. But the Congress has been the one which has regulated that subject matter.

QUESTION: And your submission is that it is impermissible for a district judge to consider in any way the difference between the going economic rate of interest and the statutory rate?

MR. GRONER: Yes, Your Honor.

QUESTION: Did the Court of Appeals say anything like that?

MR. GRONER: No, Your Honor.

QUESTION: That cuts down the scope of Rule 54 quite a bit, doesn't it?

MR. GRONER: We do not think so, Your Honor, because in our view --

QUESTION: Well, you would take that out of -- you would say that is not a factor the district judge may consider, you just said that.

MR. GRONER: Oh, yes, Your Honor, but it is a factor which he never was enabled to consider under Rule 54(b).

QUESTION: Right.

MR. GRONER: So we are not reducing the scope.

QUESTION: Well, who tells us, where do we find out that he never was able to consider that?

MR. GRONER: You find that, Your Honor, from two different sources. One is the provision or the guidance provided by the advisors. If they had thought when they specified the infrequent harsh case, we submit that we are talking about factors that are applicable uniquely to particular litigants, we are not talking about factors that are applicable to groups of cases. That is one source of our submission, that it was improper for the district judge to take the rate of interest into account.

The second source is the very concept of whether establishing and enforcing a rate of interest for judgment lies within the judicial province at all, whether it does now or whether it did when the rule was adopted or amended. We submit to Your Honors that it clearly is not within the judicial province, that Congress for federal judgments and state legislatures for state judgments have provided what the rule should be. And we cite the Funkhouser case as a holding of this Court which says that the establishment of

a rate of interest on judgments is a matter for the legislative province.

So we say to Your Honor that when a judge takes a factor into account which is within the legislative purview, he is not acting in a way which a Court of Appeals ought to sustain as a proper exercise of judicial discretion.

QUESTION: Mr. Groner, in one sense I suppose the question is whether he abused his discretion in finding no just reason for a delay. Does anything in the revisors' notes or the history of the rule tell us on whom the burden falls on the just reason for delay issue? Is it upon the proponent of the finding, does he have the burden of showing there is no just reason or is it on the one who says there is a just reason, to point out the reason?

MR. GRONER: In our view, it quite clearly falls upon the one who is proposing that the judgment be final and this is a reflection in our view again of the bedrock consideration that the general rule is that there shall be no piecemeal appeals. So it is the supplicant for the exception to the rule who has that burden and we say in this case that there was no effort to meet that burden. There was no effort to show that there was anything unique about Crutiss-Wright which distinguished it from any other holder of a money judgment which would justify holding this to be the infrequent harsh case.

The fact that the extent to which the claims and counterclaims may be independent or the prospective mootness of the issues in our view set the stage. They do not deal with the question which is whether or not the time of the Court of Appeals and of the parties should be taken up with an appeal at this particular time.

I note, for example, that the judge found that granting the certification would not prevent the rest of the case from coming to trial. He did not say that it would aid it and, quite clearly, any time there is an appeal there is some diversion of the attention and scope of resources in litigation from the trial process to the appellate process, and this is part of the public policy which is involved in the rule against piecemeal appeals and this is the general rule which is involved in our view in this case.

Now, it might be pointed out that the funds that are of concern here are not funds that have been available to the use of the General Electric Company. They are funds, if you want to look for them, they are in a public FISK. General Electric, under its prime contract, receives the funds only as reimbursement after it pays them out, so that the actual funds are funds in the treasury rather than with General Electric and that is where they have been during this time.

In our view, to say that because considerations

are appropriate under one federal rule of civil procedure, they may not be applied under another federal rule of civil procedure is plainly inaccurate. Whether or not any of these considerations are appropriate to an application under Rule 62(h) is beside the point, in our view, as to whether or not they are proper under Rule 54(b). Each of these rules has different functions and the function of Rule 54(b) is related to the traffic to the appellate process and the exception to the general rule is a narrow one. Whether or not there ought to be a stay pending an appeal or pending some other time is not the province of Rule 54(b).

