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APPEALABILITY OF CLASS ACTION DETERMINATIONS

I. INTRODUCTION

The increasing use of the class action¹ in the federal courts and the congressional and judicial policy limiting the right to appeal interlocutory orders² have come into conflict when a party seeks immediate appeal from a district court's determination of whether a class action is appropriate. In general, interlocutory orders may be considered only on appeal from a final decision.³ However, statutory⁴ and judicially created⁵ exceptions to the final judgment rule permit interlocutory appeal from district court determinations under certain circumstances. In order to decide whether the law presently permits sufficient avenues for appeal, the policies behind the final judgment rule must be weighed against the consequences of denying review of the class determination. This Comment will examine the present law on the appealability of a class action determination, and will employ the above balancing test in order to determine the sufficiency of the present state of the law.

II. THE DEATH KNELL AND COLLATERAL ORDER DOCTRINES

The final judgment rule⁶ limits the jurisdiction of the courts of appeal to review of final decisions of the district courts. Among the purposes of this rule are the avoidance of delay which would result from piecemeal review and the promotion of judicial efficiency.⁷ The traditional definition of a final decision is one "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."⁸ However, a rigid application of this definition can work irreparable harm upon a party without promoting the desired purpose of efficiency.⁹ In recognition of this, the Supreme Court has

1. In 1974, compared to 1973, the percentage increase in class action cases filed was 2.4%. 1974 Ann. Rep. of the Director, Admin. Office of the United States Courts IX-46.

2. An interlocutory order is one which is not a final decision of the entire controversy. Black's Law Dictionary 1247 (rev. 4th ed. 1968).

3. The final decision rule is codified at 28 U.S.C. § 1291 (1970) which provides in relevant part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts"

4. The relevant statutory exceptions discussed herein are: 28 U.S.C. §§ 1292(a)(1), 1292(b), 1651 (1970), Fed. R. Civ. P. 54(b); see pts. III-VI infra.

5. E.g., *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (the "balancing" test); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (the "collateral order" doctrine); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (the "death knell" doctrine). See pt. II infra.

6. 28 U.S.C. § 1291 (1970). For a complete history of the final judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 *Yale L.J.* 539 (1932).

7. See *Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940).

8. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

9. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 *Colum. L. Rev.* 1102 (1950); see note 10 infra for a discussion of *Forgay v. Conrad*, 47 U.S. (6 How.) 200 (1848), an example of irreparable harm.

developed various judicial exceptions to the finality rule, the primary one being the "collateral order" doctrine.¹⁰ The "collateral order" doctrine was created in *Cohen v. Beneficial Industrial Loan Corp.*,¹¹ a stockholder's derivative suit, wherein the district court denied defendant's motion to require plaintiffs to post a bond required by state law to cover defendant's attorney's fees. Although the district court's order did not terminate the entire action, it was final as to defendant's claimed right to the bond and therefore was deemed within the final decision rule.¹² The Court held:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.¹³

The doctrine was broadened in *Gillespie v. United States Steel Corp.*,¹⁴ wherein the district court, *inter alia*, struck from the complaint alleging negligence under the Jones Act, all reference to the recovery for brothers and sisters of the decedent. In finding the district court's order "final" for the purposes of the appeal, the Court applied *Cohen's* "practical rather than . . . technical construction."¹⁵ Balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other,"¹⁶ the Court found that delay in determining the brother's and sisters' rights might work a great injustice upon them and that their claims, while not formally severable, could be so viewed for the purpose of determining finality.¹⁷ In addition, the Court found the questions presented to be "fundamental to the further conduct of the case."¹⁸

Relying on these precedents, the Second Circuit in *Eisen v. Carlisle & Jacquelin*,¹⁹ held that where the denial of a class action certification would be

10. Another important exception was created by the Court in *Forgay v. Conrad*, 47 U.S. (6 How.) 200 (1848). *Forgay* involved an appeal of a judgment directing immediate delivery of property, even though an accounting ordered by the district court had not yet taken place. The cases following *Forgay* involved immediate delivery of property, thus causing the possibility of irremediable injury. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 125-26 n.2 (1945). They are not relevant to the discussion here.

11. 337 U.S. 541 (1949).

12. *Id.* at 546.

13. *Id.*

14. 379 U.S. 148 (1964).

15. *Id.* at 152.

16. *Id.* at 152-53, quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

17. 379 U.S. at 153.

18. *Id.*, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

19. 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967). The plaintiff, suing on behalf of himself and a class of as many as 3,750,000 members, alleged that defendants, two major odd-lot dealers, had conspired to monopolize odd-lot trading and had charged excessive fees in violation of the Sherman Act, 15 U.S.C. §§ 1-2 (1970). The class action allegations were dismissed by the district court but Mr. Eisen was permitted to proceed on his own. 41 F.R.D. 147 (S.D.N.Y. 1966), rev'd, 391 F.2d 555 (2d Cir. 1968).

the "death knell" of the action, appeal would be allowed. Since plaintiff's individual claim amounted to \$70, Judge Kaufman felt he could "safely assume that no lawyer of competence [would] undertake this complex and costly case to recover \$70 for Mr. Eisen."²⁰ In effect, the district court's dismissal of the class action had terminated the litigation, making its order a final rather than an interlocutory order.²¹ Although the court sought support in the "balancing test" of *Gillespie* and the "collateral order" doctrine of *Cohen*, the Second Circuit in reality was giving the finality rule the ultimate "practical rather than technical construction," thereby creating a new doctrine,²² the "death knell" exception.²³ Although it was hoped that the Supreme Court would rule on the validity of the death knell doctrine,²⁴ in its review of the *Eisen* litigation²⁵ the Court did not reach the question presented by

20. 370 F.2d at 120.

21. In holding the class action denial appealable, the Second Circuit distinguished its previous opinions to the contrary. *Id.* These cases, *Lipsett v. United States*, 359 F.2d 956 (2d Cir. 1966) and *All Am. Airways v. Eldred*, 209 F.2d 247 (2d Cir. 1954) were both decided before passage of amended rule 23. Under the former rule, in a "spurious" class action (*Eisen* would have been considered such a class action, 41 F.R.D. 147, 149), class members were required to "opt-in" in order to be bound by the judgment. Therefore, the dismissal of class action allegations meant that potential class members would have to intervene rather than "opt-in." Thus, from the point of view of appealability, the "death knell" question would never arise, since the original plaintiff was always "on his own" unless others opted in. See *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966); Advisory Comm. Note, 39 F.R.D. 69, 99 (1966).

22. The foundation for the doctrine was laid by the Second Circuit in *Chabot v. National Sec. & Research Corp.*, 290 F.2d 657 (2d Cir. 1961) where it was held that an order requiring plaintiffs to post a bond was appealable under 28 U.S.C. § 1291, since "the orders, if unreviewed, will put an end to the action unless plaintiffs abandon their 'claimed right' not to have to furnish security." 290 F.2d at 659; accord, *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962) where, when a district court's denial of a temporary restraining order would make the case moot, an appeal of the order was granted by giving the finality rule a "practical rather than a technical construction." 295 F.2d at 777-78.

23. A number of courts and commentators in deciding on the appealability of a class action certification, have discussed the collateral order doctrine and death knell exception separately. E.g., *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975); *Siebert v. Great N. Dev. Co.*, 494 F.2d 510 (5th Cir. 1974); *King v. Kansas City S. Indus., Inc.*, 479 F.2d 1259 (7th Cir. 1973) (per curiam); *Redish, The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 93-95 (1975); Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 Suffolk L. Rev. 1037, 1041, 1054 (1973).

24. E.g., *Lerman v. Tenney*, 459 F.2d 482 (2d Cir. 1972) (per curiam) (Friendly, C.J., concurring) (motion to dismiss appeal of class action denial denied).

25. *Eisen* has an eight year history. In 1966, the district court dismissed Mr. *Eisen's* class action allegations. 41 F.R.D. 147 (S.D.N.Y. 1966), rev'd, 391 F.2d 555 (2d Cir. 1968). Appeal of this order was granted the same year, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) and was decided on the merits in 1968 when the court reversed the class action dismissal. 391 F.2d 555 (2d Cir. 1968). On remand in 1971, the district court found a class action appropriate and ordered a preliminary hearing on the merits in order to determine which party would bear the cost of notice. 52 F.R.D. 253 (S.D.N.Y. 1971), rev'd, 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). In 1972, as a result of the preliminary hearing, defendants were ordered to bear 90%

the death knell doctrine, but rather considered the cost of notice in a class action and where the burden for such costs should lie.²⁶

Because of the "overwhelming" number of appeals filed in the federal courts subsequent to *Eisen* as well as the possibility of conflict with the policies behind the final judgment rule,²⁷ the Second Circuit set guidelines for use of the "death knell" doctrine. Generally if a plaintiff's individual claim approached \$10,000, the denial of class action certification would not be appealable.²⁸ The rationale was that, in such a case, the plaintiff would have sufficient incentive to continue on his own and the denial of certification would not constitute the "death knell" of the action.²⁹ This financial guideline

of the notice cost. 54 F.R.D. 565 (S.D.N.Y. 1972), rev'd, 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). The court of appeals reversed the district court in 1973, finding the class unmanageable. 479 F.2d 1005 (2d Cir. 1973). The Supreme Court granted certiorari, 414 U.S. 908 (1973), to consider the issue of notice cost, holding that these costs could not be placed on defendant. 417 U.S. 156 (1974).

26. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Mr. Justice Powell stated: "A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Id.* The threshold issue on appeal was the district court's placing notice costs on the defendant, which the Court found to be clearly a Cohen collateral order. *Id.* at 171-72.

27. See *Korn v. Franchard Corp.*, 443 F.2d 1301, 1305 (2d Cir. 1971); text accompanying note 7 *supra*.

28. 443 F.2d at 1307. The court used \$10,000 as a guideline since it is the federal jurisdictional minimum for certain types of cases, e.g., 28 U.S.C. § 1332 (1970) (diversity) which "suggest[s] that it is sufficient incentive to keep a case alive." In *Korn*, appeal was allowed because plaintiff's claim was \$386 (and the claims of the eight intervenors totalled \$1930), but in the companion case, *Milberg v. Western Pac. R.R.*, 443 F.2d 1301 (2d Cir. 1971), appeal was dismissed since plaintiff's claim, combined with that of her husband, amounted to \$8500. *Id.* at 1306.

29. The Second Circuit allowed appeal of the denial of class action certification in the following cases: *Lerman v. Tenney*, 459 F.2d 482 (2d Cir. 1972) (*per curiam*) (information as to amount of plaintiff's claim unreported); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) (plaintiff's claim amounted to \$386); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (plaintiff's claim amounted to less than \$1000); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (plaintiff's claim amounted to \$70).

