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Clarifying Appellate Standards of Review: Why Rule 19(b) is a Mixed Question of Law and Fact that Requires Abuse of Discretion Review

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I. Introduction

The United States Courts of Appeals are currently split regarding the appropriate standard of appellate review for a district court's decision relating to Federal Rule of Civil Procedure 19(b).[1] Federal Rule of Civil Procedure 19 concerns the required joinder of parties.[2] Rule 19(a) is used to determine persons required to be joined if feasible.[3] Rule 19(b) is applied when joinder of those parties from Rule 19(a) is not feasible.[4] Rule 19(b) requires that if a Rule 19(a) party cannot be joined, the court must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."[5]

The Second Circuit in *Marvel Characters, Inc. v. Kirby*[6] recently noted the circuit split that was first recognized in 2000.[7] Although the court in *Marvel* had no occasion to review a Rule 19(b) determination,[8] the United States Supreme Court in *Philippines v. Pimentel*[9] did, but it elected to wait to determine the appropriate standard of appellate review.[10] In *Pimentel*, the district court's decision required reversal under either abuse of discretion review or *de novo* review since a court "by definition abuses its discretion when it makes an error of law."[11] The only guidance

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[1] Only the Sixth Circuit applies *de novo* review. The Seventh Circuit has not yet articulated a standard of review. All other circuits apply abuse of discretion review, as discussed in Part III.

[2] Fed. R. Civ. P. 19.

[3] Fed. R. Civ. P. 19(a).

[4] Fed. R. Civ. P. 19(b).

[5] *Id.*

[6] Marvel Characters, Inc. v. Kirby, No. 11-3333-cv, 2013 U.S. App. LEXIS 16396, at *25 n.3 (2d Cir. Aug 8, 2013).

[7] Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., 210 F.3d 246, 250 n.7 (4th Cir. 2000).

[8] *Marvel*, 2013 U.S. App. LEXIS 16396, at *25 (noting that the district court mistakenly concluded that it had personal jurisdiction over the appellants).

[9] Philippines v. Pimentel, 553 U.S. 851, 864 (2008).

[10] *Id.* (holding that determination of the appropriate standard did not need to be decided because errors requiring reversal were implicit in the district court's rulings and explicit in the court of appeals' opinion).

[11] *Id.* (quoting Koon v. United States, 518 U.S. 81, 99–100 (1996)) (internal quotations omitted).

from *Pimentel* is that the "in equity and good conscience" language in Rule 19(b) implies some degree of deference to the district court's findings.[12]

In making a Rule 19(b) determination, a court may consider four factors.[13] While these factors may guide the analysis, they are nonexclusive.[14] Rule 19(b) is a mixed question of law and fact since it involves the application of an objective standard to a set of facts.[15] The correct level of appellate review for mixed questions of law and fact has often led to confusion amongst the courts. Since Rule 19(b) is a mixed question of law and fact involving a legal conclusion drawn from a Federal Rule of Civil Procedure concerned with the supervision of litigation, it warrants abuse of discretion review.

Part II of this Comment examines the importance of appellate standards of review, both from the appellate practitioner's perspective, as well as the court's perspective. Part II also gives an overview of mixed questions of law and fact and the main appellate standards of review. Part III provides a detailed analysis of the current landscape of the appellate review of Rule 19(b) and explains why Rule 19(b) is a mixed question of law and fact. Part IV argues that a Rule 19(b) determination is a legal conclusion drawn from a Federal Rule of Civil Procedure concerned with the supervision of litigation, which warrants abuse of discretion review. This argument is based on an analysis of cases that have applied abuse of discretion review to other legal conclusions drawn from mixed questions of law and fact concerning other Federal Rules of Civil Procedure or legal doctrines concerned with the supervision and management of litigation. Part V concludes

[12] *Id.*
[13] The four factors are: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b).
[14] *Pimentel*, 553 U.S. at 862.
[15] *See* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting).

this Comment by arguing that the United States Supreme Court should resolve this circuit split and begin to clarify the standard of review for mixed questions of law and fact.

II. Overview of Appellate Standards of Review

A. The Importance of the Standards of Review

Appellate standards of review deserve the same consideration as the merits of the case.[16] Unfortunately, however, their importance is often ignored by practicing attorneys and judges.[17] The appellant would be best served if the appellate court gives little or no deference to the lower court; whereas, the appellee would want a highly deferential standard of review. The appellant's likelihood of success is diminished if the appellate court were to apply a deferential review such as abuse of discretion, but if the appellate court applies no deference, known as *de novo* review, the appellant's likelihood of success is much higher. Thus, an appellant should attempt to persuade the appellate court to apply a less deferential standard of review.

Rule 28 of the Federal Rules of Appellate Procedure requires that both the appellant's brief and the appellee's brief contain "a concise statement of the applicable standard of review."[18] Deferential review of factual findings restricts arguments to "analysis of evidence and inferences in support of the final findings made by the factfinder and require the appellant to demonstrate that the findings cannot be correct."[19] Prejudicial or plain error review calls for arguments "analyzing the application of law to the facts to show that proper application of the law would have resulted

[16] *See* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 867–68 (1990) ("Because the appropriate standard of review will control the outcome of an appeal, appellate practitioners must consider the standard of review with the same thoughtful consideration that they give to the facts and the substantive law.").
[17] Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 368 (1997).
[18] Fed. R. App. P. 28.
[19] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.01 (Matthew Bender 3d Ed.).

in a different outcome."[20] The abuse of discretion standard "demands analysis of the facts and law to see whether the court or agency overlooked the clear significance of the facts or misapplied the law or had the power to make the ruling."[21] *De novo* review "requires a legal analysis and argument"[22] because under *de novo* review, the appellate court may give no deference to the district court's findings.[23] An argument on appeal "based on an incorrect standard of review must fail."[24] As illustrated, a clear standard on appeal is crucial to successful litigation.

The concept of appellate standards of review did not become "firmly rooted" in judicial opinions until the end of the twentieth century.[25] Both the bench and the bar will benefit from a clear explanation of not only "what" the appropriate standard of review is, but "why" that particular standard is appropriate.[26] A clear standard of review would allow appellate lawyers to more accurately predict how their issues would be treated on appeal.[27] It would also benefit appellate judges in assessing the merits of an appeal.[28] Failure to properly address the standard of review leads to "an inconsistent and unreliable body of law."[29] In addition to the development of a consistent body of law and the increased ability to predict success on appeal, standards of review also "balance the power among the courts" and "enhance judicial economy."[30]

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[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.04 (Matthew Bender 3d Ed.).
[24] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.01 (Matthew Bender 3d Ed.).
[25] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 237 (2009) (citing G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005)).
[26] Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 231 (1991).
[27] *See Id.* at 250–51.
[28] *Id*.
[29] Peters, *supra* note 25, at 235.
[30] *Id*. at 238.