In effect, the disposition by the Court of Appeals here right now has led to the same practical result as a grant of a 62(h) stay because in effect the Court of Appeals has said that there will be no execution of the judgment and there will be no appeal of the decision until after there has been trial of the other claims.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Del Deo, you have about four minutes left.

ORAL ARGUMENT OF RALPH N. DEL DEO, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. DEL DEO: Thank you, Your Honor.

In the first place, the difference between

prejudgement interest rate and the interest which we would get even if this judgment were final and stayed is considerable because the New York prejudgment interest rate is significantly lower than the interest rate applicable to judgments, so the last statement that was made that this is the same effect as a stay under 62(h) is inaccurate.

We would still love half a million dollars -- there is half a million dollar differential a year just in the difference of prejudgment-post-judgment interest rates. Besides, prejudgment interest rates are meant to apply before a claim is finalized and adjudicated. Our claim is final, it has been adjudicated.

QUESTION: Do you equate that to property?

MR. DEL DEO: Well, I think also the deprivation of property in and of itself -- the difference in the interest rate show you how much the loss is. The loss of the use of the property is significant, not being able to have it to use in their operations. And I assure you, if there is any misconception here, I want to resolve it. $20 million is a lot of money to Curtiss-Wright. It is not an insignificant amount. I don't think there is any doubt about that.

But I would like to read from this advisory committee note --

QUESTION: Is $20 million enough to change the

rule?

MR. DEL DEO: I think this is what the rule --

QUESTION: I mean that is the --

MR. DEL DEO: This is quite within the rule. This is the purpose of the rule.

QUESTION: We will say the same rule with $10,001.

MR. DEL DEO: Your Honor, the purpose --

QUESTION: Am I right?

MR. DEL DEO: Pardon?

QUESTION: You would say the same thing if the total amount involved was $10,001?

MR. DEL DEO: I think you have to take in all the facts in the case. In this case, for instance, Judge Coolahan --

QUESTION: So the answer would be you didn't know, yes or no?

MR. DEL DEO: Well, Your Honor, I was going to say in this case, if you would permit me to answer your question --

QUESTION: Sure.

MR. DEL DEO: -- was that Judge Coolahan also noted that this was going to be a lengthy proceeding, so it is not just the loss of that much money, it is the loss of that much money over a long period of time. A smaller

amount might be de minimis to one litigant. I think this is why the discretion was given to the District Court judge. The money that we are losing on the interest rate, for instance, can never be recouped. If at the end of the case General Electric counterclaims --

QUESTION: You might not get anything.

MR. DEL DEO: Pardon?

QUESTION: If you win the case you might not get anything.

MR. DEL DEO: Well, Your Honor, we will always get the $20 million but we will never recoup the difference in the interest at the end of the case.

Now, I read from this advisory committee note that was referred to. It says Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created civil action in order to avoid the possible injustice of a delay in judgment on distinctly separate claim to await adjudication of the entire case. That is exactly what we have here. We have injustice resulting from the delay of our claim.

The Third Circuit wishes to equate the kind of injustice we have to show over and above the obvious injustice to something relating to insolvency and economic duress. But if we were insolvent, my opponent would be here saying that we shouldn't get the money because we would

go broke and lose it if we had to pay it back. So that is --

QUESTION: Unless you put up a bond.

MR. DEL DEO: Pardon?

QUESTION: Unless you put up a bond.

MR. DEL DEO: Which if we were insolvent we couldn't afford, Your Honor.

QUESTION: Could I ask you, if a counterclaim hadn't been pending would you think the Court of Appeals would have said that certification is all right?

MR. DEL DEO: In similar cases which this Court has had, in Liberty Mutual and Tildon, the Court of Appeals in the Third Circuit has permitted such cases to come to be certified. In fact, they did it erroneously --

QUESTION: Even though the reason may be that just the reason that the District judge relied on here?

MR. DEL DEO: Yes, they never used harsh unusual circumstances in cases without counterclaims that I know of.

QUESTION: So that the counterclain really is the turning point in the case.

MR. DEL DEO: It is --

QUESTION: Is the reason that they imposed the different standard.

MR. DEL DEO: It is the only reason that they have articulated and it is the one I see, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:30 o'clock p.m., the case in the above-entitled matter was submitted.)

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