Appeal was denied by the Second Circuit in the following cases: *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974) (plaintiff's claim amounted to \$7,482); *Milberg v. Western Pac. R.R.*, 443 F.2d 1301 (2d Cir. 1971) (plaintiff's claim amounted to \$8500); *Caceres v. International Air Transp. Ass'n*, 422 F.2d 141 (2d Cir. 1970) (claims of the seven plaintiffs averaged \$150,000); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969) (plaintiff and twenty-seven intervenors had "substantial amounts" at stake). The court also drew attention to the fact that authorities on rule 23 have recommended the use of 28 U.S.C. § 1292(b) (1970) (see note 114 and accompanying text *infra*), an indication that it was not believed that 28 U.S.C. § 1291 would be available, and that rule 23(c)(1) provides for alteration, amendment or modification of the class action determination at any time before a decision on the merits, an indication that immediate appeal was not contemplated. *Caceres v. International Air Transp. Ass'n*, 422 F.2d 141, 144 (2d Cir. 1970).

was criticized on several grounds: that it obliged the courts to make ad hoc judgments, thus making it unworkable;³⁰ that it created the "spectacle" of a plaintiff minimizing his damages in order to obtain jurisdiction;³¹ and that while denial of certification would not be the "death knell" of the action for the plaintiff, it might be the "death knell" for potential class members with insufficient resources to litigate on their own.³²

The "death knell" doctrine has been accepted in several circuits,³³ and modified in others by the addition of other criteria to the Second Circuit's financial guidelines. Thus, in the Fifth and Sixth Circuits, the plaintiff has the burden of proving the extent of his financial resources, anticipated costs of litigation, and the potential amounts of claims of other class members before the court of appeals will determine whether or not the class action denial is the "death knell" of the action.³⁴

30. *Korn v. Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).

31. *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 401 n.11 (2d Cir. 1974).

32. *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 300-01 (2d Cir. 1969) (Hays, J., dissenting). This argument was rejected in *Caceres v. International Air Transp. Ass'n*, 422 F.2d 141 (2d Cir. 1970) on the ground that if it were followed, all class action denials would be appealable. Such a result would be contrary to the policy underlying the final judgment rule. *Id.* at 143; cf. *Weingartner v. Union Oil Co.*, 431 F.2d 26, 30 (9th Cir. 1970), cert. denied, 400 U.S. 1000 (1971).

33. E.g., *Williams v. Mumford*, 511 F.2d 363, 367 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) (appeal dismissed since plaintiffs had sufficient incentive to continue the suit); *Hartmann v. Scott*, 488 F.2d 1215, 1223 (8th Cir. 1973) (appeal dismissed since "an order refusing to permit an action to be maintained as a class action which does not operate as the death knell of the action is not appealable . . ."); *Falk v. Dempsey-Tegeler & Co.*, 472 F.2d 142, 143-44 (9th Cir. 1972) (appeal dismissed; plaintiff's claim amounted to \$14,125); *Weingartner v. Union Oil Co.*, 431 F.2d 26, 29 (9th Cir. 1970), cert. denied, 400 U.S. 1000 (1971) (appeal dismissed; claims of fifteen plaintiffs totalled \$353,700).

34. E.g., *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), cert. denied, 412 U.S. 928 (1973) (appeal dismissed; plaintiff's claim amounted to \$78,700 and no evidence as to the additional criteria was offered); *Gosa v. Securities Inv. Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971) (appeal dismissed; plaintiff's claim amounted to \$3,322.20, but he had offered no evidence as to the additional criteria); see *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975) (appeal allowed; plaintiff's claim amounted to \$30; "[t]he district court may dispense with th[e] requirement [of proving the additional criteria] where it takes judicial notice that the amount involved is so small that it is obviously unfeasible for an individual plaintiff to continue the litigation without class action status." Accord, *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), cert. denied, 412 U.S. 928 (1973)); cf. *Cotten v. Treasure Lake Inc.*, 518 F.2d 770, 772 (6th Cir. 1975) (appeal dismissed; plaintiffs had sufficient motivation to continue on their own so consideration of the "death knell" was not reached); *Greenhouse v. Greco*, 496 F.2d 213 (5th Cir. 1974) (per curiam) (appeal dismissed; class action denial was not the "death knell" of the action); *Siebert v. Great N. Dev. Co.*, 494 F.2d 510 (5th Cir. 1974) (per curiam) (same); *Sony v. Coastal Chem. Corp.*, 469 F.2d 709 (5th Cir. 1972) (per curiam) (same); *Lamarche v. Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971) (per curiam). But cf. *Miller v. Mackey Intl., Inc.*, 452 F.2d 424, 427 n.3 (5th Cir. 1971) (appeal allowed based on the "death knell" doctrine or the collateral order doctrine).

The Second Circuit has also indicated that it would consider the complexity of the issues in determining whether or not an individual plaintiff could continue on his own. *Korn v. Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971).

The Third and Seventh Circuits have rejected the doctrine.³⁵ The Third Circuit did so in *Hackett v. General Host Corp.*,³⁶ wherein the plaintiff, with an individual claim of \$9, sought to represent 1,500,000 members of an asserted class, alleging violations of the Sherman Antitrust Act.³⁷ The appeal of the denial of class action certification was dismissed with the court basing its decision on the availability of alternative methods of appeal,³⁸ the policy against interlocutory appellate review³⁹ and the belief that the provision for attorney's fees for the successful plaintiff in the Sherman Act action⁴⁰ would prevent the denial of class certification from sounding the death knell of the action.⁴¹ This rationale, however, does not withstand close scrutiny. The alternative methods of appeal are less satisfactory than the "death knell" doctrine since they are not appeals as of right as are appeals from final decisions,⁴² but depend on the discretion of one or more courts⁴³ or are available only in a limited area.⁴⁴ In addition, courts as well as commentators have expressed great skepticism about the assertion that the availability of attorney's fees would provide sufficient incentive for the suit to continue given the enormous costs involved in litigating antitrust and securities cases and the limited size of the attorney's fees recoverable.⁴⁵ Since it seems highly doubtful that the plaintiffs in *Hackett* or *Eisen* would continue on their own, the

35. *King v. Kansas City S. Indus., Inc.*, 479 F.2d 1259, 1260 (7th Cir. 1973) (per curiam); see *Samuel v. University of Pittsburgh*, 506 F.2d 355, 360 (3d Cir. 1974) (appeal of district court's decertification with respect to damages claims dismissed); *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972).

36. 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972).

37. 15 U.S.C. §§ 1-2 (1970).

38. 455 F.2d at 623-24. The alternative remedies suggested were appeal under 28 U.S.C. § 1292(b) (1970), discussed in pt. III infra; Fed. R. Civ. P. 54(b), discussed in pt. VI infra; 28 U.S.C. § 1651 (1970), discussed in pt. V infra, and 28 U.S.C. § 1292(a)(1) (1970), discussed in pt. IV infra.

39. 455 F.2d at 623.

40. 15 U.S.C. § 15 (1971).

41. 455 F.2d 622-23. "If the 'death knell' is to ring for her case the rope is in her attorney's hand." *Id.* at 623.

42. See text accompanying note 6 supra.

43. See 455 F.2d at 631 (Rosenn, J., dissenting). 28 U.S.C. § 1292(b) (1970), discussed in pt. III infra, requires certification by the district court and acceptance by the court of appeals. Fed. R. Civ. P. 54(b), discussed in pt. VI infra, also requires district court certification. 28 U.S.C. § 1651 (1970) (mandamus), discussed in pt. V infra, is discretionary with the court of appeals.

44. 28 U.S.C. § 1292(a)(1) (1970), discussed in pt. IV infra, applies only where the denial of the class action certification also effectively narrows the scope of a requested injunction.

45. E.g., *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975) (plaintiffs in antitrust actions also incur substantial costs, which would not be recoverable); *Hackett v. General Host Corp.*, 455 F.2d 618, 631 (3d Cir.) (Rosenn, J., dissenting), cert. denied, 407 U.S. 925 (1972); 86 Harv. L. Rev. 438, 440-42 (1972) (amounts recovered by plaintiffs for attorney's fees in antitrust actions rarely exceed the amount of the damages awarded); 17 Vill. L. Rev. 962, 971-72 (1972) (statutes not providing for recovery of attorney's fees heavily outnumber those which do). But see *Williams v. Mumford*, 511 F.2d 363, 367-68 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) ("It certainly may be questioned whether the 'Death Knell' doctrine can ever be applied to a case where attorney's fees are available to the prevailing party."); see text accompanying note 20 supra.

litigation effectively is terminated and this is no longer the interlocutory appeal objected to by the court, but, rather a final decision.⁴⁶ The *Hackett* court, however, did not limit itself to jurisdictional arguments. Refusing to make class actions more attractive to attorneys by making the denial appealable, it expressed hostility toward class actions brought by small claimants on behalf of huge classes, particularly in cases where public enforcement remedies are available, stating:

If in some cases . . . the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.⁴⁷

It should, however, be noted that public enforcement remedies have proven inadequate in the past.⁴⁸ While the claims of litigants may appear insignificant, they may have substantial importance to the individual involved.⁴⁹ Indeed, Professor Kaplan, reporter to the Advisory Committee on the Civil Rules, has described the "historic mission" of class actions as "taking care of the little guy"⁵⁰ and as providing a "means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."⁵¹ In addition, Congress, by not requiring a minimum jurisdictional amount in antitrust and securities actions, clearly has invited small claimants and the Supreme Court has indicated approval of such class actions.⁵²

46. See text accompanying note 21 *supra*.

47. 455 F.2d at 626. But see *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) where, upon the denial of a rehearing en banc, Judge Robinson, speaking for himself and three others, urged the court to permit appeal of the denial of the class action certification. He found that nonappealability would "chill" class action litigation which he characterized as "the refuge of the poor, the hope of the downtrodden." *Id.* at 371.

48. See Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304-05 (1973).

49. See 455 F.2d at 632 (Rosenn, J., dissenting).

50. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 A.B.A. Antitrust L.J. 295, 299 (1966), reporting conversation with Professor Kaplan.

51. Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969). One commentator has stated that "[i]t would be anomalous if an antitrust violator who happened to injure numerous consumers each in a small degree rather than a few customers in a large degree were permitted to avoid liability for that injury." 86 Harv. L. Rev. 438, 446-47 (1972). But see 3B J. Moore, *Federal Practice* ¶ 23.02-[1], at 124 (2d ed. 1974) [hereinafter cited as Moore] where Professor Moore questions "whether the federal courts should become collection agencies."

52. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo." (footnote omitted)); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) (holding that the statute of limitations is tolled for absent class members by the institution of the class action); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) (endorsing the using of class actions in the antitrust area). Congress recently amended the Truth In Lending Act, making it clear that the class action was available under that statute. 15 U.S.C.A. § 1640

Thus, it seems clear that the death knell doctrine which permits appeal of a denial of a class action certification which, for all practical purposes, terminates the litigation is the more valid approach than the questionable reasoning of the *Hackett* majority.

A strict interpretation of the collateral order doctrine, however, does lead to the conclusion that absent the "death knell" situation, an order denying class action certification is not a final decision within the purview of that doctrine. The collateral order doctrine, as established in *Cohen v. Beneficial Industrial Loan Corp.*⁵³ requires that the order appealed from be separable from and collateral to the merits and that delayed review of the order may result in the right being irreparably lost.⁵⁴ The Supreme Court has stated that an issue is a separate matter when it is "not enmeshed in the factual and legal issues comprising the plaintiff's cause of action."⁵⁵ However, review of a denial of class action certification often involves consideration of the merits, especially when the district court has held that common questions of law and fact did not predominate,⁵⁶ or that the representative plaintiffs' claims were not typical of the claims and defenses of the class.⁵⁷ In addition, review of the

(Supp. 1, 1975) discussed in *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975). But see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (holding that plaintiff must bear the cost of notifying the class); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (holding that every class member must satisfy the jurisdictional amount for suits in federal courts in diversity cases); *Snyder v. Harris*, 394 U.S. 332 (1969) (holding that claims of class members may not be aggregated to satisfy the federal jurisdictional amount). Congress is considering remedial legislation which would permit consumers to sue as a class in federal court in diversity cases. Staff of the S. Commerce Comm., Class Action Study, BNA Antitrust and Trade Reg. Rep. No. 670, at G-1 (July 2, 1974) [hereinafter referred to as Senate Study].