B. Standards of Appellate Review: Is It A Question of Law, Question of Fact, Or Mixed Question of Law and Fact?

The different standards of appellate review provide for "how 'wrong' the lower court has to be before it will be reversed."[31] The appellate standard of review is determined by the court's interpretation of the issue as one of law or fact.[32] A question of law has been defined as "[a]n issue to be decided by the judge, concerning the application or interpretation of the law."[33] A question of fact has been defined as "an issue that has not been predetermined and authoritatively answered by the law."[34]

In practice, however, "the appropriate methodology for distinguishing questions of fact from questions of law has been to say the least, elusive."[35] One scholar has noted, "at first blush, this distinction might seem self-evident, yet commentators have disputed for decades the boundaries of each, and noted their 'delusive simplicity.'"[36] Another scholar has observed that "the debate on what constitutes an issue of fact and what constitutes an issue of law has been going on in this country for over a century."[37]

When the line between a question of law and a question of fact began to blur, hybrid standards such as "mixed question of law and fact" and "application of law to facts" emerged and soon became problematic.[38] The appropriate standard to be applied to the hybrid "mixed question

[31] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 14 (3d ed. 2010).
[32] Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 21 (1994).
[33] BLACK'S LAW DICTIONARY 1366 (9th ed. 2009).
[34] *Id*.
[35] Miller v. Fenton, 474 U.S. 104, 113 (1985).
[36] Hofer, *supra* note 26, at 235 n.17 (1991) (citing Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922)).
[37] Kunsch, *supra* note 32.
[38] *Id*. at 22.

of law and fact" has historically been a point of debate among legal scholars.[39] There is still no consensus among legal scholars.

The Supreme Court has described a mixed question of law and fact as an issue that "requires application of an objective legal standard to the facts."[40] The Court noted that the standard of review is often not determined by an explicit statutory command, but is provided "by a long history of appellate practice."[41] In the absence of such a statutory command or history of appellate practice, the Supreme Court has noted that "it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer."[42]

The appropriate standard of appellate review for mixed questions of law and fact has created several circuit splits that have already been resolved by the Supreme Court.[43] The Court continues to decide the standard of review for mixed questions on an *ad hoc* basis.[44] Practical and policy considerations often guide appellate courts in determining standards of review for mixed questions of law and fact.[45] Two major practical considerations include the expertise of the district

[39] Hofer, *supra* note 26, at 243 (*comparing* J. Thayer, *A Preliminary Treatise of Evidence At The Common Law* 191 (1898) (mixed questions should be treated as questions of fact), *with* O. Holmes, *Collected Legal Papers* 236 (1920) (mixed questions should be treated as questions of law)).
[40] Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting).
[41] Pierce v. Underwood, 487 U.S. 552, 558 (1988).
[42] *Id.*
[43] *See e.g.*, Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001) (holding that an award of punitive damages should be reviewed de novo to assure compliance with Due Process); *Ornelas*, 517 U.S. 690 (holding that questions of reasonable suspicion and probable cause for a warrantless search should be given *de novo* review); Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991) (holding that a district court's determination of state law should be reviewed *de novo*); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399 (1990) (holding that a district court's imposition of Rule 11 sanctions should be reviewed for abuse of discretion); *Pierce*, 487 U.S. at 558 (holding that a district court's determination of whether the Government's position was "substantially justified" warranted abuse of discretion review); Miller v. Fenton, 474 U.S. 104, 112 (1985) (holding that a state court's determination of voluntariness of confession should be reviewed *de novo*).
[44] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.04 (Matthew Bender 3d Ed.).
[45] *Ornelas*, 517 U.S. at 700 (Scalia, J., dissenting); *See* Kunsch, *supra* note 32, at 23; Bosse, *supra* note 17, at 397.

court and the law-clarifying value of probing appellate scrutiny.[46] One major policy consideration is whether constitutional rights are implicated, if so, *de novo* review may be favored.[47]

Some United States Supreme Court cases have applied *de novo* review to mixed questions of law and fact.[48] In advancing a rule for *de novo* review of mixed questions of law and fact, the majority in *Ornelas v. United States* reasoned that fact patterns may occasionally repeat themselves.[49] Even in cases that purport to apply *de novo* review due to constitutional considerations, an appellate court may give deference to inferences made at trial.[50] The Supreme Court has also applied abuse of discretion review to mixed questions of law and fact "when it appears that the [district] court is 'better positioned' to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[51]

Rule 19(b) determinations are mixed questions of law and fact that should be reviewed under an abuse of discretion standard. The district court has more expertise over the factual considerations, and appellate review will not clarify the law. Additionally, Rule 19(b) determinations are not the type of fact patterns that the *Ornelas* Court would have deemed likely

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[46] *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting).
[47] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 15 (3d ed. 2010).
[48] When dealing with mixed questions of law and fact involving constitutional issues, the court justifies *de novo* review to unify precedent and stabilize legal principles. *See* United States v. Arvizu, 534 U.S. 266, 275-76 (2002) (reasonable suspicion under the 4th Amendment); Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001) (review of punitive damages award to comport with Due Process); *Ornelas*, 517 U.S. at 691 (1996) (reasonable suspicion and probable cause under the 4th Amendment); *Miller*, 474 U.S. at 112 (certain interrogation techniques are condemned by the Due Process Clause of the 14th Amendment); Cuyler v.Sullivan, 446 U.S. 335, 343 (1980) (right to effective counsel under the 6th Amendment); Baumgartner v. United States, 322 U.S. 665, 673–74 (1944) (constitutional rights as a naturalized citizen).
[49] *Ornelas*, 517 U.S. at 698.
[50] *See id.* at 699 ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."); *Arvizu*, 534 U.S. at 277.
[51] Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) (quoting *Miller*, 474 U.S. at 114); *see Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting) (noting that "expertise of the district court and lack of law-clarifying value in the appellate decision" are the "primary factors" that weigh in favor of deferential review of mixed questions of law and fact.).

to repeat themselves because they are so fact-intensive.[52] The Supreme Court in *Pimentel* noted that a Rule 19(b) decision is a "case-specific inquiry."[53] The district judge is in a better position to apply the objective legal standard to the facts of each unique case for Rule 19(b) determinations.

