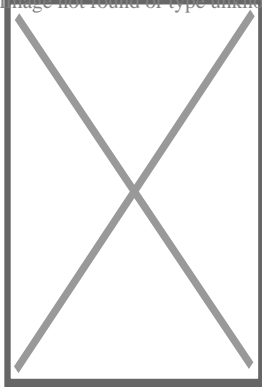


APPELLATE TIP: AT WHAT POINT IS A CERTIFICATION OF RULE 54(B) APPROPRIATE?

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Recently, opposing counsel asked if we would stipulate to Rule 54(b) certification of a particular order granting/denying summary judgment on some but not all of plaintiffs' claims. Of course, we thought this would make a great topic for an appellate tip.

Rule 54(b), Ariz. R. Civ. P., permits trial courts to enter judgments as to fewer than all claims or all parties in a multi-count or multi-party proceeding "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The phrase "no just reason for delay" means "there must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Pulaski v. Perkins*, 127 Ariz. 216, 218 (App. 1980). The purpose of Rule 54(b) is to promote judicial economy. *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 192 (1981). The rule is a "compromise between the policy against interlocutory appeals and the desirability, in a few cases, of an immediate appeal to prevent an injustice," *SW. Gas Corp. v. Irwin* (County of Cochise), 229 Ariz. 198, 202 (App. 2012).

The circumstances under which a trial court can make the requisite express determination and certify a judgment as final under Rule 54(b) is an issue committed to the trial court's sound discretion. *Cont'l Cas.*, 130 Ariz. at 191. But the mere inclusion of Rule 54(b) language in a judgment "does not make it final and appealable; the certification also must be substantively warranted." *SW. Gas Corp.*, 229 Ariz. at 202. Appellate courts have criticized the "indiscriminate use of 54(b) determinations." *Pulaski*, 127 Ariz. at 219.

A number of published cases address whether a Rule 54(b) certification is an abuse of discretion. For example, the court of appeals held that certifying a judgment under Rule 54(b) was not an abuse of discretion as to medical payments-related counts against a commercial general liability insurer. *Salerno v. Atlantic Mut. Ins. Co.*, 198 Ariz. 54 (App. 2000). The court explained that the judgment finally disposed of all claims related to the medical payments provision, those claims were enforceable apart from other claims, and they required proof of different facts. *Id.* Nor did a trial court abuse its discretion in certifying under Rule 54(b) a judgment for a plumbing, heating, and air conditioning contractor on its claim for payment, despite the fact that the developer raised counterclaims for defective construction and repudiation of warranties. *Egan-Ryan Mechanical Co. v. Cardon Meadows Development Corp.*, 169 Ariz. 161 (App. 1990). The trial court properly waited until after resolution of those counterclaims that might have resulted in significant offsets for the developer. *Id.*

Examples of cases where the court of appeals did find an abuse of discretion include one where the trial court certified under Rule 54(b) a judgment awarding statutory attorneys' fees for prospective purchasers of land against the vendor's real estate agent, where no judgment had yet been rendered on the merits of the prospective purchaser's fraud claims against the agent. *Kim v. Mansoori*, 214 Ariz. 457 (App. 2007). Other cases finding an abuse of discretion include a Rule 54(b) certification of a partial summary judgment order on a bad faith count, which did not dispose of a separate negligence claim, the facts underlying both the bad faith and negligence counts had significant overlap, and plaintiffs would be limited to a single recovery for their core compensatory damages if both counts were presented to the jury. *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369 (App. 1996).