53. 337 U.S. 541 (1949); see text accompanying notes 11-13 supra.

54. 337 U.S. at 546-47.

55. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

56. Fed. R. Civ. P. 23(b)(3) requires in relevant part that "the court [find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . ." See, e.g., *Caceres v. International Air Transp. Ass'n*, 46 F.R.D. 89, 95 (S.D.N.Y. 1969), appeal dismissed on other grounds, 422 F.2d 141 (2d Cir. 1970) (in order to decide whether common questions of fact predominated, the court of appeals would have had to review a substantive issue in the case); cf. *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1100 (2d Cir. 1974) (review of a class action certification where defendants alleged no common questions of law or fact, in an employment discrimination case, would have involved consideration of discriminatory pattern and practice in hiring, an issue at the "heart" of the merits). But see Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1303 (1970) (the argument made in this Note for broad appealability of a class action designation was rejected by the Second Circuit in *Korn v. Franchard Corp.*, 443 F.2d 1301, 1305 (2d Cir. 1971)).

57. Fed. R. Civ. P. 23(a)(3) requires, in relevant part, that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." See, e.g., *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975) (plaintiffs alleged employment discrimination; review of the district court determination that the representatives' claims were not typical would clearly have involved review of the factual issues). Although the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) prohibited a preliminary hearing on the merits to determine whether plaintiff had substantial

class action denial is available after final judgment on the merits; thus no "right" is irreparably lost.⁵⁸ Perhaps the most important argument against permitting appeal of class action denials, absent the death knell situation, is found in the following language in *Cohen*:

If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.⁵⁹

Since most class action determinations involve findings which are discretionary with the trial judge,⁶⁰ and since rule 23 makes them subject to reconsideration,⁶¹ the denial of class certification clearly does not fit within the *Cohen* guidelines.

The appealability of an order denying class action certification may more arguably fit into the *Gillespie*⁶² requirements since *Gillespie* involved appeal of an order going to the merits of the case.⁶³ It also required that the order be "fundamental to the further conduct" of the case and mandated the balancing of "the inconvenience and costs of piecemeal review . . . and the danger of denying justice by delay on the other."⁶⁴ The fundamentality requirement has

probability of succeeding on the merits, the district courts clearly must consider the merits to determine whether or not the requirements of rule 23 are met. These two procedural situations are clearly distinguishable.

There are, however, instances where the court of appeals would not be required to become involved in the merits on review of the class action denial. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (district court's order placed notice costs on defendants); *Miller v. Mackey Int'l Inc.*, 452 F.2d 424 (5th Cir. 1971) (district court's denial of the class action on the ground that plaintiff did not make a preliminary showing of substantial possibility of success reversed; this was not a proper factor for the court to consider in deciding on a rule 23 motion); *Norman v. McKee*, 431 F.2d 769, 773 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971) (district court disapproval of a proposed settlement of a class action is appealable since the proposed settlement is independent of the merits of the case).

58. The representation of a class has been termed a "right" by some commentators. See, e.g., 17 Vill. L. Rev. 962, 977 (1972). Several courts have held that the fact that the denial is reviewable on appeal makes the collateral order doctrine inapplicable. See, e.g., *Williams v. Mumford*, 511 F.2d 363, 369 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 299-300 (2d Cir. 1969); cf. *Falk v. Dempsey-Tegeler & Co.*, 472 F.2d 142, 144 (9th Cir. 1972). For a discussion of whether or not, as a practical matter, review is likely on appeal, see pt. VIII *infra*.

59. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949).

60. *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969); 3B Moore, *supra* note 51, ¶ 23.50, at 23-1105.

61. Fed. R. Civ. P. 23(c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

62. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); see text accompanying notes 14-18 *supra*.

63. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 118 (1975).

64. 379 U.S. at 152-53.

been interpreted to mean that, if the order appealed from were reversed, the case could not continue.⁶⁵ Another interpretation has been that the issue involved be significant to the legal world in general.⁶⁶ It is obvious that an appeal of a class action denial does not fit into the first interpretation and, in most cases, the issues on appeal of a class action denial involve factual situations peculiar to that case, rather than legal issues of general significance.⁶⁷ In addition, the court in *Gillespie* sought to avoid the danger of denying justice by protecting the rights of individuals whose claims for recovery would have been effectively cut off until appeal of the final judgment.⁶⁸ However, potential class members have the alternative of instituting their own actions if class standing is denied or they may attempt to intervene in the pending action under rule 24.

Thus, a denial of class certification should be appealable where the death knell requirements are satisfied. In other cases, the *Cohen* and *Gillespie* exceptions are not broad enough to support such appeals.

The Second Circuit did not confront the issue of the appealability of a class certification by a defendant until 1972 in *Herbst v. International Telephone and Telegraph Corp.*⁶⁹ Although two other circuits previously had held such orders nonappealable,⁷⁰ the court in *Herbst* permitted the appeal. Plaintiff was the owner of one hundred shares of Hartford Fire Insurance Co. stock at the time of its merger with ITT. She alleged that the merger of Hartford and ITT involved violations of the Securities Acts and she sought damages on behalf of herself and over 16,000 class members. The district court certified the class and defendant appealed. The court of appeals relied on the "practical rather than technical construction" rationale of *Cohen* and the "fundamental to the further conduct of the case" rationale of *Gillespie* to permit the

65. *Kohn v. Royall, Koegel & Wells*, 496 F.2d 1094, 1098 (2d Cir. 1974). But see *General Motors Corp. v. City of New York*, 501 F.2d 639, 657 n.2 (2d Cir. 1974) (Mansfield, J., concurring) ("[T]he term 'fundamental to the further conduct of the case' was not intended to mean that unless review were granted the action would no longer be viable.").

66. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 *Colum. L. Rev.* 89, 120 (1975).

67. See, e.g., cases cited in notes 56-57 *supra*.

68. 379 U.S. at 153.

69. 495 F.2d 1308 (2d Cir. 1974). The court did, however, formulate what is now known as the tripartite test for determining the appealability of a class action certification in *Eisen III*, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973), vacated, 417 U.S. 156 (1974): "The 'collateral order' doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause 'irreparable harm' to the complaining party." However, the appeal was allowed, not on this basis, but because the court had retained jurisdiction when it remanded the case to the district court after *Eisen II*, 391 F.2d 555 (2d Cir. 1968).

70. *Thill Sec. Corp. v. New York Stock Exch.*, 469 F.2d 14 (7th Cir. 1972); *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969). In *Walsh*, the court did not find that the order was collateral, nor did it consider it final since rule 23(c)(1) provides that an order determining whether or not a class action is maintainable "may be conditional, and may be altered or amended before the decision on the merits." *Id.* at 227.

appeal.⁷¹ However, it placed greatest emphasis on judicial efficiency and the harm to the litigants which would result from deferral of appeal. It noted that defendants were likely to spend more money and time in defense if the class were certified because of the enormous damages sought, that both parties would have to expend much time and effort to notify class members, that class actions were much more demanding of a district court's time than a suit brought by a single individual by reason of the supervisory requirements imposed by rule 23 and the fact that defendants were more likely to settle once a class is certified.⁷²

Although the *Herbst* court advocated broad appealability of orders granting class certification,⁷³ it appears to be the only case permitting such an appeal.

Subsequent to *Herbst*, the Second Circuit raised new barriers to such appeals and other circuits have followed suit. In *Kohn v. Royall, Koegel & Wells*⁷⁴ and in *General Motors Corp. v. City of New York*,⁷⁵ decided within two months of *Herbst*, the Second Circuit clarified the test first announced in *Eisen III*,⁷⁶ outlining its requirements as follows:

- (1) Whether the class action determination is "fundamental to the further conduct of the case";⁷⁷
- (2) whether review of that order is "separable from the merits;"
- (3) whether that order will cause "irreparable harm to a defendant in terms of time and money spent in defending a huge class action"⁷⁸

Neither defendant satisfied any of the test's requirements⁷⁹ and the appeals

71. 495 F.2d at 1312; see text accompanying notes 11-18 supra.

72. 495 F.2d at 1312-13. For a discussion of the validity of the court's reliance on these factors, see pt. VIII infra.

73. 495 F.2d at 1312. "We believe that immediate review of orders authorizing class actions will aid the district courts in disposing of these cases and promote the sound administration of justice." *Id.*

74. 496 F.2d 1094 (2d Cir. 1974).

75. 501 F.2d 639 (2d Cir. 1974).

76. See note 69 supra. The tripartite test had its origins in *Cohen and Gillespie*. See text accompanying notes 11-18 supra.

77. The court called the class certification order "further to the fundamental conduct of the case" because, if it were reversed on appeal, the action would be at an end for all practical purposes where the plaintiff was an *Eisen* type small claimant. The court recognized however that other interlocutory orders which, if reversed on appeal, would terminate the litigation, are not appealable, e.g., orders denying motions to dismiss under Fed. R. Civ. P. 12(b) or for summary judgment under Fed. R. Civ. P. 56. 496 F.2d at 1098-99.

78. 496 F.2d at 1098; see 501 F.2d at 644. The Tenth Circuit adopted the test in *Seiffer v. Topsy's Int'l, Inc.*, 520 F.2d 795, 797-98 (10th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3249 (U.S. Oct. 28, 1975) (No. 75-574). The Ninth Circuit rejected the test in *Blackie v. Barrack*, No. 74-2141, at 6-7 (9th Cir., Sept. 25, 1975).

79. In *General Motors*, plaintiff's claim amounted to \$12,000,000 so reversal of the certification would not be the "death knell" of the action. The defendant contended that common questions of law and fact did not predominate; inquiry into this criteria would have involved consideration of the merits; defendant would not incur irreparable harm in defending the action against the class since the class consisted of 177 entities as compared with the 16,000 in *Herbst*. 501 F.2d at 644-47.

were dismissed. In addition, in *General Motors*, the court noted that, unlike the order involved in *Cohen*, an order certifying a class was reviewable by the trial court until a final decision on the merits,⁸⁰ a factor not considered in *Herbst*. It also noted that defendant's attack on the certification was grounded on the contention that two requirements of rule 23(b)(3) were not met: (1) that common questions of law and fact must predominate and (2) that the class action be superior to other available methods of adjudication:

Accordingly, we would review here not a finite and conclusive determination of judicial power—e.g. the power to shift notice costs and forego individualized notice, as in *Eisen*, or the power to dispense with security, as in *Cohen*—but a discretionary decision, the propriety of which will necessarily vary from case to case. That this distinction is of fundamental importance in the calculus of appealability was plainly acknowledged in *Cohen* itself.⁸¹

Since *Herbst* involved a consideration of rule 23(b)(3) requirements, determination of which was clearly within the district court's discretion,⁸² *General Motors* is a definite retreat from *Herbst* and appears to establish a new criterion for permitting appeal of a class action certification: that the review must not involve a discretionary decision of the district court. The retreat was confirmed by the Second Circuit in *Parkinson v. April Industries, Inc.*,⁸³ where the court held that the appeal would be dismissed when the defendant questioned a discretionary rule 23 ruling of the trial judge.⁸⁴ Thus, while the *Parkinson* court reaffirmed the tripartite test,⁸⁵ it added another restriction: that discretionary rulings are not appealable.

The tripartite test is not immune to criticism. The first requirement—that the order be “fundamental to the further conduct of the case”—has been interpreted to mean “whether the action's viability turns on the class action

Kohn involved a sex discrimination complaint under rule 23(b)(2). The court found that plaintiff would continue on her own if the certification were reversed since in this area, attorneys from the “public interest” bar were available to aid plaintiffs. Again, defendant contended that common questions of law and fact did not predominate, inquiry into which would involve consideration of the merits of the action. The court also found that the defendant would incur no additional costs in defending against a class as compared to an individual since the scope of relevant inquiry would be the same in either situation. 496 F.2d at 1099-1100.