Until the Supreme Court makes a ruling on the appropriate standard, the courts of appeals will continue to follow their own precedent in reviewing a district court's Rule 19(b) determination. The following subsections explain in detail the three traditional appellate standards of review, as well as the policy considerations behind them. Understanding the differences between the various standards of review further clarifies why a Rule 19(b) determination warrants abuse of discretion review.

i. De Novo Standard of Review

De novo review is also known as "plenary" or "independent" review.[54] Under *de novo* review, the district court's conclusions may be given no deference by the appellate court.[55] The appellate court is allowed to make its own decision as to the correct application of the law using the evidence and findings of fact from the district court.[56] The Supreme Court has said that a reviewing court is performing *de novo* review when it "makes an original appraisal of all the evidence to decide whether or not it believes [the conclusions reached by the district court]."[57] Questions of law warrant *de novo* review.[58]

[52] *See Ornelas*, 517 U.S. at 703 (Scalia, J., dissenting) (noting that fact-intensive issues such as probable cause and reasonable suspicion are "fluid concepts," which are not determined by a set formula are not likely to repeat themselves).
[53] Philippines v. Pimentel, 553 U.S. 851, 864 (2008).
[54] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.04 (Matthew Bender 3d Ed.).
[55] *Id.*
[56] *Id.*
[57] Bose Corp. v. Consumers Union of United States, Inc. 466 U.S. 485, 514 n.31 (1984).
[58] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.04 (Matthew Bender 3d Ed.).

De novo review of purely legal issues "best serves the dual goals of doctrinal coherence and economy of judicial administration."[59] This goal is particularly important when an appellate court reviews constitutional issues.[60] Institutional competence is a major consideration in determining the appropriate level of deference that is to be given to a district court's determination.[61] District courts necessarily focus their energy and resources towards hearing witnesses and reviewing evidence.[62] Logistical burdens "limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs."[63] Appellate judges have the benefit of a developed record, which allows them to "devote their primary attention to legal issues."[64] Since the appellate courts are directed toward resolving questions of law, the parties' briefs will be refined to provide more comprehensive information and analysis that were not provided for the district court.[65]

In addition to questions of law and mixed questions of law and fact involving constitutional considerations, issues involving complex analysis of the law might benefit from the uniformity that review from a non-deferential appellate court can provide. For these types of issues, *de novo* review is the best way to achieve uniformity within a jurisdiction. Uniform development of the law is important for people to understand the boundaries of the law. The Supreme Court should maintain its commitment to *de novo* review for questions of law and explicitly adopt the *de novo* standard for mixed questions of law and fact relating to constitutional issues.

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[59] Salve Regina Coll. v. Russell. 499 U.S. 225, 231 (1991).
[60] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 15 (3d ed. 2010).
[61] Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 440 (2001) (holding that an appellate court is better positioned to evaluate a punitive damages award for consistency with due process).
[62] *Salve Regina*, 499 U.S. at 231.
[63] *Id.*
[64] *Id.* at 232.
[65] *Id.*

While *de novo* review may enhance uniformity with respect to purely legal questions, "fact-bound resolutions cannot be made uniform through appellate review, *de novo* or otherwise."[66] It would be "unwise" to require courts of appeals to review mixed questions of law and fact that are fact-bound in nature under *de novo* review.[67] Reviewing fact-specific determinations may "'strangely distort the appellate process' by establishing circuit law in 'a most peculiar, second-handed fashion.'"[68] The following subsections will give further detail as to why issues involving facts or the application of an objective standard of law to the facts do not benefit from *de novo* review.

ii. Abuse of Discretion Standard of Review

The abuse of discretion standard is "deferential to the district court's familiarity with the proceedings and evidence in the case."[69] Abuse of discretion review has been applied to mixed questions of law and fact involving "legal conclusions"[70] drawn from a district court's analysis of a "procedural device"[71] or issues concerning supervision of litigation.[72] The appropriate level of review for such questions that involve the weighing and balancing of contending factors is "likely to be close," but a district judge is in the best position to "explore all the facets of a case;" therefore, a district judge's assessment merits substantial deference on review.[73]

The Supreme Court has not articulated a test to determine whether a district court has abused its discretion;[74] however, many circuits have developed their own standards.[75] In abuse of

[66] Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 936 (7th Cir. 1989).
[67] Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).
[68] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990) (quoting Pierce v. Underwood, 487 U.S. 552, 561 (1988)).
[69] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.05 (Matthew Bender 3d Ed.).
[70] *Cooter & Gell*, 496 U.S. at 401 (describing Federal Rule of Civil Procedure 54(b) as a "procedural device").
[71] Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 3 (1980).
[72] Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991).
[73] *Curtiss-Wright*, 446 U.S. at 12.
[74] Koon v. United States, 518 U.S. 81, 99–100 (1996).
[75] 19-206. MOORE'S FEDERAL PRACTICE – CIVIL § 206.05 (Matthew Bender 3d Ed.).

discretion review, an appellate court is "not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments [of the district court] are judicially sound and supported by the record."[76] An appellate court must scrutinize the district court's evaluation of the facts, but the "discretionary judgment of the district court should be given substantial deference."[77] In an abuse of discretion review, it does not matter if the appellate court would have decided the matter in the same way, only that the district court did not abuse its discretion.[78]

The deference shown to the district courts through the abuse of discretion standard "will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court."[79] Similarly, the deference will "enhance [a district court's] ability to control the litigants before them."[80] Additionally, the abuse of discretion standard will discourage litigants from appealing marginal issues.[81]

There is a long line of Supreme Court jurisprudence that supports the concept that legal conclusions drawn from mixed questions of law and fact concerning Federal Rules of Civil Procedure or legal doctrines concerned with the supervision and management of litigation should receive abuse of discretion review.[82] The Supreme Court should explicitly adopt the abuse of discretion standard for all such mixed questions of law and fact, including Rule 19(b). The district court is ideally positioned to evaluate the facts and to apply them to an objective legal standard. If the appellate court were to duplicate the efforts of the district court, "it would very likely contribute

[76] *Curtiss-Wright*, 446 U.S. at 10.
[77] *Id.*
[78] NHL v. Metro. Hockey Club, 427 U.S. 639, 642 (1976).
[79] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990).
[80] *Id.*
[81] *Id.*
[82] Some of the cases will be discussed in Part IV.

only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."[83]

iii. Clearly Erroneous Standard of Review

The "clearly erroneous" standard of review applies to findings of fact.[84] As stated in Federal Rule of Civil Procedure 52(a)(6), findings of fact "must not be set aside unless clearly erroneous."[85] This standard "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."[86] When dealing with facts, applying the clearly erroneous standard versus the abuse of discretion standard might be a distinction without a difference.[87]

The clearly erroneous standard of review respects the district court as the primary fact-finder and mandates that the appellate court give proper deference on appeal.[88] The clearly erroneous standard of review also "requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions."[89] A finding of fact is clearly erroneous when the appellate court is "left with the definite and firm conviction that a mistake has been committed."[90] An appellate court may not reverse the trier of fact "simply because it is convinced that it would have decided the case differently."[91]

The Supreme Court has been very consistent in its application of the clearly erroneous standard to findings of fact. Mixed questions of law and fact, such as Rule 19(b) determinations,

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[83] Anderson v. Bessemer City, 470 U.S. 564, 574–75 (1985).
[84] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 16 (3d ed. 2010).
[85] Fed R. Civ. P. 52(a)(6).
[86] Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 286 (1982).
[87] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990). ("A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.").
[88] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).
[89] *Cooter & Gell*, 496 U.S. at 400.
[90] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
[91] Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

would benefit from a similar pronouncement that abuse of discretion review is the appropriate standard of review.