80. 501 F.2d at 646-47; see text accompanying note 54 supra.

81. 501 F.2d at 647.

82. The *Herbst* court reviewed the rule 23(a)(2) requirement that plaintiff's claims be typical of the class and the rule 23(b)(3) requirement that common questions of law or fact predominate. 495 F.2d at 1313-16.

83. 520 F.2d 650 (2d Cir. 1975).

84. *Id.* at 658. The court recognized that “[t]he continuing precedential validity of *Herbst* . . . is an open question which is not now before us.” *Id.* n.9. It did however leave the door open to appeal in cases where manageability would “present questions so important that an immediate appeal . . . will lie.” *Id.* But see *Handwerger v. Ginsberg*, 519 F.2d 1339 (2d Cir. 1975) where, in dismissing an appeal of an order certifying a class, the court found that defendant did not meet the tripartite test and did not discuss the fact that discretionary rulings of the district court were at issue on appeal.

85. 520 F.2d at 656.

determination."⁸⁶ The Second Circuit itself has recognized that this is not consistent with refusals to allow appeal from motions denying summary judgment where, if the denial were reversed, the litigation would also terminate.⁸⁷ The second requirement, that the order be separable from the merits, has proven difficult for a defendant to meet.⁸⁸ The third requirement, that of "irreparable harm to a defendant" is contrary to the principle that "there is no substantive right to protection from unnecessary litigation."⁸⁹ The *Parkinson* court disagreed with the *Herbst* court's contention that appeal of a class action certification serves to alleviate burdens on district court judges and is justified as an exercise of the appellate court's supervisory powers.⁹⁰ It found that the burdens thrust upon a trial court by unnecessary litigation were not of sufficient concern when weighed against the policy against "noxious interference" by the appellate courts into the "proper sphere of the trial judge."⁹¹

Thus, it is doubtful that orders certifying class actions are appealable under any circumstances. The *Cohen* requirement of separability from the merits is difficult to meet; discretionary orders prohibited by *Cohen* are often involved; and review of the order is available after final judgment.⁹² *Gillespie* is clearly

86. 496 F.2d at 1099.

87. *Id.* at 1098-99; see note 77 *supra*.

88. E.g., *Handwerker v. Ginsberg*, 519 F.2d 1339, 1341 (2d Cir. 1975) (defendant contended that plaintiff could not adequately represent the class as required by rule 23(a)(4) since plaintiff had allegedly received an accurate description of one of several financial transactions, plaintiff claimed defendant had fraudulently represented. Defendant contended that this was the only transaction on which a claim could be made. The court held that to decide on these contentions would involve an inquiry into the merits.); *Seiffer v. Topsy's Int'l, Inc.*, 520 F.2d 795, 798 (10th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3249 (U.S. Oct. 28, 1975) (No. 75-574) (defendant contended that common questions of law and fact did not predominate as required by rule 23(b)(3) since each individual class member should have to prove due diligence. The court held that such an inquiry on its part would involve it with an "integral part of the cause of action."); *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 216 (8th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435) (defendant contended that the class representative would not adequately represent the class' interests as required by rule 23(a)(4) since, *inter alia*, its status as a former dealer created a conflict of interest with present dealers. The court held that consideration of that issue would plunge it "headlong" into the merits of the case.). For a discussion of this issue in relation to *General Motors and Kohn*, see note 79 *supra*. But see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (the district court's placing the cost of notice on defendant was collateral to the merits); see, Note, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 *Geo. Wash. L. Rev.* 621, 628 (1974).

89. Comment, *Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule*, 51 *Nw. U.L. Rev.* 746, 750 (1957). But see *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963) where appeal of a question was allowed where the matter was "not enmeshed in the factual and legal issues comprising the plaintiff's cause of action" and where long and complex litigation could be avoided were appeal allowed. *Id.* at 558.

90. *Herbst v. ITT*, 495 F.2d 1308, 1313 (2d Cir. 1974).

91. 520 F.2d at 654.

92. *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 216 (8th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435). See pt. VIII *infra*, for a discussion of whether, as a practical matter, the order will be appealed.

inapplicable since no parties are denied justice by delayed review.⁹³ Perhaps, however, the most compelling argument against permitting immediate appeal is the specific provision in rule 23(c)(2) for review by the district court of its certification order. Permitting an appeal each time a district court issues a new certification order could indeed lead to successive appeals on the same issue, a result clearly at odds with the purposes of the final judgment rule.⁹⁴

Thus, the requirements of the final judgment rule as interpreted by the courts can only be satisfied when a plaintiff with a small claim wishes to appeal an order denying certification.

III. APPEAL UNDER SECTION 1292(b)

In 1958, Congress passed The Interlocutory Appeals Act⁹⁵ which grants discretion to the courts of appeal to review interlocutory orders which (1) the district court has certified as involving a controlling question of law, (2) resolution of which will materially advance the litigation, (3) as to which there is substantial ground for difference of opinion. All three criteria must be met before the district court may grant the section 1292(b) certificate,⁹⁶ but discretion to grant leave to appeal at the level of the court of appeals is not limited by any criteria.⁹⁷

It has been suggested by some commentators that, since one of the criteria to be met is that the order must involve "a controlling question of law," its use is inappropriate where matters involved are within the discretion of the district court.⁹⁸ Since class action determinations are largely discretionary with the district court,⁹⁹ such an interpretation of section 1292(b) would

93. In *Gillespie* the court's concern was that decedent's brother and sisters might have to wait years before their claims could be adjudicated. 379 U.S. at 153; see text accompanying note 17 *supra*. But cf. *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971) where the court permitted appeal of a district court order disapproving a settlement of a class action. The court found that the district court's order was collateral to the merits, and that the "right of the unnamed plaintiffs to fair representation" could be infringed by erroneous disapproval of the settlement. It also found that the specter of a lengthy and expensive trial outweighed the cost and delay of piecemeal review. *Id.* at 774. Although a fair amount of emphasis was placed by the court on the avoidance of a costly trial, it was careful to point out that other Cohen and Gillespie requirements were met.

94. See text accompanying note 7 *supra*. This has clearly been an important factor in the court's rejection of these appeals. See, e.g., *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 215-16 (8th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435); *General Motors Corp. v. City of New York*, 501 F.2d 639, 646-47 (2d Cir. 1974); *Walsh v. City of Detroit*, 412 F.2d 226, 227 (6th Cir. 1969).

95. 28 U.S.C. § 1292(b) (1970).

96. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974); *Redish, The Pragmatic Approach to Appealability in the Federal Courts*, 75 *Colum. L. Rev.* 89, 109 (1975).

97. Hearings on H.R. 6238 & H.R. 7260 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., ser. 11, at 21 (1958) [hereinafter cited as *Hearings*].

98. 9 *Moore*, *supra* note 51, ¶ 110.22[2], at 261; C. Wright, *Federal Courts* § 102, at 463 (2d ed. 1970). But see Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 *Harv. L. Rev.* 607, 618 n.57 (1975) [hereinafter cited as *Harvard Note*].

99. "[W]here the trial court does apply the Rule's criteria to the facts of the case, the trial

severely limit review of district courts' determinations of class actions under that section. At the very least, section 1292(b) should apply when the issue is whether or not the district court applied the correct factors as required by rule 23.¹⁰⁰

However, the Third Circuit, in permitting a section 1292(b) appeal of a class action certification in *Katz v. Carte Blanche Corp.*,¹⁰¹ reviewed a discretionary finding of the district court.¹⁰² It glossed over the requirement of "controlling question of law" but rather looked to the policies favoring interlocutory appeals¹⁰³ and to the legislative history of section 1292(b).¹⁰⁴ According to the court, the House of Representatives, in considering the types of orders appropriate for interlocutory review emphasized judicial efficiency and avoidance of hardship to litigants¹⁰⁵ with the stated purpose of the bill being "to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay."¹⁰⁶ Thus, for the *Katz* court, the first requirement is almost equivalent to the second, that resolution of the question certified "materially advance termination of the litigation." Although a line of cases holds that section 1292(b) was only to be applied in "exceptional" cases where immediate appeal might avoid "protracted and expensive litigation,"¹⁰⁷ a net reduction in trial time and cost to litigants would seem to be all that is necessary to meet this requirement.¹⁰⁸ The requirement would be easily satisfied where defendant is attempting to obtain the section 1292(b) certificate

court has a broad discretion in determining whether the action may be maintained as a class action. . . ." 3B Moore, *supra* note 51, ¶ 23.50, at 23-1105; see, e.g., *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

100. Harvard Note, *supra* note 98, at 618 n.57.

101. 496 F.2d 747 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

102. The court reviewed the question of whether the class action was superior to alternative methods of handling the controversy. *Id.* at 757.

103. The court stated: "The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. . . the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." *Id.* at 756. *Accord*, *Tucker v. Arthur Andersen & Co.*, [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,107, at 97,938 (S.D.N.Y. 1975).

104. 496 F.2d at 753-54.

105. The examples discussed were cases where (1) there is an adjudication of liability which will necessitate an extended accounting for damages, (2) "a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action," (3) third-party defendants are involved, "where there would be no reason for going on if they could not be held liable," (4) the case involves a transfer "when it is claimed that the transfer is not authorized by law." Hearings, *supra* note 97, at 8-9.

106. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958) [hereinafter cited as House Report].

107. *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958). But see *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 & n.13 (5th Cir. 1961) (exceptional case doctrine is a "shibboleth").

108. While the House Report includes the exceptional case requirement, the Senate Report does not. Compare House Report, *supra* note 106, at 2 with S. Rep. No. 2434, 85th Cong., 2d Sess. 1-4 (1958); see Harvard Note, *supra* note 98, at 627.

since class action litigation is often more protracted and expensive than actions brought by a single plaintiff.¹⁰⁹ Thus a reversal of the order certifying the class would lessen the burden on the courts and litigants.¹¹⁰ It is less clear that an order denying class certification would be appropriate for a section 1292(b) certificate. However, refusal to certify a class could lead to a multiplicity of class suits, a burden on the courts which could be avoided by a section 1292(b) review and a possible reversal of the refusal to certify.¹¹¹

The third requirement, that there be substantial grounds for difference of opinion, requires the trial judge to determine whether arguments against his order have merit¹¹² and whether he believes the court of appeals might reverse his order.¹¹³

Whatever doubts exist about the appropriateness of a section 1292(b) certification in a class action, the weight of authority favors its use. The drafters of rule 23 strongly advocated the use of section 1292(b) to review rule 23 orders, stating, "We should be disturbed, however, if the change in the form of the Rule caused the Courts to determine that there was no 'controlling question of law,' but only questions of 'discretion' not subject to review under Subdivision (b) of Section 1292 of Title 28."¹¹⁴ The Third Circuit, which does not permit appeal as of right from class action determinations under either the death knell or collateral order doctrines¹¹⁵ has come out strongly in favor of using section 1292(b) to grant both plaintiffs¹¹⁶ and defendants¹¹⁷ the right to appeal. The Second Circuit, which originated the death knell doctrine,¹¹⁸ has hinted that section 1292(b) might be the only appropriate route for an appeal by a defendant¹¹⁹ and has also suggested its use by a plaintiff in a non-death knell situation.¹²⁰

109. *Parkinson v. April Indus., Inc.*, 520 F.2d 650, 654 (2d Cir. 1975); American College of Trial Lawyers, Report and Recommendations of the Special Comm. on Rule 23 of the Fed. R. Civ. P., 15-17 (1972). But see Senate Study, *supra* note 52, at G-1.

110. *Tucker v. Arthur Andersen & Co.*, [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,107, at 97,938 (S.D.N.Y. 1975).

111. Cf. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 434 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

112. Comment, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 *Yale L.J.* 333, 342 (1959).

113. See Harvard Note, *supra* note 98, at 624.

114. Report of the A.B.A. Special Comm. on Federal Rules of Procedure, 38 F.R.D. 95, 104 (1965); cf. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 *Harv. L. Rev.* 356, 390 n.131 (1967) (Professor Kaplan was Reporter to the Advisory Committee on Civil Rules from 1960 to 1966).

115. See text accompanying note 36 *supra*.

116. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 360-61 (3d Cir. 1974); *Hackett v. General Host Corp.*, 455 F.2d 618, 623 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

117. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 752-56 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); accord, *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 216 (8th Cir. 1975), petition for *cert. filed*, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435).

118. See notes 19-23 *supra* and accompanying text.

119. *Parkinson v. April Indus., Inc.*, 520 F.2d 650, 655 n.5 (2d Cir. 1975).

120. *Caceres v. International Air Transp. Ass'n.*, 422 F.2d 141, 144 (2d Cir., 1970).

It is often difficult to determine why district courts refuse to certify a question under section 1292(b) since they are not required to give reasons for the decisions, and often do not.¹²¹ However, two district courts in the Second Circuit have indicated that their refusals to certify their denials of a class action determination would be contrary to the law in the Second Circuit which permits interlocutory appeal of a class action denial in a death knell situation only.¹²² This approach does not take into account whether the requirements of section 1292(b) were satisfied and ignores the fact that the section is a statutory exception to the final judgment rule thus not requiring a death knell situation. A more valid reason for refusal of section 1292(b) certificate to review denial of class action certification would be the fact that the case was about to go to trial and the appeal would "materially delay final termination of the litigation."¹²³

Section 1292(b) certificates have been granted, however, to review discretionary district court class determinations where an issue was raised respecting conflicts of interest between the class representative and class members;¹²⁴ where common questions of law and fact predominated;¹²⁵ and where it was unclear whether the class action was superior to other available methods of adjudication.¹²⁶ A section 1292(b) certificate has also been granted to review such questions of law as whether a diversity case may be allowed to

121. See, e.g., *Albertson's, Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43, 58 (D. Utah 1973), *aff'd* in part and vacated in part on other grounds, 503 F.2d 459 (10th Cir. 1974); *La Mar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22, 26 (D. Ore. 1972), *rev'd* on other grounds, 489 F.2d 461 (9th Cir. 1973).

122. *Wood v. Rex-Noreco, Inc.*, 61 F.R.D. 669, 674 (S.D.N.Y. 1973); cf. *Hyatt v. United Aircraft Corp.*, 50 F.R.D. 242, 248 (D. Conn. 1970). But see *Kinzler v. New York Stock Exch.*, 62 F.R.D. 196, 202 (S.D.N.Y. 1974) ("I think the District Court should be encouraged . . . to certify an appeal . . . under § 1292(b).").

123. *Winokur v. Bell Fed. Sav. & Loan Ass'n*, 16 Fed. Rules Serv. 2d 1070 (N.D. Ill. 1972).

124. See, e.g., *Albertson's, Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd* in part and vacated in part, 503 F.2d 459 (10th Cir. 1974). The appellate court vacated the district court's denial of certification on one of the counts in plaintiff's complaint since the trial court had made no findings, indicating, however, that once the findings were made it would not consider another interlocutory appeal since that count was not the "core" of the case. 503 F.2d at 464. The appellate court agreed with the district court in its class action rulings on the other counts. *Id.*

125. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (the court of appeals reversed the district court's certification of the class); *In re Hotel Tel. Charges*, 500 F.2d 86, 88-92 (9th Cir. 1974) (the court of appeals reversed the district court's certification of the class); *Tucker v. Arthur Andersen & Co.*, [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,107, at 97,937 (S.D.N.Y. 1975); *Kinzler v. New York Stock Exch.*, 62 F.R.D. 196 (S.D.N.Y. 1974).

126. *Kamm v. California City Dev. Co.*, 509 F.2d 205, 210-12 (9th Cir. 1974) (district court's refusal to certify the class affirmed since there was no abuse of discretion); *Katz v. Carte Blanche Corp.*, 496 F.2d 747,760 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974) (district court's certification of the class reversed since the test case method was held superior to the class action); *Wilcox v. Commerce Bank*, 474 F.2d 336, 345 (10th Cir. 1973) (district court's refusal to certify the class affirmed since the order was within its sound discretion).

proceed as a class action when the named plaintiffs meet the jurisdictional requirement, but the class members do not¹²⁷ and whether named plaintiffs could represent a class against defendants with whom the named plaintiffs themselves had no dealings.¹²⁸ A certificate was also granted when the court of appeals, on review, found that the district court did not consider the correct factors in making the class action determination.¹²⁹

Since section 1292(b) may often be the only method by which the parties are able to obtain review of a class action determination,¹³⁰ it should be utilized in those cases where novel or controversial questions are at issue, in order to expedite termination of the litigation and to give the district courts guidance in disposing of rule 23 motions for class action certification.

IV. APPEAL UNDER SECTION 1292(a)(1)

Another avenue for appeal of the denial of class action certification is section 1292(a)(1) which provides:

The courts of appeals shall have jurisdiction from . . . interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .¹³¹

Several circuits have allowed appeal as of right to class action plaintiffs under this section when the denial of class certification has had the effect of narrowing the scope of injunctive relief requested by the plaintiff. In *Price v. Lucky Stores, Inc.*,¹³² a recent Ninth Circuit decision, plaintiff brought an employment discrimination complaint against his employer and labor union under Title VII of the Civil Rights Act.¹³³ The court of appeals permitted a section 1292(a)(1) appeal of the class action denial, reasoning that the injunctive relief obtainable by plaintiff on his own would probably benefit him alone while the discriminatory practices affecting all employees would be left unremedied. This rationale has been used by the First,¹³⁴ Fourth and Fifth

127. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 434 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

128. *La Mar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22, 24-25 (D. Ore. 1972), *rev'd*, 489 F.2d 461 (9th Cir. 1973).

129. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), *rev'g* 47 F.R.D. 327 (N.D. Ga. 1968) (the district court found that plaintiff was not a proper representative of the class unless he could prove his own right to relief; the court of appeals held that this was not the proper standard to apply and was an abuse of discretion).

130. Appeal as of right is only available in a death knell situation and, even then, is not available in the Third and Seventh Circuits. See pt. II *supra*. Mandamus is available only in exceptional cases. See pt. V *infra*. Section 1292(a)(1) is available only in limited circumstances. See pt. IV *infra*. The other methods of appeal are only available to plaintiff and are of limited use. See pts. VI-VII *infra*.

131. 28 U.S.C. § 1292(a)(1) (1970).

132. 501 F.2d 1177 (9th Cir. 1974) (*per curiam*).

133. 42 U.S.C. §§ 2000e to 2000e-15 (1970).

134. See *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972). Plaintiffs brought class action against a police department alleging police surveillance in violation of their constitutional rights and requested injunctive relief. The court of appeals held that the denial of class status was

Circuits¹³⁵ but was rejected by the District of Columbia Circuit in *Williams v. Mumford*.¹³⁶ The *Williams* court relied on a 1966 Supreme Court decision, *Switzerland Cheese Association v. E. Home's Market, Inc.*¹³⁷ and found section 1292(a)(1) inapplicable.¹³⁸ In *Switzerland Cheese*, the Court held that a district court's order denying summary judgment to plaintiff in an action seeking a permanent injunction was not an interlocutory order denying a preliminary injunction appealable under section 1292(a)(1). Congressional policy against piecemeal appeal would not be fostered by an order which "does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial."¹³⁹ *Williams*, however, was an employment discrimination case, analogous to *Price*. The district court had refused to certify the class. The court of appeals dismissed the appeal on the ground, *inter alia*,¹⁴⁰ that section 1292(a)(1) was inapplicable, since the district court's order was not specifically directed to the issue of injunctive relief.¹⁴¹ The decision, however, contained inconsistencies which leave its validity open to question. The court stated:

[I]t would appear that the Supreme Court in *Switzerland Cheese* has opted for a narrow construction of the statutory language. Although an order denying class action certification *might at some later stage* have an effect on the scope of equitable relief, such orders "in no way touch on the merits of the claim" and thus fall outside the scope of the section.¹⁴²

appealable under section 1292(a)(1) since, if plaintiff won on the merits, the injunction would only prevent the surveillance of plaintiffs and not that of non-parties; it then found that the district court's order had narrowed the scope of any possible injunctive relief.

135. *Brunson v. Board of Trustees of School Dist. No. 1*, 311 F.2d 107 (4th Cir. 1962) (per curiam). Black children and their parents brought an action against their school district, alleging that it maintained a biracial school system. The court of appeals permitted appeal of an order striking the class action allegations since the order effectively limited the scope of possible injunctive relief to an order requiring admission of the named plaintiff to the school of his choice, whereas the class had sought reorganization of the entire school system. *Id.* at 108. See *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975). See also *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 522 F.2d 1235, 1237-38 (7th Cir., 1975).

136. 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 44 U.S.L.W. 3201 (U.S. Oct. 7, 1975).

137. 385 U.S. 23 (1966).

138. 511 F.2d at 369.

139. 385 U.S. at 25. One commentator has explained the rationale by stating: "[T]here is no correlation between the need for immediate relief and the propriety of summary judgment. . . . [I]t does not seem an undue procedural nicety to insist that the plaintiff amend his pleadings and seek immediate relief by means of a preliminary injunction." Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 370 (1961) (commenting on the court of appeals' opinions which led the Supreme Court to grant certiorari in *Switzerland Cheese*).

140. The court also dismissed the appeal on the ground that neither the death knell nor collateral order doctrines applied. 511 F.2d at 367-69. See note 33 *supra*.

141. 511 F.2d at 370-71.

142. *Id.*, quoting *Switzerland Cheese*.

Thus, if the court admits that the denial of class certification "might . . . have an effect in the scope of equitable relief" it is difficult to understand why this effect will take place "at some later stage" since the denial of the class certification is the crucial order which affects the scope of the injunction.¹⁴³ Moreover, the court relied on a Second Circuit decision, *City of New York v. International Pipe and Ceramics Corp.*,¹⁴⁴ wherein the Second Circuit refused to permit an appeal of a class action denial under section 1292(a)(1).¹⁴⁵ *International Pipe* is, however, clearly distinguishable from *Williams* since it involved an action alleging a conspiracy in restraint of trade. The Supreme Court has recognized that "one injunction [against violations of the antitrust laws] is as effective as 100."¹⁴⁶ This is not the case, however, in class action suits seeking injunctive relief in the area of deprivation of civil rights since the individual relief accorded would not be broad enough to provide relief to the potential class members.

In cases decided subsequent to *Switzerland Cheese*, courts have permitted section 1292(a)(1) appeals where the scope of prospective injunctive relief was narrowed by a district court's dismissal of some of the defendants¹⁴⁷ or by the striking of allegations in an intervenor's complaint.¹⁴⁸ Thus, additional support for the use of section 1292(a)(1) in allowing appeal of district court orders denying class certification can be found by analogy with these cases.¹⁴⁹

143. It is possible that the court was alluding to rule 23(c)(1) which gives the district court the right to modify its class action order at any time. However, the only possible modification would broaden the scope of injunctive relief from its present narrowest point. It would not be logical to permit defendant to appeal a class certification which would broaden the scope of possible relief, while refusing plaintiff the same right when the relief is narrowed.