III. The Current Landscape of Rule 19(b)

A. Federal Rule of Civil Procedure Rule 19(b)

Rule 19(b) requires that a court determine whether an action may proceed in the absence of a party that it deems to be "required" under Rule 19(a). Rule 19(b) provides four factors for the court to consider.[92] Those factors are "to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations."[93] The text of Rule 19(b) is as follows:

> "Rule 19(b) Required Joinder of Parties
> . . .
> (b)When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."[94]

[92] Fed. R. Civ. P. 19.
[93] Fed. R. Civ. P. 19 advisory committee's notes (1966).
[94] Fed. R. Civ. P. 19(b).

Based on the fact that Rule 19(b) requires the district court to establish facts and then apply them to a statutory test, Rule 19(b) is a mixed question of law and fact. Although none of the circuits have explicitly evaluated Rule 19(b) as a mixed question of law and fact, the First, Second, Ninth, and District of Columbia Circuits have noted that a Rule 19(b) determination involves both factual and legal considerations.[95] The next subsections will review the United States Supreme Court's jurisprudence on the standard of appellate review for Rule 19(b) and will also describe the approaches taken by the various courts of appeals.

i. *United States Supreme Court*

The United States Supreme Court has not articulated a standard of appellate review for Rule 19(b).[96] The design of Rule 19(b) "indicates that the determination whether to proceed will turn upon factors that are case specific."[97] *Pimentel* concluded that "the case-specific inquiry that must be followed in applying the standards set forth in subdivision (b), including the direction to consider whether 'in equity and good conscience' the case should proceed, implies some degree of deference to the district court."[98] The *Pimentel* Court did not decide on a standard of review because the lower court's judgment could not stand due to "errors of law that require reversal."[99]

The Supreme Court in *Provident Tradesmens Bank & Trust Co. v. Patterson* noted that a district court's decision to dismiss pursuant to Rule 19 "must be based on factors varying with the different issues, some factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."[100] *Provident* stated that both Rule 19(a)

[95] *See infra* Part iv.
[96] Philippines v. Pimentel, 553 U.S. 851, 864 (2008).
[97] *Id.* at 862–63.
[98] *Id.* at 864.
[99] *Id.* (citing Koon v. United States, 518 U.S. 81, 99–100 (1996) (a court "by definition abuses its discretion when it makes an error of law.")).
[100] Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968).

and 19(b) "can only be determined in the context of a particular litigation."[101] Thus, combining *Pimentel* with *Provident*, a Rule 19(b) determination is a mixed question of law and fact that requires an appellate court to give "some degree of deference" when reviewing a district court's decision.

ii. *United States Court of Appeals for the Sixth Circuit*

The United States Court of Appeals for the Sixth Circuit is the only circuit court that applies *de novo* review to a district court's Rule 19(b) determination.[102] The Sixth Circuit in *Local 670, United Rubber v. International Union, United Rubber* "implicitly adopted the abuse of discretion standard for Rule 19 issues."[103] The *Local 670* court implicitly adopted a *de novo* standard for Rule 19(b) when it noted that "a determination that a party is 'indispensable,' thereby requiring dismissal of an action, represents a legal conclusion reached after balancing the prescribed factors under Rule 19."[104] The court then said "in that sense, [a Rule 19(b) determination] becomes a conclusion of law which this court reviews *de novo*."[105]

Subsequent to *Local 670* in *Keweenaw Bay Indian Community v. Michigan*[106], the Sixth Circuit explicitly adopted the *de novo* standard of review for Rule 19(b).[107] In adopting the *de novo* standard, the *Keweenaw* court noted that its "careful and limiting construction in articulating this standard is self-evident."[108] The Sixth Circuit continues to review 19(a) determinations under the *de novo* standard.[109]

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[101] *Id.* at 118.
[102] Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 665 (6th Cir. 2004).
[103] Local 670, United Rubber v. Int'l Union, United Rubber, 822 F.2d 613, 619 (6th Cir. 1987).
[104] *Id.*
[105] *Id.* (citing Taylor and Gaskin v. Chris-Craft Indus., 732 F.2d 1273, 1277 (6th Cir. 1984)).
[106] Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341 (6th Cir.1993).
[107] *Id*. at 1346.
[108] *Id*.
[109] *Id.*

iii. *United States Court of Appeals for the Seventh Circuit*

The Seventh Circuit has yet to decide what standard of appellate review it should apply to a district court's Rule 19(b) determination.[110] The first Seventh Circuit case to address the proper standard of review, *Sokaogon Chippewa Community v. Wisconsin*, declined to articulate a standard because the district court failed to apply any of the considerations listed in the rule and elaborated upon in *Provident*.[111] Thus, the *Sokaogon* court would have reversed under either standard of review.

Although the *Sokaogon* court did not articulate the appropriate standard, it noted that the "looseness and fact-specific nature of the inquiry that Rule 19(b) requires argue[s] for a deferential standard of appellate review."[112] *Sokaogon* also noted that Rule 19(b) might warrant a broader scope of review because a Rule 19(b) determination may lead to dismissal.[113] Subsequently, all Seventh Circuit decisions have similarly declined to decide between abuse of discretion and *de novo* review because it would have reversed under either standard.[114]

iv. *All Other United States Courts of Appeals*

The United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Eight, Ninth, Tenth, Eleventh, and District of Columbia Circuits apply the abuse of discretion standard to Rule 19(b) determinations by a district court.[115]

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[110] Askew v. Sheriff of Cook Cnty., 568 F.3d 632, 634 (7th Cir. 2009).
[111] Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 304 (7th Cir. 1989).
[112] *Id.*
[113] *Id.*
[114] *Askew*, 568 F.3d at 634 (legal error in analysis); Davis Co v. Emerald Casino, Inc., 268 F.3d 477, 481 (7th Cir. 2001) (party was not necessary under Rule 19(a)); Thomas v. United States, 189 F.3d 662, 666 (7th Cir. 1999) (district court made an error in legal analysis); North Shore Gas Co. v. Salomon, Inc., 152 F.3d 642, 648 (7th Cir. 1998) (district court's decision would meet either standard); United States *ex rel*. Hall v. Tribal Dev. Corp., 100 F.3d 476, 478 (7th Cir. 1996) (the district court's decision would meet either standard); Wade v. Hopper, 993 F.2d 1246, 1249 (7th Cir. 1993) (party is not indispensable); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 937 (7th Cir. 1993) (complete relief cannot be accorded under either standard).
[115] Bacardi Int'l Ltd. v. V. Suarez & Co., 719 F.3d 1, 8 (1st Cir. 2013); Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 132 (2d Cir. 2013); Salt River Project Agric. Improvement and Power Dist. v. Lee, 672 F.3d 1176, 1178 (9th Cir. 2012); Northern Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1277 (10th Cir. 2012); Kaloe Shipping Co. Ltd.