While it is true that the district court may modify its order denying certification, one court has analogized such modifiable orders to the denial of a temporary injunction without prejudice to an application for its renewal, an order which is appealable. *Spangler v. United States*, 415 F.2d 1242, 1248 (9th Cir. 1969).

144. 410 F.2d 295 (2d Cir. 1969).

145. *Id.* at 299.

146. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). The *International Pipe* court, recognizing this distinction, did not hold that section 1292(a)(1) would never be available in an appeal of a class action denial. It simply stated that the discrimination cases were inapplicable. 410 F.2d at 299.

147. *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284, 286-87 (2d Cir. 1971); cf. *Hartmann v. Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973). The Second Circuit decision in *Build of Buffalo* would seem to indicate that it would react favorably to a section 1292(a)(1) appeal of a class action denial involving the issue of narrowing the scope of possible injunctive relief. But see *Male v. Crossroads Ass'n*, 469 F.2d 616 (2d Cir. 1972). In *Male*, plaintiff welfare recipients alleged that the rental agents in a privately owned but government-funded development denied them housing solely because of their welfare status, in violation of the equal protection clause of the Constitution. The district court denied plaintiff's motion for certification of a class action. The court of appeals held that the denial was not appealable since it was not the "death knell" of the action. There was no discussion of the possibility of jurisdiction under section 1292(a)(1) although this would seem to be an appropriate case for it. *Id.* at 619 n.3.

148. *Spangler v. United States*, 415 F.2d 1242, 1246-48 (9th Cir. 1969) (the court distinguished *Switzerland Cheese*, but limited *Spangler's* holding to the facts of the case).

149. These cases are distinguishable from cases holding that a district court's dismissal of a

Notwithstanding *Williams*, the better view is that refusal to certify a class action where such denial would narrow the scope of requested injunctive relief should be appealable by the plaintiff under section 1292(a)(1).¹⁵⁰ Appeal is probably unavailable in the converse situation—where defendant wishes to appeal a class certification—since certification has no effect on the scope of the injunctive relief requested.

V. MANDAMUS UNDER SECTION 1651

The All Writs Act provides, in pertinent part, that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”¹⁵¹ The use of the writs, however, by the federal courts is limited. They have been termed “drastic and extraordinary remedies,”¹⁵² and have traditionally been used “to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so.”¹⁵³ However, “jurisdiction” is not to be given a “technical” definition,¹⁵⁴ but rather has been defined by the Supreme Court as a “judicial usurpation of power.”¹⁵⁵ Thus, the writ may issue when a district court has exceeded the “sphere of its discretionary power”¹⁵⁶ but mandamus does not lie to review mere error.¹⁵⁷ Thus, where a district court

permissive counterclaim is not appealable, since the only effect of the dismissal is to oblige the claimant to institute his own action. Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 370-71 (1961). In the cases discussed in this section which sought injunctive relief for a class, the institution of actions by individual class members would not have the desired effect of ending a pattern of illegal conduct.

150. Such cases will arise mainly where the plaintiff is seeking to represent a class under rule 23(b)(2) which provides that such an action is maintainable when “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole” Orders which are purely procedural, such as those restraining or refusing to restrain the parties from contacting class members, are not appealable. See, e.g., *Siebert v. Great N. Dev. Co.*, 494 F.2d 510 (5th Cir. 1974) (per curiam); *Weight Watchers, Inc. v. Weight Watchers Int'l, Inc.* 455 F.2d 770 (2d Cir. 1972).

151. 28 U.S.C. § 1651(a) (1970). The writs referred to include those of mandamus, prohibition and common law certiorari. The petitioner may seek the different writs alternatively or cumulatively and the label attached to the section is unimportant. 9 Moore, *supra* note 51, ¶ 110.26 at 278-79, 282. The writ sought will hereinafter be referred to as mandamus.

152. *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

153. *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945).

154. *Will v. United States*, 389 U.S. 90, 95 (1967).

155. *Id.*, quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

156. *Will v. United States*, 389 U.S. 90, 103-04 (1967).

157. Comment, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 599 (1973); cf. *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 445 (2d Cir. 1966) (“Mandamus [lies] to redress a clear-cut abuse of discretion”). But see Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 377 (1961) (“The rather tenuous distinction between ‘mere’ error and ‘abuse of discretion’ provides the appellate courts with the opportunity to exercise their extraordinary power whenever they consider immediate review appropriate.”).

making a class action determination applies the criteria of rule 23 to the facts, the order is not reviewable by mandamus, absent a clear abuse of discretion.¹⁵⁸

In 1957, the Supreme Court expanded the use of mandamus in *La Buy v. Howes Leather Co.*¹⁵⁹ There the issue was whether a court of appeals could review by mandamus a district court's reference to a master of an entire antitrust action. The Court, announcing its "supervisory mandamus" doctrine, affirmed the court of appeals' issuance of the writ vacating the reference and stated "that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."¹⁶⁰ Since *La Buy* took note of the fact that Judge La Buy had referred eleven cases to masters in the past six years,¹⁶¹ it would appear that the exercise of supervisory mandamus is limited to instances where the district court has repeatedly indulged in the disapproved practice.¹⁶² Thus, in *McDonnell Douglas Corp. v. United States District Court*,¹⁶³ the Court of Appeals for the Ninth Circuit issued a writ of mandamus to vacate an order certifying a class relying, *inter alia*, on *La Buy*. The court noted that this was the second time the district court had reached the identical erroneous conclusion and it found a clear abuse of discretion coupled with the district court's disregard of a previous holding of the court of appeals.¹⁶⁴ *McDonnell Douglas* involved the certification of a class representing the next of kin of the 335 passengers who died

158. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 793 (10th Cir. 1970) (order certifying a class not reviewable by mandamus where there was no abuse of discretion; the district court properly found common questions of fact and superiority of the class action device.); accord, *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 217 (8th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435) (writ refused to review an order certifying a class where defendant alleged plaintiff would not adequately represent the class: "absolutely no showing the district court abused its judicial power . . ."); *General Motors Corp. v. City of New York*, 501 F.2d 639, 647-48 (2d Cir. 1974) (writ refused to review an order certifying a class where defendant alleged lack of common questions of law and fact.); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974) (in discussing the availability of mandamus to review a class action determination, affirmative or negative, the court stated "if the court has acted within its jurisdiction pursuant to appropriate procedural safeguards and in a nonarbitrary manner, mandamus will not lie." (citations omitted)). The court permitted appeal of the class action certification under 28 U.S.C. § 1292(b)). *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972) (writ refused to review a district court order finding a class of 1½ million unmanageable); *Interpace Corp. v. City of Philadelphia*, 438 F.2d 401 (3d Cir. 1971) (writ refused to review a district court certification of a class where defendant contended, *inter alia*, that there were conflicts of interest between class members and that the district court breached its duty in not making findings to support its ruling). But see *McDonnell Douglas Corp. v. United States Dist. Ct.*, 20 Fed. Rules Serv. 2d 11 (9th Cir. 1975), discussed at notes 163-66 *infra* and accompanying text.

159. 352 U.S. 249 (1957); see C. Wright, *Federal Courts* § 102, at 462 (2d ed. 1970).

160. 352 U.S. at 259-60.

161. *Id.* at 258.

162. See Comment, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 610 (1973).

163. 20 Fed. Rules Serv. 2d 11 (9th Cir. 1975). This appears to be the only case where a writ of mandamus has issued to vacate a class action determination.

164. *Id.* at 12.

in the crash of a Turkish Airlines plane in France. The court of appeals held that certification of the class under rule 23(b)(1)(A), (b)(1)(B) and (b)(2) was a clear abuse of discretion¹⁶⁵ since none of these subdivisions permitted certifications of a class whose members had independent tort claims arising out of the same occurrence where damages constituted the only relief sought.¹⁶⁶

The Supreme Court, in 1964 in *Schlagenhauf v. Holder*,¹⁶⁷ announced the doctrine of what has been termed "advisory mandamus."¹⁶⁸ *Schlagenhauf* involved the validity and construction of rule 35(a) of the Federal Rules of Civil Procedure as applied to a defendant in a negligence action, a question of first impression. The Court stated:

The meaning of Rule 35's requirements of "in controversy" and "good cause" also raised issues of first impression. In our view, the Court of Appeals should have also, under these special circumstances, determined the "good cause" issue, so as to avoid piecemeal litigation and to settle new and important problems.¹⁶⁹

Although the *Schlagenhauf* doctrine of advisory mandamus has not yet been utilized by the courts to review a class action determination, it should be available in an appropriate case, since the courts have relied on *Schlagenhauf* to review issues of first impression.¹⁷⁰

Since the Supreme Court has often stated that mandamus is not to be used as a substitute for appeals,¹⁷¹ it has been suggested that where appeal may lie under section 1292(b),¹⁷² a party may not petition for mandamus until its request for certification has been denied.¹⁷³ Although it has been suggested that mandamus would be appropriate to review a refusal of a section 1292(b) certificate,¹⁷⁴ the better view would be that it should not be used except to

165. *Id.*

166. *Id.* at 11-12. Although rule 23(b)(3) would seem the appropriate subdivision under which to certify an action such as this, the Advisory Committee Notes to rule 23 specifically stated that mass accident litigation would not be appropriate for rule 23(b)(3) treatment. 39 F.R.D. 69, 103 (1966). However, there is no discussion of the appropriateness of rule 23(b)(3) in the court of appeals opinion.

167. 379 U.S. 104 (1964).

168. See Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 613 (1973).

169. 379 U.S. at 111.

170. See Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 616-19 (1973) and cases cited therein; cf. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) (the court found that additional requirements had to be met: the forestallment of future error in the trial courts and the aid of efficient judicial administration).

171. E.g., *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 203 (1945); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

172. See pt. III *supra*.

173. See *A. Olinick & Sons v. Dempster Bros.*, 365 F.2d 439, 442 (2d Cir. 1966) (review of a transfer order is appropriate by mandamus rather than under 28 U.S.C. § 1292(b)); 9 Moore, *supra* note 51, ¶ 110.22[5], at 267. Professor Moore also suggests that if review of a question of law is sought, section 1292(b) would be appropriate, but if review of "abuse of discretion" is sought, the section is inappropriate and should not be sought since no controlling question of law is involved. *Id.* But see notes 98-101, 114 *supra* and accompanying text.

174. See Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 382 (1961); 17 Vill. L. Rev. 962, 976 (1972).

review the order for which the certificate was sought.¹⁷⁵ To hold otherwise would contravene the requirements of section 1292(b), that both the district court and the court of appeals must agree to the review.¹⁷⁶

While mandamus is available to review a class action determination, it has been used sparingly by the courts.¹⁷⁷ It is available when the district court has not proceeded in a procedurally correct manner in applying the standards of rule 23, or has clearly abused its discretion.¹⁷⁸ In addition the more recent doctrines of supervisory and advisory mandamus are also available to the parties.¹⁷⁹

VI. RULE 54(b) AS AN ALTERNATIVE

Rule 54(b) has been urged as an alternative method of appeal of an order denying class certification. The rule permits the district court judge, in his discretion, to certify an order as final and hence appealable in an action involving multiple claims or multiple parties when a decision final as to less than all the claims or parties is entered and the district court feels there is no just reason for delaying an appeal.¹⁸⁰ To fall within the purview of the rule, the claim must be capable of being decided "independently" of other claims, although it may arise out of the same transaction or occurrence as the other claims.¹⁸¹ Moreover, rule 54(b) "scrupulously recognizes the statutory requirement of a 'final decision' under § 1291 as a basic requirement for an appeal"¹⁸²

While, absent the death knell situation, a refusal to certify a class action is not a final decision under section 1291,¹⁸³ the Third Circuit, without analysis, has indicated that the denial of a class action certification can be appealed if rule 54(b) procedures are followed.¹⁸⁴ However, its use creates conceptual

175. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); 9 Moore, *supra* note 51, ¶ 110.22[3], at 262.

176. See text accompanying notes 96-97 *supra*.

177. See note 163 *supra*.

178. See note 158 *supra* and accompanying text.

179. See notes 159-66 *supra* and accompanying text.

180. Fed. R. Civ. P. 54(b) provides in pertinent part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . ."

181. *Cold Metal Process Co. v. United Eng'r. & Foundry Co.*, 351 U.S. 445, 452 (1956); Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 360 (1961).

182. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956).

183. See pt. II *supra*.

184. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 361 (3d Cir. 1974); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974); *Hackett v. General Host Corp.*, 455 F.2d 618, 623 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *Hayes v. Sealtest Foods Div.*, 396 F.2d 448, 449 (3d Cir. 1968) (per curiam). In none of these cases were the courts actually presented with a rule 54(b) certification; therefore their advocacy of the use of rule 54(b) is in the nature of dicta. The Sixth Circuit permitted such an appeal from the dismissal of derivative action counts of a complaint in *Nolen v. Shaw-Walker Co.*, 449 F.2d 506 (6th Cir. 1971), without discussion. The district court had also certified dismissal of the class

problems. There has been little discussion of whether an appeal of a denial of a class action certification pursuant to rule 54(b) is an order involving multiple "claims" or multiple "parties." It has been suggested that the class action denial is an order striking the claims for relief¹⁸⁵ of absent class members.¹⁸⁶ Another interpretation would be that the class members should be considered parties prior to the certification, thus making the denial of certification tantamount to dismissal of less than all the parties. However, neither interpretation is satisfactory. A situation analogous to appeal of a class action denial is that of a denial of permissive intervention.¹⁸⁷ When a petitioner for intervention has been denied the right to intervene, he has been denied only a procedural right. His claim for relief has not been disposed of.¹⁸⁸ This is also true of the class members, who now have the right to bring their own actions. Moreover, although for certain purposes, a suit filed as a class action is presumed to be one before district court certification,¹⁸⁹ potential class

action allegations, but the plaintiff chose not to appeal on that issue. *Id.* at 508. One district court has certified a class action denial for appeal under rule 54(b), finding that "this order . . . is a final judgment [as to the absent class members]". *Wyndham v. American Brands, Inc., BNA Anti-trust and Trade Reg. Rep. No. 734*, at E-1, 8 (D.S.C. Sept. 26, 1975).

185. "Claim for relief" in rule 54(b) has been defined as "the aggregate of operative facts which give rise to a right enforceable in the courts." *Gottesman v. General Motors Corp.*, 401 F.2d 510, 512 (2d Cir. 1968) (per curiam), quoting *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943).

186. 9 Moore, *supra* note 51, ¶ 110.13[9], at 186.

187. Fed. R. Civ. P. 24(a) and (b) set forth the requirements for intervention of right and permissive intervention: "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

188. 6 Moore, *supra* note 51, ¶ 54.38, at 641. "[R]ule [54(b)] refers only to claims in the sense of the substantive right being asserted . . . rather than requests that are incidental to the procedure for obtaining a judicial award and enforcing it." 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2658, at 71 (1973).

189. E.g., *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951 (9th Cir. 1971) (assume a suit is a class action for purposes of determining jurisdiction, prior to class certification); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 42 F.R.D. 324, 326 (E.D. Pa. 1967) (assume a suit is a class action for purposes of dismissal or compromise).

members cannot be considered parties since they are not bound by the outcome of the suit unless the class is certified.¹⁹⁰

Although a denial of permissive intervention is generally considered a nonappealable final order, absent abuse of discretion,¹⁹¹ and although it has been suggested that rule 54(b) certification of such an order would be inappropriate,¹⁹² the Tenth Circuit recently permitted, without analysis, a rule 54(b) appeal of a denial of permissive intervention.¹⁹³ Finding that "[t]he general rule . . . that interlocutory orders from which no appeal lies are merged into the final judgment and open to review on appeal from that judgment,"¹⁹⁴ the court also reviewed the district court's denial of the class action certification.

In addition to the multiple claim and multiple party requirements of rule 54(b), the courts must also adhere to the finality test of section 1291.¹⁹⁵ Thus class action denials are only appealable under rule 54(b) in a death knell situation. Oddly enough, the Third Circuit which rejected the death knell doctrine, advocates permitting appeals under rule 54(b). Thus, it is apparently ignoring the fact that if it regards death knell situations as not meeting the requirements of the final decision rule, then rule 54(b) would also not permit appeal.

190. Cf. *Pan Am. World Airways, Inc. v. United States Dist. Ct.*, 20 Fed. Rules Serv. 2d 1 (9th Cir. 1975). The court vacated the district court order which was designed to notify potential plaintiffs of the action, which had been brought as a class action. The court stated "[s]o long as the persons sought to be notified do not become parties to these actions, they will not be bound by the outcome." *Id.* at 5.

191. 3B Moore, *supra* note 51 ¶ 24.15, at 561-62; 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 923, at 627 (1972). Both commentators criticize this rule and suggest that denials of both permissive intervention and intervention as of right under rule 24(a) (see note 187 *supra*) should be appealable under section 1291. The rationale is that unless the intervenor as of right is permitted to intervene his rights will be unduly affected (see 6 Moore, *supra* note 51, ¶ 54.38, at 643) while the permissive intervenor has alternative remedies (see 3B Moore, *supra* note 51, ¶ 24.15 at 564).

192. 6 Moore, *supra* note 51, ¶ 54.38, at 642-43.

193. *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975).

194. *Id.* at 1077. The general rule referred to permits review of a nonappealable interlocutory order on appeal from an appealable order or a final judgment. *Skirvin v. Mesta*, 141 F.2d 668 (10th Cir. 1944); cf. *Green v. Wolf Corp.*, 406 F.2d 291, 302 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969). However, Professor Moore states: "[W]here an interlocutory order is properly appealed and review is sought of an incidental discretionary order, the appellate court should not review the discretionary order where there is no showing of an abuse of discretion." 9 Moore, *supra* note 51, ¶ 110.25[1], at 272. The Second Circuit has held "the guiding principle" to be "whether review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order." *General Motors Corp. v. City of New York*, 501 F.2d 639, 648 (2d Cir. 1974).

Thus, another avenue of appeal would appear to lie when appeal is taken of a denial of intervention as of right, with the court of appeals taking pendent jurisdiction of the class action denial.

195. See pt. II *supra*.

Rule 54(b) arguably does not permit a plaintiff to appeal an order denying class certification. Moreover, its use is discretionary with the district court which, in addition to meeting the above requirements, must also find "no just reason for delay."¹⁹⁶ Rule 54(b) clearly should not be available to a defendant seeking the right to appeal a class certification.¹⁹⁷

VII. DISMISSAL OF THE ENTIRE COMPLAINT

In *Oppenheimer v. F.J. Young & Co.*,¹⁹⁸ the district court dismissed with leave to amend plaintiff's complaint alleging a class action. Plaintiffs refused to amend and judgment was entered dismissing the complaint with prejudice. Appeal of the judgment was obtained and, thus, review of the class action determination. Rule 41(b), which permits defendants to move for dismissal for failure of the plaintiff to prosecute, would have the same effect.¹⁹⁹

This is however a drastic method of obtaining appeal of a class action denial since the dismissal acts as an adjudication on the merits and the plaintiff is taking an all or nothing risk that the district court's order will be reversed. However, where the plaintiff's claim is so small that he would not continue without class status, and where no other avenue for appeal exists,²⁰⁰ this risk becomes irrelevant.

VIII. CONSEQUENCES OF DENYING APPEAL

Where certification has been denied and plaintiff's appeal of that order is dismissed, in the circuits which do not recognize the death knell doctrine, or the modified version of it, denial of appeal may, for all practical purposes, terminate the litigation.²⁰¹ Plaintiff, as well as potential class members with similarly small claims, will not have the opportunity to have the merits of the case heard, nor will the validity of the class action determination ever be tested. When the death knell situation does not exist, and plaintiff continues on his own to a decision on the merits, the question of whether the class action determination will be reviewed may well depend on which party was

196. The following are among the factors which should be taken into account by the district court when it determines that there is "no just reason for delay": weighing the policies of the final decision rule against the exigencies of the case at hand; independence between the adjudicated and unadjudicated claims; the possibility that the need for review might be mooted by future developments in the trial court and whether hearing the appeal might delay the trial without having the positive effect of simplifying it. 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2659, at 77-80 (1973).

197. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir.) (en banc), cert. denied; 419 U.S. 885 (1974); cf. *In re Cessna Aircraft Distributorship Antitrust Litig.*, 518 F.2d 213, 216 (8th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3267 (U.S. Nov. 4, 1975) (No. 75-435).

198. 144 F.2d 387 (2d Cir. 1944).

199. Under rule 41(b) defendant has control over whether to move for dismissal. He can delay his motion while the statute of limitations runs against the class members. Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1298 (1970).

200. In the Third and Seventh Circuits, which have rejected the death knell doctrine, absent a writ of mandamus or section 1292(b) certification by the district court, this would be the only method by which the small claim plaintiff could continue his suit. See pt. III supra.

201. See pt. II supra.

successful on the merits. If plaintiff is not successful on the merits, he will most likely appeal the judgment as well as the class action determination. Where, however, a plaintiff is successful on the merits, a successful appeal by him of the adverse class determination may result in the court of appeals ordering a new trial on the merits:

For . . . it may conclude . . . that it would be improper merely to order that notice pursuant to rule 23(c)(2) be sent to the members of the class without a new trial, since such a disposition of the appeal would permit members of the class to make their decision whether to join in the action at a time when they already know its outcome—a form of “one-way” intervention that the 1966 amendments [to rule 23] were designed to prevent.²⁰²

Thus, a successful plaintiff may not wish to appeal the denial of certification if it would mean a reversal. However, at least one judge has asserted that the reversal on appeal of the denial of the class would not permit reopening of the judgment on the merits.²⁰³ Such a holding would result in unfairness to defendants who had conducted the trial in the expectation of a smaller liability,²⁰⁴ or it would result in defendants expending large sums in defending small claims in all cases where class actions have been denied in order to protect themselves against the possibility of a class certification being made on appeal.²⁰⁵

Another possible result of a denial of class action certification is a proliferation of law suits by potential class members. The purpose of rule 23(b)(3) is to “achieve economies of time, effort, and expense”²⁰⁶ A wrongful denial of class certification by the district court and the resultant lawsuits of potential class members would defeat this purpose of rule 23(b)(3) if immediate appeal of the determination were not allowed. Such lawsuits are more probable if plaintiff is successful on the merits,²⁰⁷ and the defendant

202. Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1294 (1970), citing Advisory Comm. Note, *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 105 (1966). Although a new trial may be the result of a successful appeal of class action denial, as a practical matter, plaintiff's attorney may urge such an appeal since his fee is, in most cases, contingent on the size of the recovery.

203. *Hackett v. General Host Corp.*, 455 F.2d 618, 628 (3d Cir.) (Rosenn, J., dissenting), cert. denied, 407 U.S. 925 (1972).