The Fifth Circuit was the first circuit court to adopt an abuse of discretion standard.[116] The Fifth Circuit relied on the pragmatic nature of Rule 19(b).[117] This pragmatic approach to Rule 19(b) "elevates the role of judgmental discretion in the joinder problem."[118] *Broussard v. Columbia Gulf Transmission Co.* concluded that this discretion is due to the fact that the district judge is "closer to the arena and is often in a better position to survey the practicalities involved in the litigation."[119] The Ninth Circuit has added that the lack of a prescribed formula in such a fact-specific determination was significant in holding that abuse of discretion is the appropriate standard.[120] The First, Second, Fourth, Tenth, and District of Columbia Circuits have taken a similar approach in applying abuse of discretion review for Rule 19(b) determinations.[121]

The Ninth Circuit was the first court to intimate that a Rule 19(b) determination is a mixed question of law and fact.[122] The District of Columbia Circuit subsequently adopted the Ninth Circuit's position.[123] The First Circuit also noted that Rule 19(b) determinations are "anything but pure legal conclusions."[124] Rather, Rule 19(b) determinations "involve the balancing of competing

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v. Goltens Serv. Co., Inc., 315 Fed.Appx. 877, 881 (11th Cir. 2009); Hood *ex rel*. Mississippi v. City of Memphis, Tenn., 570 F.3d 625, 628 (5th Cir. 2009); Huber v. Taylor, 532 F.3d 237, 247 (2d Cir. 2008); Scenic Holding, LLC v. New Bd. of Trs. of Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656, 665 (8th Cir. 2007); Am. Gen. Life and Accident Ins. Co. v. Wood, 429 F.3d 83, 92 (4th Cir. 2005); Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1497 (D.C. Cir. 1997).

[116] Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 (5th Cir. 1968).

[117] *Id*.

[118] *Id.*

[119] *Id*.

[120] Walsh v. Centeio, 692 F.2d 1239, 1242 (9th Cir. 1982).

[121] *See* Universal Reinsurance Co., Ltd. v. St. Paul Fire Marine Ins. Co., 312 F.3d 82, 87 (2d Cir. 2002) ("Given the flexible nature of Rule 19(b) analysis, we review such decisions only for an abuse of discretion."); Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., 210 F.3d 246, 250 n.7 (4th Cir. 2000) (noting that the fact-specific inquiry of Rule 19(b) requires abuse of discretion review); Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 635 (1st Cir. 1989) ("The district court, which is 'closer to the arena,' is in the preferred position to make these decisions."); Glenny v. Am. Metal Climax, Inc. 494 F.2d 651, 653 (10th Cir. 1974) (since a Rule 19(b) determination is based on specific facts and in light of equitable considerations, the court gives discretion to the district court).

[122] *Walsh*, 692 F.2d at 1242 ("[R]ule 19(b) requires the district court to analyze various equitable considerations within the context of particular litigation, rather than to decide a purely legal issue.").

[123] Cloverleaf Standardbred Owners Ass'n, Inc. v. Nat'l Bank of Wash., 699 F.2d 1274, 1277 (D.C. Cir. 1983).

[124] *Travelers*, 884 F.2d at 635.

interests and must be steeped in 'pragmatic considerations.'"[125] Similarly, the Second Circuit concluded that the latitude afforded by the flexible nature of Rule 19(b) "puts a Rule 19(b) determination more in the arena of a factual determination than a legal one."[126]

The Third and Eighth Circuits have not yet explained their reasoning for applying abuse of discretion, simply stating that they apply the abuse of discretion standard of review to Rule 19(b) determinations made by a district court.[127] The rationale underlying the Eleventh Circuit's approach is also not clear.[128]

The factual nature of a Rule 19(b) determination is not in dispute and neither is the fact that the district court is making a legal conclusion. Surprisingly, none of the circuits have ever attempted to examine the issue as a mixed question of law and fact. Next, Part IV explains why Rule 19(b), which is a mixed question of law and fact, warrants abuse of discretion review.

IV. Legal Conclusions Drawn From Mixed Questions of Law and Fact Involving Federal Rules of Civil Procedure or Other Legal Doctrines Concerned With the Supervision and Management of Litigation Warrant Abuse of Discretion Review

A) Cooter & Gell v. Hartmarx Corp.[129]

In *Cooter & Gell*, the Supreme Court held that the appropriate standard of appellate review for Rule 11[130] sanctions was abuse of discretion.[131] In *Cooter & Gell*, the petitioner filed an antitrust claim against the respondent for an alleged "nationwide conspiracy to fix prices and to

[125] *Id.* (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968)).
[126] Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 75 (2d. Cir. 1984).
[127] *See* State of South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991) (first time the Eighth Circuit applied abuse of discretion); Steel Valley Auth. v. Union Switch & Signal Div., Am. Standard, Inc., 809 F.2d 1006, 1010 (3d Cir. 1987) (same).
[128] The Eleventh Circuit in Mann v. Albany, 883 F.2d 999, 1003 (11th Cir. 1989) was the first court in the Eleventh Circuit to adopt the abuse of discretion, but cited 3A MOORE'S FEDERAL PRACTICE ¶ 19.19-1 at 19-299 (1989), which is not commercially available.
[129] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).
[130] Fed. R. Civ. P. 11.
[131] *Cooter & Gell*, 496 U.S. at 409.

eliminate competition through an exclusive retail agent policy and uniform pricing scheme, as well as other unfair competition practices such as resale price maintenance and territorial restrictions."[132] Respondent then filed Rule 11 motions, contending that those allegations had no basis in fact.[133] Petitioner subsequently filed three affidavits that set forth the findings of his research, which he alleged supported his allegations in the complaint.[134] Petitioner's research involved telephone calls to salespersons in New York City, Philadelphia, Baltimore, and Washington D.C.[135] From this research, petitioner inferred that "only one store in each major metropolitan area nationwide sold Hart, Schaffner & Marx suits."[136]

Five months after filing his complaint, petitioner filed a voluntary dismissal under Rule 41(a)(1)(i).[137] The district judge heard oral argument on the Rule 11 motion one month prior to the effective date of the dismissal.[138] The district court subsequently granted respondent's motion for Rule 11 sanctions.[139] The district court held that "petitioner's prefiling inquiry was grossly inadequate."[140] Specifically, it found that the complaint regarding exclusive retail agency arrangements "completely baseless" and that a survey of four Eastern cities was not sufficient to support the claim that there were exclusive retailer agreements nationwide.[141]

A district court must consider three types of issues when determining whether or not an attorney has violated Rule 11.[142] First, "the court must consider factual questions regarding the

[132] *Id.*at 389.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Cooter & Gell*, 496 U.S. at 389.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 390.
[142] *Id.*at 399.

nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper."[143] Next, "legal issues are raised in considering whether a pleading is warranted by existing law or a good faith argument for changing the law and whether the attorney's conduct violated Rule 11."[144] Third, "the district court must exercise its discretion to tailor an 'appropriate sanction.'"[145] The Court in *Cooter & Gell* noted that the scope of disagreement between the circuits was over "whether the court of appeals must defer to the district court's legal conclusions in Rule 11 proceedings."[146] The Court decided that the district court is "better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11" because it is "more familiar with the issues and the litigants."[147]

Rule 11 is a mixed question of law and fact that requires the court to consider factual questions, legal issues, and then apply those findings to arrive at a conclusion, which in the case of Rule 11, is an appropriate sanction. *Cooter & Gell* is an example of a case where the Court applied the abuse of discretion standard to a legal conclusion drawn from a Federal Rule of Civil Procedure concerned with the supervision and management of litigation. Thus, *Cooter & Gell* stands in direct opposition to the Sixth Circuit's *de novo* review of Rule 19(b), which also requires a district court to make a legal conclusion from another mixed question of law and fact concerned with the supervision and management of litigation.

B) Piper Aircraft Co. v. Reyno[148]

In *Piper*, the Supreme Court affirmed the district court's decision to grant the petitioners' motion to dismiss for *forum non conveniens*. The Court held that the "*forum non conveniens*

[143] *Cooter & Gell*, 496 U.S. at 399.
[144] *Id.* (internal quotations omitted).
[145] *Id.* (quoting Fed. R. Civ. P. 11(c)(1)).
[146] *Id.*at 401.
[147] *Id.* at 402.
[148] Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

determination is committed to the sound discretion of the trial court."[149] A district court's forum determination may be reversed only when "there has been a clear abuse of discretion."[150] Although the Third Circuit purported to apply abuse of discretion review, it "substituted its own judgment for that of the District Court."[151] The Supreme Court held the district court did not abuse its discretion, thus affirming the district court's decision.[152]

Piper involved the crash of a small aircraft in the Scottish highlands during a charter flight, instantly killing the plane's pilots and five passengers.[153] Reyno, the administatrix of the estates of the five passengers and legal secretary of the attorney who filed the lawsuit, brought the action against Piper Aircraft Co. and Hartzell Propeller, Inc. in the Superior Court of California.[154] The claim alleged negligence and strict liability.[155] Reyno also filed suit in the United Kingdom against Air Navigation and Trading Co., Ltd., McDonald Aviation, Ltd., and the pilot's estate.[156] Reyno admitted to filing a separate suit against Piper and Hartzell because United States laws were more favorable to the decedents than Scottish laws.[157]

The district court granted both Piper and Hartzell's motions to dismiss for *forum non conveniens* based on the balancing test set forth in *Gulf Oil Corp. v. Gilbert*[158] and *Koster v.*

[149] *Id.* at 257.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 259.
[153] *Id.* at 238–39.
[154] *Piper*, 454 U.S. at 239–40. The five passengers were all Scottish residents. *Id.* at 239. Piper and Hartzell were the only connection to the United States. *Id.* Piper manufactured the plane in Pennsylvania. *Id.* Hartzell manufactured the propeller in Ohio. *Id.*
[155] *Id.* at 240.
[156] *Id.* Air Navigation and McDonald were organized in the United Kingdom. *Id.* The deceased pilot was a Scottish resident. *Id.*
[157] *Id.* (Scottish law does not recognize strict liability in tort).
[158] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

Lumbermens Mut. Cas. Co.,[159] *Gilbert's* companion case.[160] The Third Circuit reversed on two alternative grounds.[161]

The balancing test from *Gilbert* provided a list of "private interest factors"[162] and "public interest factors"[163] to guide the district court's discretion in a *forum non conveniens* inquiry.[164] The private interest factors included the accessibility to sources of proof, the availability of compulsory process to compel attendance of the unwilling, the cost of attendance for the willing witnesses, the possibility to view the premises if necessary, and all other practical problems that "make trial of a case easy, expeditious, and inexpensive. The public factors included the administrative difficulties associated with court congestion, the interest of local controversies being decided in the home state, the interest in having a trial of a diversity case in a forum that is "at home" with the law that governs the case, the avoidance of unnecessary problems and conflicts of law that are foreign to the court, and the unfairness of burdening citizens with jury duty.[165]

Ordinarily, there is a "strong presumption in favor of the plaintiff's choice of forum."[166] This presumption may be overcome "only when the private and public interest factors clearly point towards trial in the alternative forum."[167] This presumption has "less force when the plaintiff or real parties in interest are foreign."[168] The Supreme Court held that the district court's evaluation of the private and public factors was reasonable and did not abuse its discretion.[169]

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[159] Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).
[160] *Piper*, 454 U.S. at 241.
[161] *Id.* at 244. (First, the Third Circuit determined that the district court abused its discretion in the balancing test. Second, they held that when the alternative forum is less favorable to the plaintiff, dismissal is automatically barred.).
[162] Private interest factors affect the convenience of the litigants.
[163] Public interest factors affect the convenience of the forum.
[164] *Piper*, 454 U.S. at 241.
[165] *Id.* at 430.
[166] *Id*. at 255.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 257–61.

Piper invalidates the Sixth Circuit's position that a Rule 19(b) determination warrants *de novo* review simply because it may lead to dismissal.[170] Similar to a Rule 19(b) analysis, *Piper* involved the balancing of several factors, prescribed by *Gilbert*, which led to the dismissal of the action for *forum non conveniens*. Both cases require a district court to make a legal conclusion to dismiss a case after balancing a number of factors that are within the district court's discretion. Thus, the Sixth Circuit's reliance on the fact that a Rule 19(b) determination may lead to a dismissal of the action is misplaced.

C) *Pierce v. Underwood*[171]

In *Pierce*, the Supreme Court held that an appellate court should review an award of attorney's fees under the Equal Access to Justice Act[172] using the abuse of discretion standard.[173] Under the Equal Access to Justice Act, a prevailing party other than the United States should receive fees and other expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[174] A district court may also award attorney fees in excess of seventy-five dollars per hour if there is a "special factor" to justify a higher fee.[175]

Pierce involved the decision of a former Secretary of Housing and Development to not implement an "operating subsidy" program authorized by the Housing and Community Development Act of 1974.[176] The program was designed to offset the rising costs of utilities and

[170] *See* Local 670, United Rubber v. Int'l Union, United Rubber, 822 F.2d 613, 619 (6th Cir. 1987) (noting that Rule 19(b), by requiring a dismissal, "represents a legal conclusion reached after balancing the prescribed factors under Rule 19.").
[171] Pierce v. Underwood, 487 U.S. 552 (1988).
[172] 28 U.S.C. § 2412 (1982).
[173] *Pierce*, 487 U.S. at 559.
[174] 28 U.S.C. § 2412 (d)(1)(A) (1982).
[175] 28 U.S.C. § 2412 (d)(2)(A) (1982).
[176] *Pierce*, 487 U.S. at 555.