204. See Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 Colum. L. Rev. 1292, 1294 (1972).

205. 455 F.2d at 628 (Rosenn, J., dissenting). Judge Rosenn finds it “inconceivable that either the lawyers or the court will give a \$9.00 suit the same consideration and attention due a class action involving hundreds of thousands of persons and many millions of dollars in potential damages.” *Id.*

206. Advisory Comm. Note, *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 102-03 (1966).

207. The Supreme Court's decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) lengthened the period of time during which a defendant may be subject to the lawsuit by holding that the commencement of a class action tolls the applicable statute as to all asserted class members who make timely motions to intervene after the district court has denied class certification. *Id.* at 553. It follows that the statute is also tolled when the asserted class member seeks to file his own action. See 15 B.C. Ind. & Com. L. Rev. 1010, 1027-28 (1974).

would face not only the costs of litigating numerous actions, but also the possible effects of stare decisis²⁰⁸ and/or collateral estoppel²⁰⁹ of the original plaintiff's case.

Denying defendant an immediate appeal of an affirmative class action certification may also frustrate or preclude review of the district court's class findings. Possible serious consequences for class members may result. If the plaintiff is not successful on the merits, and does not appeal the adverse final judgment, members of the class are bound by that judgment²¹⁰ unless they can successfully obtain collateral review, in this instance, on the ground of inadequate representation by the class representative.²¹¹ If the plaintiff were successful on the merits, the defendant would probably appeal the class action determination when he appeals on the merits. In the event the class action certification is reversed on appeal, plaintiff would have suffered since at least

208. Stare decisis concerns only rules of law. The doctrine applies when a court establishes a certain rule of law to be applied by it and by all courts owing obedience to it in all subsequent litigation where such a rule is relevant. See 1B Moore, *supra* note 51, ¶ 0.401, at 11.

209. Traditionally, collateral estoppel prevents a litigant from invoking the conclusive effect of a judgment unless he would have been bound had the judgment gone the other way. 1B Moore, *supra* note 51, ¶ 0.412[1], at 1801. However, several courts and commentators have found that where the plaintiff, a stranger to the original action, is suing a defendant who was a party to the original action, the plaintiff may offensively assert the original judgment against the defendant, on the theory that defendant has already had his day in court. See generally Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1499-1501 (1974). But see 1B Moore, *supra* note 51, ¶ 0.412[1], at 1809. Defendant may not, however, assert a judgment favorable to himself against a plaintiff who was not a party to the original action since the plaintiff has not had his "day in court," a due process requirement. *Id.*, ¶ 0.411[1], at 1252. However "[i]t is always a prerequisite to the invocation of collateral estoppel that the issue determined in the prior action be identical to the issue whose litigation is sought to be estopped." Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1499 (1974).

210. Fed. R. Civ. P. 23(c)(3) provides: "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

211. Fed. R. Civ. P. 23(a)(4) provides that a prerequisite of granting class action status is that "the representative parties will fairly and adequately protect the interests of the class." In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Supreme Court found that there would be a failure of due process where the procedures adopted did not insure the protection of the absent parties, but that absent parties could be bound by a judgment where they were adequately represented. *Id.* at 42-43. In *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), the court held that where the class representative in the original class suit failed to appeal an order which granted retroactive relief to the plaintiff, but not to the class, the class representative's failure to prosecute an appeal on behalf of other members of the class rendered his representation of them inadequate. *Id.* at 69. See generally Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

in a rule 23(b)(3) class action, notice must be sent to all class members, with notice costs borne by the plaintiff.²¹²

The *Herbst*²¹³ court is apparently the only court which has held the certification of a class action to be immediately appealable. Although the court recited the Second Circuit tripartite test,²¹⁴ it relied on the third factor, irreparable harm to the defendant, and added an additional factor, judicial efficiency, in permitting the appeal.²¹⁵ The court found that defendants often will spend large amounts of money defending class actions because of the "enormous" damages sought. Defendants often are pressured into settling the action once the class is certified, even though the validity of plaintiff's claims is doubtful, because of the enormous potential liability to the class. Finally, it found that judicial efficiency would be served since the district courts must expend more time in supervising class actions than would be required in individual cases.²¹⁶ These possible consequences led the court to hold that it had jurisdiction to hear the appeal of the certification.²¹⁷ The validity of this rationale is, however, open to question. Although several commentators,²¹⁸ as well as a study sponsored by the American College of Trial Lawyers,²¹⁹ have asserted that defendants are pressured into settling once the class is certified, the more reasonable view would seem to be that, when a frivolous class action suit is brought, defendant, which is usually a substantial business organization, would prefer to litigate than to settle.²²⁰ This point of view is borne out by a more recent study of class actions, sponsored by the Staff of the

212. Fed. R. Civ. P. 23(c)(2). In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the Supreme Court held that the cost of notice to class members must be borne by the plaintiff.

213. *Herbst v. ITT*, 495 F.2d 1308 (2d Cir. 1974); see notes 36-52 *supra* and accompanying text.

214. 495 F.2d at 1312.

215. *Id.* at 1312-13.

216. *Id.* Fed. R. Civ. P. 23(e) requires the district court to approve settlements and Fed. R. Civ. P. 23(d) gives it the power to issue orders determining the course of the proceedings and protecting class members.

217. 495 F.2d at 1312-13.

218. See, e.g., Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 9 (1971) (describing the class action suit as a "form of legalized blackmail"); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 388-89 (1973).

219. American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, 15-17 (1972) (hereinafter referred to as ACTL Study). Attorneys representing class action plaintiffs have criticized this report as not being disinterested, alleging that its authors are mainly defense attorneys. Patrick & Cherner, *Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers*, 28 Bus. Law. 1097 (1973). Judge Weinstein found the recommendations of the report "premature." Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 306 (1973). The *Herbst* court, however, relied on it in its decision. 495 F.2d at 1313.

220. Rosenfeld, *The Impact of Class Actions on Corporate and Securities Law*, 1972 Duke L.J. 1167, 1190.

Senate Commerce Committee.²²¹ This study found that 55 percent of the completed class action cases covered by the study were disposed of in favor of the defendant, either by summary judgment or dismissal. Thus the authors concluded that "the class action is not a very effective tool for forcing settlements."²²² In addition, defendants' attorneys who were interviewed stated that they would litigate a weak suit on the merits rather than settle the claim.²²³ And, as Judge Weinstein has pointed out, the trial judge may use his discretion to "reduce the effect of possible abuse" when presented with settlement proposals.²²⁴ The Senate Study also cast doubt on the assertion that class action litigation takes up a disproportionate amount of district court time. It noted that "most class actions do not take markedly longer from filing to disposition in district court than do civil actions in general."²²⁵ Moreover, in an analogous situation, interlocutory review of a denial of a motion for summary judgment or of an order granting a motion for a new trial is not available, although reversal of these orders would save the district court the burden of an unnecessary trial.²²⁶ Therefore, although both parties will undoubtedly incur larger expenses in prosecuting the suit in the event the class is certified,²²⁷ the impact of the other two factors relied on by the *Herbst* court to permit appeal, judicial efficiency and settlement pressure, does not appear to be as great as feared by the *Herbst* court.

Thus denial of the right to appeal the class action determination may result in: termination of the lawsuit in the death knell situation, absence of appellate review of the class action determination, increased expenses of the parties and a possible decrease in judicial efficiency due to proliferation of lawsuits and longer trials.

These consequences must be weighed against the principles underlying the final judgment rule. The fact that interlocutory appeal of orders denying summary judgment²²⁸ is not permitted demonstrates that burdens on the judicial efficiency and increased expenses to litigants are not factors sufficient to overcome the finality principle. Absence of appellate review of the class action determination is also not a compelling reason for permitting interlocutory appeal. The Supreme Court has held that "the right to a judgment

221. Senate Study, *supra* note 52, at G-1.

222. *Id.* at G-3.

223. *Id.*

224. Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 58 F.R.D. 299, 302 (1973).

225. Senate Study, *supra* note 52, at G-4. But see *Parkinson v. April Indus., Inc.*, 520 F.2d 650 (2d Cir. 1975) where the court stated: "The actual and potential burdens of the trial judge in the maintenance and supervision of large class actions are colossal, and immediate review of class designations would relieve the trial judge of these responsibilities in cases found to be inappropriate upon interlocutory appeal." *Id.* at 654.

226. *Parkinson v. April Indus., Inc.*, 520 F.2d 650, 654 n.3 (2d Cir. 1975); see Comment, Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule, 51 Nw. U.L. Rev. 746, 750 (1957).

227. See note 218 *supra* and accompanying text.

228. See text accompanying note 226 *supra*.

from more than one court is a matter of grace and not a necessary ingredient of justice"²²⁹ Numerous district court orders incidental to the litigation are never reviewed.²³⁰ Although the consequences of such a lack of appellate review may be inconsistent district court decisions,²³¹ policies behind the final judgment rule would seem to outweigh this disadvantage. Most compelling of these policies are the delay caused by such interlocutory appeals,²³² the burden on appellate dockets,²³³ and the impairment of the confidence of litigants and the public in the decisions of the trial courts.²³⁴ Creation of additional judicial exceptions to the finality rule to permit early appeals of class action determinations would undoubtedly increase litigation on the appealability of interlocutory orders.²³⁵ An excellent example of this is the large number of appeals of class action determinations which followed the *Eisen I* decision. The death knell situation is the one instance in which appeal of a class action determination²³⁶ is essential, since the denial of the certification in effect terminates the litigation. Most circuits have correctly allowed immediate appeal of such an order. The Third and Seventh Circuits might well reconsider their rejection of the doctrine. In all other instances of class determinations, however, the presently available methods of appeal would appear sufficient.²³⁷

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229. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

230. Note, *Appealability in the Federal Courts*, 75 *Harv. L. Rev.* 351, 352 (1961).

231. *Id.*

232. *Catlin v. United States*, 324 U.S. 229, 234 (1945); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

233. From 1962-1972, there was an increase of more than 200 percent in appeals filed in the courts of appeals. *Ann. Rep. of the Director, Admin. Off. of the United States Courts*, 87 (1974). See generally Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 *Harv. L. Rev.* 542 (1969).

234. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 *Minn. L. Rev.* 751, 781 (1957).

235. One commentator has stated: "There is one thing to be said in favor of no restrictions at all [on appeals]—it will save an immense amount of useless litigation over the question whether parties may or may not appeal particular cases. . . . Machinery to save labor may become so complex as to waste more labor than it saves." Sunderland, *The Problem of Appellate Review*, 5 *Texas L. Rev.* 126, 127 (1927).

236. It is interesting to note, however, that interlocutory appeals were sought in only three of the one hundred twenty District of Columbia Circuit cases surveyed by the Senate Study. *Senate Study*, supra note 52, at G-4. The death knell situation may also arise when the plaintiff who sought to represent the class has a large enough claim to continue alone when class certification is denied, but potential class members, having small claims, may exist, for whom the denial spells "the death knell." It has been suggested that such plaintiffs can bring their own class suits and when class certification is denied, gain appeal under the "death knell" doctrine, 39 *U. Chi. L. Rev.* 403, 418 (1972).

237. Profesor Moore agrees with the resistance to the extension of judicially created exceptions to the final judgment rule, finding that section 1292(b) and the "still evolving doctrine of supervisory mandamus" are preferable methods of appeal. 9 *Moore*, supra note 51, ¶ 110.10, at 136. See also, Comment, *Requiem for the Final Judgment Rule*, 45 *Texas L. Rev.* 292, 320 (1966). But see Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 *Colum. L. Rev.* 89, 128 (1975) (urging an expanded interpretation of finality).