property taxes to owners of Government-subsidized apartment buildings.[177] Several plaintiffs successfully challenged the Secretary's decision to not implement that subsidy in the district courts.[178] Subsequently, a new Secretary was appointed, and the cases were consolidated and settled.[179]

In the present action seeking attorneys' fees for the aforementioned cases, the district court granted attorney's fees, finding that the Secretary's decision was not "substantially justified" and that "special factors" justified in increased rate.[180] The district court assessed a multiplier of 3.5 to the total award due to these "special factors."[181] The Ninth Circuit applied abuse of discretion review and found that the Secretary's position was not substantially justified, but it held that there were no special factors to justify the multiplier.[182]

The Supreme Court noted that the statutory language "unless the court finds" implies deference, but noted that the inference is not compelled.[183] More importantly, the Court relied on the fact that the district court is in a better position to analyze this issue.[184] The Court noted that some aspects of the case, including whether the Government's stance "'*was* substantially justified' may be known only to the district court."[185] Although the Court labeled the award of attorney's fees a "purely legal issue,"[186] it is more properly construed as a legal conclusion drawn from a mixed question of law and fact, given the factual underpinnings of the analysis.

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[177] *Id.*
[178] *Id.*
[179] *Id.*at 556.
[180] *Id.* at 557.
[181] *Id.*
[182] *Pierce*, 487 U.S. at 557.
[183] *Id.* at 559.
[184] *Id.* at 559–60.
[185] *Id.* at 560 (quoting 28 USC § 2412 (d)(1)(A) (1982)) (emphasis in original).
[186] *Id.*

This classification as a mixed question of law and fact is supported by the Court's adoption of the abuse of discretion standard.[187] Although the Court's language was not carefully chosen, by the Court's own analysis, a "purely legal question" would properly receive *de novo* review; therefore, the Court acknowledges that an award of attorney's fees is a "matter of discretion," which would receive an abuse of discretion review. Also in support of this proposition, the Court notes that an inquiry into what is "substantially justified" is a multifarious and novel question which is based on facts that are not appropriate for generalization.[188] Abuse of discretion permits that "needed flexibility" for such an inquiry.[189]

The Court relied on precedent to determine if the district court abused its discretion in relation to awarding attorney's fees and whether there was a "special factor" to justify increased attorney's fees.[190] The "special factors" evaluated by the district court included the limited number of attorneys available for these proceedings, the contingent nature of the fee, the "novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, and the results obtained."[191] The Court concluded that the district court did not abuse its discretion in finding that the United States' position was not substantially justified, but did abuse its discretion in finding a "special factor" where none existed.

Pierce strongly supports the application of the abuse of discretion standard for Rule 19(b) determinations. *Pierce* applied abuse of discretion review to amorphous concepts such as "substantially justified," "special circumstances," and "special factors." *Pierce* reasoned that deference was owed to the district court's findings because it was in a better position to make a

[187] *Id.* at 561 (the Court noted that there are only three types of questions on review: (1) denominated questions of law, which are reviewable de novo; (2) questions of fact, which are reviewable for clear error; and (3) matters of discretion which are reviewable for abuse of discretion).
[188] *Pierce*, 487 U.S. at 562.
[189] *Id.*
[190] *Id.* at 571.
[191] *Id.* at 571–73 (internal quotations omitted).

determination that depended greatly on factual findings. Similarly, Rule 19(b) requires that a district court interpret terms such as "adequate" and "the extent to which." Interpretation of such terms, especially in the context of a Federal Rule of Civil Procedure, should be reviewed for abuse of discretion.

D) *Curtiss-Wright Corp. v. General Electric Co.*[192]

In *Curtiss-Wright v. General Electric Co.*, the Supreme Court granted *certiorari* to examine the use of Federal Rule of Civil Procedure 54(b),[193] which it termed a "procedural device."[194] Rule 54(b) allows a district court to direct the entry of final judgment to fewer than all of the claims or parties if it "expressly determines that there is no just reason for delay."[195]

Curtiss-Wright focused on a dispute between Curtiss-Wright Corp. and General Electric for the manufacturing of components for nuclear powered naval vessels.[196] The total value of the contracts at issue was $215 million.[197] Curtiss-Wright brought a diversity action alleging fraud, misrepresentation, and breach of contract, as well as payment of $19 million for contracts already performed.[198] General Electric counterclaimed for costs allegedly incurred from "extraordinary efforts" provided to Curtiss-Wright, which enabled Curtiss-Wright to avoid default.[199] This counterclaim was for $1.9 million.[200] General Electric also counterclaimed to recover $52 million that Curtiss-Wright allegedly received as a result of General Electric's "extraordinary efforts."[201] The facts underlying most of the claims and counterclaims were in dispute, but the only dispute

[192] Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980).
[193] Fed. R. Civ. P. 54(b).
[194] *Curtiss-Wright*, 446 U.S. at 3.
[195] *Id*.
[196] *Id*.
[197] *Id*.
[198] *Id*. at 4.
[199] *Id*.
[200] *Curtiss-Wright*, 446 U.S. at 4.
[201] *Id*.

for Curtiss-Wright's claim for the $19 million owed concerned the application of a release clause stating that Curtiss-Wright agreed "as a condition precedent to final payment, that the Buyer [General Electric] and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order."[202] General Electric contended this clause prevented Curtiss-Wright from recovering as long as other claims were pending.[203]

The district court rejected General Electric's argument and granted summary judgment for Curtiss-Wright with respect to the unpaid balance.[204] The district court then granted Curtiss-Wright's motion for certification of the district court's orders as a final judgment pursuant to Rule 54(b).[205] The district court subsequently provided a written statement supporting its decision, noting that such relief should not be granted as a matter of course.[206] The district court considered the independent nature of the final judgment relative to the other claims and counterclaims involved, the fact that these adjudicated claims would not be mooted by future developments in the case, and that the claims were not the type of claims that an appellate court would have to review in a subsequent appeal.[207]

The district court also considered justice to the litigants in this case.[208] It found that Curtiss-Wright would suffer severe daily financial loss as a result of General Electric's nonpayment.[209] The district court also noted the delay in payment that would result due to the complex nature of the remaining claims.[210] The district court did not consider the solvency of both parties, which the

[202] *Id*.
[203] *Id*.
[204] *Id*.
[205] *Id*. at 4–5.
[206] *Curtiss-Wright*, 446 U.S. at 5.
[207] *Id*. at 6.
[208] *Id*. at 6.
[209] *Id*. at 6.
[210] *Id*. at 6.

Third Circuit found to be significant in reversing the district court's decision.[211] The Supreme Court then reversed the decision of the Third Circuit, finding that the district court had not abused its discretion.[212]

Analysis under Rule 54(b) requires that the district court balance "judicial administrative interests as well as the equities involved."[213] The district court's discretionary judgment should be given deference because that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay."[214] The Supreme Court noted that the justification for giving the district court discretion is because "the number of possible situations is large" and that the Court is "reluctant to either fix or sanction narrow guidelines for district courts to follow."[215] The Court notes that questions that involve the weighing and balancing of contending factors is "likely to be close," but that the task is "peculiarly one for the trial judge, who can explore all the facets of a case."[216] As such, a district judge's determination merits substantial deference on review.[217]

Curtiss-Wright demonstrates that a conclusion drawn by a district court from a variety of non-specific interests and equities is reviewed for abuse of discretion. Rule 19(b) prescribes four factors to be considered by the district court, but that list is nonexclusive. Thus, a district court may focus on factors that were not enumerated in Rule 19(b) and its decision would still be reviewed for abuse of discretion. As long as a district court provides a reasoned analysis from relevant factors, the appellate court should review only for abuse of discretion.

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[211] *Id*. at 6–7.
[212] *Curtiss-Wright*, 446 U.S. at 13.
[213] *Id*. at 8.
[214] *Id*. at 10 (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)).
[215] *Id*. at 10-11.
[216] *Id*. at 12.
[217] *Id*.

E) *Gulf Oil Co. v. Bernard*[218]

Bernard involves the appropriate standard of review for conducting class actions under Federal Rule of Civil Procedure Rule 23(d)[219] in a class alleging employment discrimination.[220] Gulf Oil Co. and the Equal Employment Opportunity Commission entered into a conciliation agreement regarding alleged discrimination at one of its refineries.[221] Gulf agreed to cease its allegedly discriminatory practices and offered backpay to the alleged victims in exchange for a full release of all discrimination claims against it.[222] A class action was brought in the district court alleging racial discrimination in employment and seeking injunctive, declaratory, and monetary relief.[223] The named plaintiffs sought to vindicate the alleged rights of the employees who were receiving settlement offers.[224]

Gulf subsequently filed an order seeking to limit communications with class members by parties and their counsel.[225] An accompanying brief for Gulf asserted that one of the class attorneys recommended that the employees not sign the agreement because they could get at least double that amount through the class action.[226] The district court then entered a temporary order that prohibited all communications to potential or actual class members.[227] This order was "not based on any findings of fact."[228]

After an oral argument concerning the potential violation of the class members' First Amendment rights in which the district court took no evidence, the district court imposed "a

[218] Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).
[219] Fed. R. Civ. P. 23(d).
[220] *Bernard*, 452 U.S. at 91.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 92.
[224] *Id.*
[225] *Id.*
[226] *Bernard*, 452 U.S. at 93.
[227] *Id.*
[228] *Id.*

complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court."[229] This order also came without any findings or fact or written explanation.[230] The Supreme Court granted *certiorari* to determine if the court order that limited communications was constitutionally permissible.[231]

The district court has "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[232] Rule 23 requires the district court to balance the importance of class actions with the "opportunities for abuse as well as problems for courts and counsel in the management of [class actions]."[233]

In *Bernard*, the district court "failed to provide any record useful for appellate review."[234] There was no indication of any weighing of competing factors.[235] Similarly, "the court made neither factual findings nor legal arguments."[236] Instead, the district court adopted "verbatim the form of order recommended by the Manual for Complex litigation in the absence of a clear record and specific findings of need."[237] The Court found that the lack of careful weighing of competing factors significant in finding that the district court had abused its discretion.[238] *Bernard* would likely not happen again because district courts are more aware of the importance of the record on appeal in light of this case.

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[229] *Id.* at 95.
[230] *Id.* at 96.
[231] *Id.* at 99.
[232] *Bernard*, 452 U.S. at 100.
[233] *Id*. at 99–100.
[234] *Id*. at 102.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 104.
[238] *Bernard*, 452 U.S. at 102.

The Court did not reach the constitutionality of the district court's order because a court must first consider non-constitutional grounds for decision prior to any constitutional questions.[239] In order to grant an order to limit communications, a district court's determination must be "consistent with the general policies embodied in Rule 23."[240] A district court's determination should "be based on a clear record and specific findings that reflect a weighing of the need for a limitation [on communications] and the potential for interference with the rights of the parties."[241] Such a determination is the only way to ensure "that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23."[242]

Since Rule 19(b) is also a mixed question of law and fact that requires a district court to balance a number of competing factors, as long as the district court provides a record of its analysis of the competing factors, the appellate court should view their conclusion deferentially through the abuse of discretion standard. The absence of any record in *Bernard* was the result of the district court's assumption that "no particularized weighing of the circumstances of the case was necessary" when adopting the order suggested by the Manual for Complex Litigation.[243] The complete absence of a record on appeal is the exception and not the rule. As long as the district court provides an indication of careful weighing of the competing factors, the circuit court should review the district court's determination for abuse of discretion. Such a reasoned determination is in line with the policies embodied in the Federal Rules of Civil Procedure.

V. Conclusion

[239] *Id.*
[240] *Id.*
[241] *Id.* at 101-102.
[242] *Id.* at 102.
[243] *Id.* at 102-03.

The Supreme Court in *Pierce* noted in the absence of an explicit statutory command or a long history of appellate practice, "it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer."[244] Since *Pierce* was decided, however, the Supreme Court has taken substantial steps forward in declaring appellate standards of review. When one steps back and analyzes the big picture of appellate review, mixed questions of law and fact fall into two categories.

The first category involves mixed questions of law and fact that have constitutional considerations. These cases are justifiably elevated to *de novo* review because of the importance the law-clarifying appellate process. The second category includes mixed questions of law and fact that do not involve constitutional considerations. Within this second category are legal conclusions drawn from Federal Rules of Civil Procedure or legal doctrines concerned with the supervision or management of litigation. The fact-intensive nature of these inquiries demands deferential review. The district court is in a much better position to determine the intricacies of the case and manage the litigation before it.

Rule 19(b), as a Federal Rule of Civil Procedure, is undeniably implicated in the supervision and management of litigation, and it requires the district court to draw a legal conclusion by applying the law to the facts. Consistent with Supreme Court jurisprudence, Rule 19(b) warrants abuse of discretion review.

The Sixth Circuit's application of *de novo* review to Rule 19(b) determinations is not appropriate. Applying *de novo* review simply because a Rule 19(b) determination is a legal conclusion is erroneous. Similarly, elevating the standard of review because the district court's

[244] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

conclusion may lead to a dismissal is incorrect. As long as the district court provides a reasoned analysis of the competing factors, the appellate court should apply abuse of discretion review.

The Supreme Court should resolve the circuit split concerning the appellate review of Rule 19(b) determinations. Ideally, the Supreme Court should move beyond making *ad hoc* determinations for mixed questions of law and fact. Adopting the abuse of discretion standard of review for all mixed questions of law and fact would help to harmonize and clarify the appellate process.